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Scal. Court of Session.

REPORTS OF CASES

DECIDED IN THE,

COURT OF SESSION, TEIND COURT,

COURT OF EXCHEQUER, COURT OF JUSTICIARY,

AND IN

THE HOUSE OF LORDS,

FROM 11th NOVEMBER 1851 TO 20th JULY 1852.

BY

ROBERT STUART, JAMES S. MILNE, AND WILLIAM PEDDIE,
ESQUIRES, ADVOCATES; AND
WILLIAM PATERSON, ESQUIRE, BARRISTER-AT-LAW,
GRAY'S INN, LONDON.

"JUDICIA ENIM ANCHORE LEGUM SUNT."—*Bacon. Aphor.*

VOLUME I.

EDINBURGH:
BELL & BRADFUTE, 12 BANK STREET.

M D C C C L I I .

ALEX. WALKER, PRINTER, 6 JAMES'S COURT.

PREFACE.

In completing the first volume of these Reports, the authors have to express their gratification at the reception they have met with, throughout the past legal year, from the different branches of the profession; a reception by which their labours have been sustained, and by which they are encouraged to persevere in a work which has thus been allowed a place in the legal library. They had, from the first, reason to hope for some measure of support, and the kind consideration they have received so generally, with the numerous and influential names that already at the outset constitute their list of subscribers, proves how well-founded were their expectations.

Were they disposed to enter on an examination of the grounds on which they have ventured to come before the profession, there are ample means within their reach for shewing the nature of the services they propose to render to the law and its practice. But they have already intimated that any such critical explanation is in their opinion unsuitable. Yet, at the conclusion of this their first volume, they may be allowed to offer some general reasons for their juridical existence.

Mere novelty of enterprise they repudiate. Nor, if there may be observed in the style of these Reports, any marked change from former methods, can it, they hope, be said that they have laid themselves open to the charge of unnecessary innovation. The law itself having been reformed, and its administration simplified and im-

proved, it seemed fitting that some attempt should be made to accommodate the form of the reported case to the professional habitudes that had grown upon the adoption of the new practice; and the report that might have suited the leisure of the study, and the peculiarities of written argument, seemed but ill adapted to the exigencies of that despatch by which the business of the Courts is at the present day distinguished. By the form and system of these Reports then, it has been sought to afford a judicial aid that appeared to be demanded by the spirit, at least, of recent changes; and although the authors may not have yet succeeded in fully carrying out their design in all its features and details, (as they hope still to do) they have reason to believe its utility has been admitted by the legal body generally, whose labours it is their ambition to facilitate.

The object of the Law Report is to promote the certainty of the law; and to be useful under all the calls of professional business, its form should be characterized by clearness of arrangement, by terseness and precision, so that concise in method, and comprehensive in meaning, it may communicate the whole case in its full application. "Descriptio legum" says Lord Bacon,* "obscura oritur, aut ex loquacitate et verbositate earum; aut rursus ex brevitate nimia; aut ex prologo legis cum ipso corpore legis pugnante," a saying from which may be deduced a rule for the correct form of the legal statement. To exhibit the record in its pure form—to select such portions of the pleadings as are material and relevant to the point or points to be reported—to separate the law from the fact—to distinguish matter of averment from argumentative matter, and that which is of the nature of evidence—to present,

* De fontibus juris, Aphorism 65.

by the proper arrangement of these parts of the case, the peculiar question or questions on which the litigants are at issue—to make the legal controversy, thus clearly ascertained, to be briefly and sufficiently spoken to by the argument from the bar—and finally, to set forth the judgment of the Court; with the grounds on which the Judges have arrived at it—in short to make the Law Report the true exponent of the actually administered law, both in form and substance, is at once to describe its office, and to demonstrate how we may affect by it that great legal desideratum which the well-noted precedent can alone supply.

The importance of these considerations must, it is thought, appeal to the experience of every practitioner. To him indeed, and to all concerned in the administration of the law, the characteristic value of the Law Report cannot be over-rated. The legal certainty, the identity of procedure, and the continuity of rule and principle which it secures, have been too long recognised to render necessary, at the present day, any vindication of its authority. It is an expedient that concerns the integrity of the law, the learning of the Bar, the justice of the Court; and which, therefore, involves in the faithful discharge of the duty it imposes a responsibility of the most serious nature. The reporters were sensible of the labour and difficulty they had to encounter in any attempt to satisfy the severe conditions of that responsibility, and their work may, as yet, have fallen short of their own expectations. But knowing, as they believe they do, what the mind of their brethren, and of the profession generally, on the subject of these remarks is, and convinced that, in the views they have declared, they will be supported by the opinion of every practical lawyer, they shall hope to com-

mend themselves still further to professional approval, and thus be maintained in a position, in some degree, to contribute towards even a more extended knowledge of the law and judicature of Scotland, the sound principle of which, uniting, as it does, the rigour of law with the counsels of equity, seems at last to be so generally and so remarkably acknowledged.

It remains now to the Reporters to thank their numerous legal friends for the professional assistance that has on all hands, in the course of this volume, been so readily afforded them. To the learned Judges,—their brethren of the Bar, particularly the late and present Dean of Faculty, and the Curators of the Advocates' Library, who kindly allowed the use of the Session papers in the Library,—the Law Agents attending the Courts,—and to the Clerks and Depute-clerks, the reporters tender their grateful sense of the many facilities and considerate kindness they at all times experienced in the prosecution of their undertaking. Their thanks are also due to the Sheriffs-Substitute, and many other friends in the country, to whom they are indebted for several suggestions, by which they have endeavoured to make the Reports useful to practitioners in the local courts.

With these acknowledgments, they now proceed to prepare themselves for their second volume. The arrangements that have been made, are, it is hoped, such as will prove conducive to the accuracy, punctuality, and to the economy of the publication, as well as to the convenience of the profession. They may here state that, in deference to the opinion of the highest authorities, and in accordance with the general feeling of the profession, it is not intended to continue, in the form originally announced, the notes of English and other foreign cases, which it is considered

increase the expense of the volume without materially adding to its value, as a book of reference on the immediate concerns of Scotch law; but at the close of the volume, and in the event of there being any general demand for it, a digest of English cases of general interest may be given. With this exception the authors do not contemplate any change for the future on the general style of the Reports, or in the manner of their periodical issue. They will continue to be published in weekly numbers, and will contain every litigated proceeding in the Superior Courts of this country, involving matter of law, as well as all Scotch appeal cases from the House of Lords. Brevity and succinctness will be observed in their preparation, without excluding anything that is material, or the ruling of which, by the Court, is calculated to be useful to the profession. The Reports will, it is hoped, be found to be legally exact, while they will be as brief as is consistent with the relevant and sufficient statement of the case.

EDINBURGH, October 1852.



**NAMES of JUDGES, LAW OFFICERS of the CROWN in
SCOTLAND, and Counsel holding the Office of DEAN
of FACULTY during the currency of these Reports.**

HOUSE OF LORDS.

LORD HIGH CHANCELLOR.

Right Honourable **LORD TRURO**, succeeded by
Right Honourable **LORD ST LEONARDS**.

*Other Law Lords, who, in addition to the above, have taken part in
Scotch Appeals :—*

Right Honourable **LORD BROUGHAM**, and
Right Honourable **LORD CAMPBELL**.

COURT OF SESSION.

FIRST DIVISION.

Right Honourable **DAVID BOYLE, Lord President**, succeeded by
Right Honourable **DUNCAN M'NEILL**, (Lord Colonsay. *)

Honourable **LORD FULLERTON**.
" **LORD CUNINGHAME**.
" **LORD IVORY**.

SECOND DIVISION.

Right Honourable **JOHN HOPE, Lord Justice-Clerk**.

Honourable **LORD MEDWYN**.
" **LORD COCKBURN**.
" **LORD MURRAY**.

PERMANENT LORDS ORDINARY.

Honourable **LORD WOOD**.

" **LORD ROBERTSON**.
" **LORD RUTHERFURD**.
" **LORD COWAN**.
" **LORD ANDERSON**, † (succeeded Lord
Colonsay on his promotion to the
office of Lord President.)

* See p. 707.

† See pp. 707 and 713.

HIGH COURT OF JUSTICIARY.

Right Honourable DUNCAN M'NEILL, *Lord Justice-General.*
,, JOHN HOPE, *Lord Justice-Clerk.*

Lords Commissioners of Justiciary.

Honourable LORD COCKBURN.

„ LORD WOOD.

„ LORD IVORY.

„ LORD COWAN.

„ LORD ANDERSON.

COURT OF EXCHEQUER.

Full Court.

Honourable LORD MEDWYN.

„ LORD FULLERTON.

„ LORD CUNINGHAME.

„ LORD MURRAY.

„ LORD ROBERTSON.

„ LORD RUTHERFURD.

TEIND COURT.

The Judges of the two Divisions of the Inner House, and the
Lord Ordinary on the Teinds.

Lord Advocate—James Moncreiff, Esq., succeeded by Adam Anderson, Esq., Dean of Faculty, (Lord Anderson) who, on his promotion to the Bench, was succeeded by JOHN INGLIS, Esq.*

Dean of Faculty—Adam Anderson, Esq., (Lord Anderson) succeeded by JOHN MARSHALL, Esq. †

Solicitor-General—George Deas, Esq., succeeded by John Inglis, Esq., who, on his promotion to the office of Lord Advocate, was succeeded by CHARLES NEAVES, Esq. ‡

* See pp. 586 and 707.

† See p. 627.

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IN THE
COURT OF SESSION, &c.

WINTER SESSION, 1851.

SECOND DIVISION.

No. 1.

November 12. 1851.

THOMAS LEBURN, S.S.C., and OTHERS, v. Admiral GEORGE
FERGUSON of Pitfour.

Reduction-Improbation—Reclaiming Note—Act 13 and 14 Vict. c. 36, § 12.
—Circumstances in which held competent to reclaim against the Lord Ordinary's Interlocutor, prorogating the time for reporting diligence granted to defender, to enable him to satisfy production, although Lord Ordinary's consent had not been obtained.

This was an action of reduction-improbation of certain title-deeds. Nov. 12. 1851.
The defender took the usual order to satisfy the production; and, to enable him to do so, obtained a diligence against havers. After Leburn, &c.,
repeated renewals and prorogations, Lord Dundrennan pronounced an interlocutor, circumducing the term for reporting the commission and diligence. v. Ferguson.

Thereafter, the pursuer enrolled the case before Lord Cowan, (who had succeeded to Lord Dundrennan's roll,) for the purpose of moving his Lordship, “in respect of the circumduction, to pronounce decree of certification *contra non producta*, and reduction, in so far as regards the titles contained in the specification, for recovery of which a diligence was granted at the instance of the defender; and, also, for decree of certification *contra non producta*, in so far as the other titles, specified in the summons at the pursuers' instance, have not been produced,” &c. On this being moved, the defendant's counsel made a counter motion for prorogation, when his Lordship (mistaking the import of the pursuers' motion), pronounced the following interlocutor:—“19th July 1851. Having heard parties' procurators on the motion of the pursuers for circum-

Nov. 12. 1851. duction of the defender's commission and diligence, and the defender's counter motion for prorogation thereof, in respect it is stated for the defender, that there is a prospect of Colonel Johnstone's (the haver's) return to this country in the course of this summer, prorogates the time for reporting said diligence till the 3d day of November next, and refuses the pursuers' motion *in hoc statu.*"

Against this interlocutor the pursuers reclaimed;—and the Reclaiming Note appearing to-day in the Single Bills,

Dundas and *G. G. Bell* for respondents, objected. This reclaiming note is incompetent under the 12th sec. of the Act 13th and 14th Vict. The interlocutor having been pronounced before closing the record, the reclaimers required the consent of the Lord Ordinary before reclaiming, which they have not obtained.

W. G. Dickson and *Solicitor-General* for reclaimers, answered. This reclaiming note falls under that portion of the section of the Act referred to, which permits reclaiming without consent of the Lord Ordinary in the case of interlocutors disposing in whole or in part of the merits, because, had the Lord Ordinary proceeded regularly, and not as he did on a mistake as to the position of affairs and the nature of the pursuers' motion, the interlocutor would have been a decree of certification *contra non producta*, which would have been in reality an interlocutor on the merits.

Bell replied.—Had such been the nature of the interlocutor, it would, doubtless, have been an interlocutor on the merits. But, in point of fact, it is a mere interlocutory judgment; and the interlocutor must be looked at for its own import.

LORD JUSTICE-CLERK.—Looking at the pursuers' motion and the circumstances of the case, it would be hard on the pursuers, and a judical construction of the words of the statute, to say that the interlocutor complained of is not a judgment on the merits.

The COURT repelled the objection, and the case was sent to the Summar-Roll.

Lockhart, Morton, Whitehead, and Greig, W.S., Agents for Reclaimers.
Dundas and Wilson, C.S., Agents for Respondents.

No. 2.

November 12. 1851.

In going over the Single Bills to-day, the Lord Justice-Clerk observed that the headings of some of the Reclaiming Notes were incorrect and irregular, being thus expressed, "Reclaiming Note A against B," instead of "Reclaiming Note A against Lord _____'s Interlocutor." His Lordship added, that formerly agents were fined by the First Division for committing this mistake.

SECOND DIVISION.

No. 3.

November 12. 1851.

Mrs CHARLOTTE BAIRD of STERLING and HUSBAND v. The TRUSTEES of the late GENERAL SIR DAVID BAIRD.

Legacy—Lapsing—Next of Kin of Deceased Legatee.—A legacy was left to D. B., who survived the testator, but died intestate before the legacy became due and payable;—*Held*, that the legacy had not lapsed, to the effect of preventing the next of kin claiming it.

This was an action to recover payment of a legacy, the pursuer Nov. 12. 1851. being the next of kin of the legatee. The late General Sir David Baird, by trust-disposition and settlement executed by him on 31st Baird or Ster-
ling, &c. v. July 1849, bequeathed, among other legacies, the sum of £500 to Baird's Trus-
tees. David Baird, son of his brother Joseph, payable six months after
the death of his wife, Lady Baird. David Baird survived his
uncle, Sir David, and died in the year 1835 intestate; and Lady
Baird, the liferentrix, died on the 28th May 1847. The pursuer
was his only sister and next of kin, and claimed the £500.

In defence it was pleaded, that by the terms of the trust-disposition and settlement, the legacy had not vested in the legatee, David Baird, and that, consequently, the pursuer had no right to it as next of kin.

The Lord Ordinary (Colonsay), of this date, pronounced an July 1. 1851. interlocutor finding that the legacy had not lapsed, and that the right to it now belonged to the pursuers, and repelled the defendants' first plea to this effect. His Lordship added a note, in which he referred to the cases of *Wallace*, 28th January 1807, *Mor. Dict. v. Clause*, App. 6; *Smith v. Lauder*, 30th May 1834, 12 Shaw, 646; *Maxwell v. Wyllie*, 25th May 1837, 15 Shaw,

Nov. 12. 1851. 1005. All of these cases appeared to him to favour the claim of ^{Baird or Sterling, &c. v.} the pursuer, but some, of more recent date, had been referred to as opposed to the claim. In particular, the cases of *Provan*, 14th Baird's Trustees. Jan. 1840, 2 D. 298; and *Johnston*, 9th June 1840, 2 D. 1038. His Lordship also noticed the case of *Newton v. Thomson*, 27th January 1849, 11 D. 452.

The defender reclaimed.

W. B. Clark and *Dunlop* for the claimer commented on the cases referred to in the Lord Ordinary's note, and argued that the legacy had not vested in David Baird.

H. J. Robertson appeared for the respondent, but

THE COURT, without calling on him, unanimously decided, that the legacy in favour of David Baird had not lapsed. The case of *Wallace* (*supra*) was conclusive. They therefore adhered to the interlocutor of the Lord Ordinary, but reserving the question of expenses.

Mackenzie, Innes and Logan, W.S., Agents for Pursuer.

Gibson-Craig, Dalziel, and Brodie, W.S., Agents for Defenders.

FIRST DIVISION.

No. 4.

November 13. 1851.

HERONS v. M'GEOCH.

Trustee—Actings during life of Trustee—Evidence.—Bank deposit receipts handed over to a trustee by the trustor during the life of the latter, who had previously consulted the trustor about the management of his affairs,—*Held* not to be presumed to be a donation, but must be accounted for by the trustee.

Nov. 13. 1851. THIS was an action of count, reckoning, and payment, and the question was, whether certain deposit receipts handed over to ^{Herons v. M'Geoch.} M'Geoch by Kevan, the trustor, before his death, were gifts or donations, or fell to be accounted for. By trust-disposition and settlement, dated 29th July 1829, and relative codicil, dated 29th July 1842, the late William Kevan, farmer in Craiglarie, appointed as trustees and executors, Alexander M'Geoch, farmer in Kilbreen, the defender in this action, Alexander Heron and

John Heron, pursuers, and Andrew M'Cormack in Anniemag - Nov. 18. 1851.
blish, who subsequently went to America.

*Heron v.
M'Geoch.*

This deed, *inter alia*, authorised the trustees to divide equally among themselves the sum of £100, to be taken out of the first of the executry funds, as a token of the truster's regard; and farther directed them, failing directions by the truster for the distribution of the residue of his estate, to pay the same to the children of a deceased brother, who were all resident in America, or their lawful issue. On the 29th July 1842, the truster executed a codicil, which altered the original trust-settlement in various important respects. It cancelled the bequest of £100 to the trustees, as also the appointment of Mr M'Cormack as trustee and executor; it revoked the conditional bequest to the truster's relatives in America, and directed the trustees, after satisfying the purposes of the trust, to divide among themselves the whole free residue and remainder of the estate.

Kevan died in June 1845, being then about eighty years old. For some years before his last illness, the Herons and M'Geoch had assisted him in the management of his affairs: M'Geoch was his cousin-german; the Herons were no relations. Kevan being apprehensive that his latter end was approaching, had frequent communications with the Herons and M'Geoch relative to his affairs and the settlement thereof then contemplated by him. About the 22d of June 1842, he handed over to M'Geoch nine deposit receipts, blank indorsed, for money then lying in bank, to the amount of £1434 : 13 : 7, which M'Geoch uplifted and retained, and on 22d July following, he executed the codicil as above mentioned.

The Herons now founding on their rights as residuary legatees under this codicil, required M'Geoch to hold count and reckoning with them for payment of two-thirds of the above sum, with interest, on the ground that the deposit receipts had been committed to his charge *qua* trustee by the testator. On the other hand, M'Geoch denied his liability to account, in respect the sums in question were given to him as donations, and therefore constituted no part of the trust-estate. Both parties renounced probation. The Lord Ordinary (Wood) having found for the pursuers, M'Geoch reclaimed.

Wood and Inglis for Reclaimer. This question comes to be a plain one of evidence *quo animo* were the documents given? M'Geoch was the truster's only near relation in this country. He uplifted the money, and during the three years that Kevan lived

Nov. 18. 1851. thereafter paid no interest nor was required to do so by him. He
Herons v.
M'Geoch. was not called upon to account in any shape, or give any voucher for the moneys which he had uplifted in virtue of the indorsations. The inference, therefore, is in favour of donation. *Martin v. Unsworth*, 8th March 1849, Scottish Jurist.

Ross, with whom *Marshall*. The presumption of law is against donation. No one is held to give away his property gratuitously to his own detriment. Blank indorsation does not imply donation. *Henderson v. M'Culloch*, 12th June 1830; 1. Dunlop 927. M'Geoch confessedly acted as trustee for the three years preceding Kevan's death; therefore the property entrusted to him by Kevan must be held to have been given merely to be managed by him, and not as a donation.

The LORD PRESIDENT was of opinion that the predominating evidence was in favour of the pursuer. In law *donatio non presumitur*. The defender must prove donation. It is also an important feature in this case, that a trust subsisted at the time the donation is alleged to have been made; and that the defender has admitted that he had a joint duty as trustee to perform. The testator substantially called the trust into operation during his life. He could have demanded back the receipts any time before his death; and the pursuers, as his trustees, are now entitled to insist in the same claim.

LORD FULLERTON concurred.

LORD CUNNINGHAME was of the same opinion. In addition to the cases referred to by counsel, there is an earlier case reported in the Dictionary, where a right of ownership in a fund said to have been deposited for behoof of a sister, was held to continue with the depositor till his death. Dictionary, p. 3600.

LORD IVORY also concurred, remarking that this was properly a case for a jury; the *animus* in which the documents were given to M'Geoch depending upon the construction of various facts, which it was properly the province of a jury to interpret.

THE COURT adhered to the Lord Ordinary's interlocutor, and remitted to his Lordship to dispose of all questions of expenses.

Hunter, Blair, & Cowan, W.S., Agents for Reclaimers (Defender.)
Tods & Romanes, W.S., Agents for Respondent (Pursuer.)

SECOND DIVISION.

No. 5.

November 13. 1851.

ANDERSON v. POAG.

Railway Shares—Liability of Purchaser for Calls made previous to the recording of the Transfer—Relief.—A purchaser of railway shares is bound to pay the calls made subsequent to his purchase, whether the transfer be recorded or not, and the seller who had paid the calls is entitled to relief.

This was an action for relief, and for repayment of railway calls, which the pursuer had been compelled to pay, in consequence of the defender, who had purchased the shares, having failed to divest the pursuer, by recording the transfer. By the Companies' Clauses Act, a shareholder continues liable for calls, although he may have sold the shares, until the transfer in favour of the purchaser is duly recorded.

It appeared that the reason why the transfer had not been recorded, was, that it included, besides the shares conveyed by the pursuer, certain shares conveyed by other parties, upon which there were unpaid calls, and that in terms of the Act, until these were paid, the transfer could not be registered.

The defence mainly relied upon was, first, That the defender was not to blame for the deeds not having been recorded, as it had been duly transmitted to the secretary of the company, and ought to have been registered *quoad* the pursuer's shares, whatever was the state of the others included in it; and, secondly, That the calls paid by the pursuer were illegal, made in contravention of the Acts constituting the company; and that, accordingly, the pursuer could not have been compelled to pay these calls; and if he did so, he did so voluntarily and without relief.

The Lord Ordinary (Robertson) held that, whatever was the cause why the transfer was not recorded, still in all questions *inter se*, the defender was bound to relieve the pursuer of all liability; that the pursuer was not bound to try the question as to the legality or validity of the calls demanded from him, but that he was entitled to demand repayment of the calls, provided that before paying them, he had given notice to the defender so as to give him an opportunity of litigating the questions himself.

The Lord Ordinary accordingly allowed a proof that the pursuer had intimated the calls to the defender before paying them.

The defender reclaimed.

Nov. 13. 1851. *Shaw* for defendant. I was not to blame for the non-recording of the transfer.

Anderson v. Boag. LORD MEDWYN. Yes, you were. You put the pursuer in bad company by including in your transfer other shares which were not in a recordable condition.

P. Shaw.—The calls paid were entirely illegal and unwarrantable; for example some of them were made payable by instalments, and it had been decided that calls payable by instalments were bad; if the pursuer chose to pay illegal calls, he could not ask relief or repayment.

Gifford and Inglis for the pursuer were not called upon.

LORD JUSTICE-CLERK. It is quite plain that the pursuer is entitled to relief. Nothing can be imputed to the pursuer, as, in fault for the non-registration; he at least was not to blame. And the pursuer was not bound to try the legality of the calls. No man is bound to litigate for another's behoof. I doubt very much the relevancy of the proof allowed by the Lord Ordinary, for I don't see any relevant averment by the defender that the pursuer culpably failed to give him the opportunity of litigating, and paid the calls prematurely, or otherwise.

LORD MEDWYN.—I entirely agree; and I think that after what your Lordship has remarked, the defenders ought to consider well before the proof is gone on with. But, of course, as there is no counter reclaiming note for the pursuer, we cannot recal that part of the interlocutor. It is not before us just now. But the relevancy of the proof is all open afterwards.

The other judges having concurred—

THE COURT refused the reclaiming note, with expenses.

Alexander Gifford, S.S.C., Agent for Pursuer.

J. W. Mackenzie, W.S., Agent for Defender.

FIRST DIVISION.

No. 6.

November 13. 1851.

RECLAIMING NOTE FOR ADAM BELL.

Decree by default.—Competency of reclaiming under Act of Sedentary 10th July 1828, s. 110, against a decree by default for not lodging defences.

This was a reclaiming note to be reponed against a decree by default, for not lodging peremptory defences in an action of reduction.

Reclaiming
Note for
Adam Bell.

Munro was for the claimer.

Pattison, for the respondent, objected that the interlocutor ordering the paper had not been prefixed to the note in terms of § 110 of Act of Sederunt, 11th July 1828, although the interlocutor prorogating the time for lodging the paper was printed. He referred to the recent cases of *Dargavel v. Heron*, 25th May 1850, 12 D. p. 944; and *Thomson v. Innes*, 19th June 1851, 13 D. p. 1173.

THE LORD PRESIDENT.—The cases cited differ from the present case. They proceed upon the ground that the interlocutor prorogating the time was not printed, which is imperatively required by the Act of Sederunt. I do not think so rigid a construction as that now contended for should be put upon that section. The interlocutor granting the prorogation being prefixed, shews that the party persisted in his default.

THE COURT repelled the objection, and remitted to the Lord Ordinary to repon.

J. P. Falkner, Agent for Reclaimer.

FIRST DIVISION.

PETITION, MRS DANE E. GRAHAM OR M'FARLANE.

This was a petition for sequestration of the rents of Calziemuck, and the appointment of a factor.

Inglis and Sandford.—Mrs M'Farlane succeeded, after a long litigation, in obtaining decree in an action of reduction-improbation of a deed of entail, and was thereafter served heir to her predecessor. On proceeding to make her right effectual, she was met by a fee-simple disposition, now brought forward for the first time, dated 27th October 1802. Had this fee-simple deed of 1802 existed prior to the raising the action of reduction, the petitioner alleges it would have been a title to exclude the action, and would also have excluded her right to appear in an action of proving

Nov. 14. 1851.
Pet. Graham
or M'Farlane.

Nov. 14. 1851. the tenor, in which she was defender. It was not until long after the
 Pet. Graham
 or McFarlane. decrees dismissing the action of proving of the tenor, and of reduction
 of the deed of entail, and after the respondent, Alexander Graham,
 had denied the representation of his father, in order, as alleged, to
 avoid liability for his intromissions, by himself or through his law-
 agent or trustee, with the rents of the property that this pretended
 deed was for the first time heard of. A summons of reduction-im-
 probation of this deed has been raised and executed. The petitioner
 alleges that this is but some attempt to resist her right of posses-
 sion, and for no other purpose than to bring her into additional
 trouble and expense. And as some time must elapse before the
 deed, if bad, can be set aside, and as the respondent is drawing
 the rents of the property, the petitioner now prays the Court to
 interpose their authority, by the appointment of a factor for draw-
 ing the rents, and for the management of the property, subject to
 the orders of the Court, pending the discussion between the
 parties.

Horne and the *Solicitor-General* for respondent.—The petitioner
 has been in possession of this deed for two years, and Alexander
 Graham, in whose favour it is drawn, has been infest upon it.
 When a party is so infest, there is no case in the books to shew
 that the Court will sequestrate, simply because that right is
 challenged. In the former reduction, judgment proceeded on the
 fact that there were no witnesses to the signature.

THE LORD PRESIDENT.—In the answers to this petition, it is
 said that no objection will be taken to what arrangement the
 Court shall make. The proper course is to sequestrate.

THE COURT accordingly granted the prayer of the petition for
 the appointment of a factor on the disputed estate.

William Muir, S.S.C., Agent for Petitioner.

John Marshall, S.S.C., Agent for Respondent.

FIRST DIVISION.

No. 8.

November 14. 1851.

**JOHN RENTON and COMMISSIONERS v. MRS CHRISTIAN RENTON
 or BUCHAN and HUSBAND.**

Heir—Executrix—Claim for Repairs—Arrears of Rent—In a question
 between heir and executrix as to liability for repairs and arrears of rent,—

Held, that the heir was not entitled to relief against the executrix beyond Nov. 14. 1851.
the amount of the executry funds in hand—the heir refusing to investi-
gate these funds.

Renton, &c. v.
Mrs Renton or
Buchan, &c.

THIS was an action of relief at the instance of the heir of the late Mr Robert Renton of Bridgehouse against his executrix. A lease of the farm of Bridgehouse had been granted by the late proprietor, in the year 1837, to Messrs John and James Gray. The yearly rent was £120, payable at Whitsunday and Martinmas, beginning at Whitsunday 1839. The lease contained an obligation on Mr Renton to effect certain repairs prior to the entry of the tenant, which repairs, however, had not been made up to the time of his death in December 1838. After that event took place, a question arose as to whether the heir or executrix had right to the first year's rents. It was also questioned whether the heir or executrix was liable to fulfil to the tenant the obligation as to repairs. On these points a reference was submitted, in November 1840, to Mr Anderson, advocate (the present Dean of Faculty), who (March 1842) issued an award in favour of the pursuer, the heir, finding that the defender, the executrix, had no right to any part of the rents, and that she was liable to make such repairs as the tenants were entitled to under the lease.

In the meantime the tenants had raised a suspension against both the executrix and the heir, as of a threatened charge for the rents of the first year falling due as above mentioned at Whitsunday and Martinmas 1839. In that suspension the Lord Ordinary (Cockburn) pronounced an interlocutor in November 1840, which in substance found the tenants bound to pay one half-year's rent to the pursuer, and allowed them retention of a half-year's rent until the amount of their claim for repairs was ascertained, for which purpose a remit was made to Mr Lawrie. This was before Mr Anderson issued his award. So soon as it was fixed that the defender, the executrix, was liable for these repairs, she expressed her readiness to fulfil her obligation, and did not afterwards dispute her liability. But no report was made by Mr Lawrie, and consequently the amount could not be ascertained or paid.

During the interval which elapsed from the Lord Ordinary's interlocutor downwards, a great deal of litigation took place between the pursuer and the tenants, with regard to the rents *subsequent* to those of the first year, to which subsequent rents the pursuer, as heir, had admittedly the exclusive right. The amount of the claim due to the Messrs Gray was ultimately fixed at £120, and the same was paid by the heir, who was bound to the Messrs Gray for the same equally with the executrix.

Nov. 14. 1851. Pending these proceedings, in the year 1843 the present action was raised by the heir against the executrix, concluding for relief from the claim for repairs, and also for payment of the whole rents arising under this lease, from the first term's rent due at Whitsunday 1839, down to the term's rent due at Whitsunday 1842, so far as not recovered from the tenants, or so far as allowed to be reclaimed by them for the repairs. It also concludes for reimbursement of the whole expenses incurred by and occasioned to the heir in all the litigations. This claim was made upon the ground that the obligation to make the repairs had all along lain upon the defender, the executrix, and that the loss of rents to the pursuer, to the extent of £120, (to which sum the tenant's claim had been restricted,) and the expenses had been occasioned by her failure to fulfil that obligation.

The Lord Ordinary, (Robertson) found that there were no *termini habiles* under this action for pronouncing any personal decree against the defender, the same having been instituted and concluding against her in her character of executrix only.

The heirreclaimed.

Pattison and Sandford for reclaimer. The sum paid to the Messrs Gray is £120, while the whole amount of the executry funds is stated to be only £98 : 18 : 4. When Mrs Buchan succeeded to the executry there were sufficient funds to enable her to fulfil her obligation. She then denied her liability, but was ultimately found wrong. She ought, therefore, now to be found personally liable for the deficiency, and for the expenses of the subsequent litigation, which was occasioned by her failing properly to apply the executry funds. This action amounts, in point of fact, to an action of damages against her for failing to perform what was incumbent on her.

Penney for respondent. No doubt the proprietor is entitled to relief against the executrix, but not beyond the amount of the executry funds. These we are willing to make over to him. But the summons contains no personal conclusions, and, even if it did, there are no grounds in this case for anything else than the usual adjustment between heir and executor. The expenses of subsequent litigation are expenses of litigation in which he appeared for his own interest.

The LORD PRESIDENT could find no grounds for altering the Lord Ordinary's interlocutor. The executrix was brought forward to answer in her capacity of executrix alone. The heir re-

fuses to investigate the executry funds, and, in that case, must just Nov. 14. 1851.
take what is here given.

Renton, &c.,
v. Mrs Renton

LORD FULLERTON. It would require a special case to make or Buchan, &c. out that the executrix is liable in relief beyond the amount of the executry funds, and it would be necessary to state the grounds on which such liability rests. The severest scrutiny is necessary as between heir and executor. A special case is here attempted to be made out, viz., that the executrix should have fulfilled the obligation to complete the repairs at the time she succeeded to the executry funds; but the heir cannot maintain this, as he himself denied there was an obligation to repair in the litigation with the Messrs Gray. There were no grounds here for altering the interlocutor of the Lord Ordinary.

LORDS CUNNINGHAME and IVORY concurred.

The COURT, therefore, adhered to the interlocutor of the Lord Ordinary, finding the executrix liable only to the amount of the executry funds, and not liable in the expenses found due by the pursuer to the Messrs Gray, or in his own part of the litigation; also, in respect, she did not dispute her liability as executrix, finding her entitled to the expenses of this action of relief, without prejudice to further investigation by the heir into the executry funds.

Alexander Goldie, W.S., Agent for John Renton.

Gibson-Craigs, Dalziel and Brodie, W.S., Agents for Mrs Buchan and Husband.

SECOND DIVISION.

No. 9.

14th November 1851.

FINLAY v. OUTRAM.

Contract for skilled work—Non-implement—Defective Furnishings—Plea of mora—Minute of Reference—Procedure in Sheriff Courts.—A party was induced, by the representations of a tradesman, to order certain furnishings to be fitted up in his house. These furnishings failing to answer the purpose and nature of the work so represented,—held that the price could not be recovered. Held also that, in the circumstances, there was no mora. Observed, that a Minute of Reference during the progress of a cause in a reference as to specific facts and not of evidence generally, and, per LORD JUSTICE-CLERK, that it is incompetent to order a Minute of Debate and Answers after Reclaiming Petition and Answers.

Nov. 14. 1851. THIS was an advocation from the Sheriff of Lanarkshire (Sheriff Court of Glasgow). The advocator, the pursuer in the court below, sought to recover the sum of L.42, 15s. 11 $\frac{1}{2}$ d., being the amount of an account incurred in fitting up a ventilating apparatus and a dining-room lustre with "patent air-slide." The respondent (defender) resisted payment, on the ground not only of the unskilfulness of the work, but that the furnishings were not such as had been described and bargained for. A record having been made up in the Sheriff Court, in which the pursuer in effect pleaded *mora* on the part of the defender, and a proof having been led, a variety of procedure, including a minute of reference by the defender to the pursuer's oath, substantially referring to his evidence generally, the Sheriff-substitute, on the 17th July 1850, pronounced an interlocutor finding a modified sum due, in respect of the lustre which had been put right, but that the ventilating apparatus was utterly inefficient, and finding the defender liable in half costs. In the interlocutor, the Sheriff, on the 18th December 1850, adhered, with this variation, that the defender was entitled to expenses generally, because the material part of the expense had arisen in regard to the discussion about the ventilating apparatus, in which the defender had been successful.

The pursuer advocated.

Moir and the *Lord-Advocate*, for the advocator, argued that he had kept within the terms of his bargain; that although there was not complete ventilation, there was no undertaking on his part that the plan would be successful; he gave Outram his choice of plans, and Outram chose the pursuer's; the machinery was put up, and Outram makes no complaint from November till March. Counsel remarked on the interlocutor in the Inferior Court, from which it appeared that a Minute of Debate and Answers had been ordered after a reclaiming petition and answers.

LORD JUSTICE-CLERK.—Surely it is not competent under the Act of Sederunt to allow a Minute of Debate after a Reclaiming Petition and Answers?

Moir.—It is very much the practice in that court.

LORD JUSTICE-CLERK.—It may be so; but it is not allowable under the Act of Sederunt.

Dean of Faculty.—The Sheriff may have his mind enlightened by further debate.

LORD JUSTICE-CLERK.—If the Sheriff wants his mind enlightened, he may order a Reclaiming Petition and Answers, which, too, may be drawn by counsel.

Mora remarked on the Minute of Reference to the pursuer's Nov. 1. 1851.
oath.

LORD JUSTICE-CLERK.—I never saw anything like this Minute of Reference. The party should state the facts he is to prove; here there is no point whatever referred

Finlay v. Outram.

T. Mackenzie and Dean of Faculty, for respondent (defender).—We have nothing here to do with the gas lustre. The ventilating process was a complete failure. There is no relevant plea of *mora* in the record. If there was any such objection it was waived.

The COURT took time.

Saturday, 15th November 1851.

This day the case was advised.

LORD MEDWYN.—There was a total failure, from thorough unsuitableness, arising from the application of a false principle. The answer to the plea of *mora* is, that time was required to ascertain the working of the apparatus. Defender therefore is not barred by the plea. It is clear that the apparatus operated in a manner quite different from what was intended. The evidence proves that it was the first experiment of the kind of apparatus; it was a novelty. The pursuer was bound to have told all this to defender. I cannot make the defender pay for what totally failed.

LORD COCKBURN.—It was not a ventilating apparatus at all. The question is whether the pursuer is bound to supply apparatus that would work; and whether the defender was to take the risk on himself. The question therefore is what was the nature of the original contract? Was the pursuer bound to supply an apparatus or the elements of one? The pursuer is a professional ventilator, and the defender consulted him. He gave his opinion as a man of skill.

LORD MURRAY.—I take the same view. The pursuer was bound to have told the defenders that this was a mere experiment.

LORD JUSTICE-CLERK.—I have the misfortune to differ from your Lordships. The advocator has suffered from the great irregularity of the Minute of Reference. I do not think it competent to draw an inference as to the kind of apparatus to be fitted. The defender was bound to prove the facts he founds on by the deposition, and the pursuer does not admit that he undertook the apparatus should be successful, no such question was put to him.

Nov. 14. 1851. His LORDSHIP expressed a strong opinion on the irregularity
 and incompetency of the procedure in the Inferior Court.
Finlay v. Out-ram.

THE COURT repelled the reasons of advocation, and remitted simpliciter to the Sheriff, and found expenses due to the respondent.

Webster and Renny, W.S., Advocate's Agents.
Davidson and Syme, W.S., Respondent Agents.

SECOND DIVISION.

No. 10.

November 15. 1851.

SAMUEL v. the EDINBURGH AND GLASGOW RAILWAY COMPANY.

Jury Trial—Expenses. Where, in a jury trial for damages which were laid at L.2000, the jury by their verdict only gave L.10, held that only modified expenses of the trial could be allowed.

Nov. 15. 1851. THIS was an action against the Railway Company for inundating and injuring the pursuer's lands, by reason of the insufficiency of Samuel v. Edinburgh and Glasgow railway works. The damages were laid at L.2000, but the jury by their verdict gave only L.10.

Railway Company. The case came to-day before the Court, on two motions, one by the pursuer to apply the verdict, and for expenses. The other was a counter motion for expenses by the defender, in respect that the pursuer, by his verdict, had substantially failed at the trial.

G. Young, Macfarlane and Inglis for pursuer, moved for expenses, and referred to the cases of *Ballendene*, 7th March 1835, *Young*, 27th January 1832, and *Barclay*, 9th June 1847.

Patton for defender. This is not a case where expenses ought to be given; case of *William's Executors v. Fraser*, 29th November 1837, and *Paterson v. Walker*, 30th May 1849.

The Court were of opinion that the pursuer was entitled to expenses, subject to modification to the extent of one third of the taxed cost of the trial; that the defenders were entitled to the expenses of the discussion of the issue, after the date of the Lord Ordinary's interlocutor, respecting the same; and that the pursuer was entitled to one half of the expenses of the record.

James F. Wilkie, S.S.C., Agent for Pursuers.
David Smith, W.S., Agent for Defenders.

SECOND DIVISION.

No. 13.

November 13 and 14. 1851.

**WATSON CHALMERS v. ROBERT CHALMERS and OTHERS,
TRUSTEES of ROBERT WATSON.**

Special Legacy—Trust-deed—Divesting of Trustee.—A trust-disposition and deed of settlement contained a special bequest of a house, which afterwards, and during the trustee's life, was conveyed by a compulsory sale to a railway company: *Held*, that the price given for the subject could not be recovered by the legatee named in the deed.

In this action, which concluded for payment to the pursuer of Nov. 13 and the price given, under a compulsory sale to the Stirling and Dun-^{14. 1851.} ferline Railway Company, for a house which had been specially destined to him, the facts were these:—The late Robert Watson owned several tenements and yards in the town of Alloa. He had no children, but had several nephews, all brothers, of whom the pursuer and the defender, Robert Chalmers, were two. On the 19th August 1847, Watson executed a trust-deed containing a general settlement of his property and affairs. By that deed he conveyed his whole real and personal estate, and, particularly, certain tenements and houses in the town of Alloa, in favour of the defenders, as trustees, for the uses, ends and purposes thereby declared.

The trustees, after paying the trustee's debts, deathbed and funeral expenses, and the expenses that might be incurred in executing the trust, were directed, as soon as convenient after the trustee's death, to convey to each of his four nephews therein mentioned one of the four heritable subjects, houses. In particular the trustees were directed to assign and make over, to and in favour of the pursuer, and his heirs and assignees whomsoever, certain subjects and others, situated on the south side of Castle Street of Alloa, but under the express burden of the sum of L.100 to be paid to his brother, John Chalmers, which was declared a real and preferable burden affecting the said subjects and others. The deed further directed the trustees to pay to the pursuer and his other three nephews the sum of L.100. It concluded with a reservation of full power "to alter, innovate, or revoke these pre-

Nov. 13 And
14. 1851.
Chalmers v.
Chalmers, &c.

sents, in whole or in part," by any deed to be executed by the trustor, at any time of his life, and even on deathbed.

In June 1849, the Stirling and Dunfermline Railway Company gave notice in writing, in the usual statutory form, to the trustor, that certain subjects, which were those destined by the trust-deed to the pursuer, were required and would be taken by the Company for the purposes of their acts, and, after some preliminary negotiation, the property was, on the 1st March, sold to the Company for L.420. A disposition was subsequently, on the 20th August 1850, executed by the trustor in favour of the Company, and immediately recorded in the Register of Sasines. The trustor thus became entirely divested. It was averred on record that the L.420, with other funds, were the same day deposited by the trustor in the Branch of the Union Bank at Alloa.

The trustor died on the 2d October 1850 following—that is, about six weeks after executing the disposition. The trust-deed was found in his repositories, and was in no respect revoked or altered, nor had any provision whatever been made by the deceased for the change in the state of his property occasioned by the sale to the Railway Company.

The pursuer, however, claimed the price given for the subjects to the Railway Company, and he brought the present action against the trustees, contending by his pleas in law, *inter alia*, that as the property was forced from the testator by a compulsory sale, the estimated value paid to the trustor became in his hands a surrogatum for the property, and that he, the pursuer, had the same right and interest in the money which he would have had over the property itself if it had been still extant.

The trustees had paid the L.100 bequeathed respectively to the pursuer and the other three nephews of the trustor; but by their defence they opposed the pursuer's claim in this action, explaining that, in order to meet the possibility of its being sustained, they had set aside a sum, which had been deposited with the Union Bank of Scotland, upon a receipt payable to the order of the Lord Ordinary or the Court. The deposit-receipt was lodged with the Clerk to the process.

The Lord Ordinary (Robertson), after hearing parties' procurators, pronounced an interlocutor sustaining the defences, assailing the defenders, and finding them entitled to expenses. In the note to this interlocutor, his Lordship cited Erskine, 3, 9, 10, and the cases of *Paul v. Paul*, 5th July 1831, 1 Shaw, 100, and *Pagan v. Pagan*, 26th January 1838, 16 Shaw, 383.

The pursuer reclaimed.

Inglis and the *Lord Advocate* for the claimant. The *ratio* of Nov. 13 and the judgment in the case of *Paul* was, that the sale was voluntary, ^{14. 1851.} and there the fund was thrown into the general estate; and in *Pagan's* case the question was rather whether the provision was a ^{Chalmers v. Chalmers, &c.} special legacy. It is not the fact of alienating the subject that takes away the right of the legatee—*Voet*, lib. 34, tit. 4. *de alimendis*. In the present case there was no opportunity for re-investment. This was a compulsory sale. It was evidently the intention of the testator to put the parties favoured by his will on an equal footing. And it is material to observe that they were all equally related to him. English cases shew that it is a question of intention—*Coleman v. Coleman*, 2 *Vesey*, Jun., 638; *Avelyn v. Ward*, 1 *Vesey*, Sen., 420. It is not conclusive against the legacy that it cannot be given *in forma specifica*—*Inst. 2, 2, 12. Pothier*, Paris Edition 1810, *voce* testaments, tacit revocation. But we have authorities in our own law—*Bankton*, 3, 8, 53. Erskine and Stair do not lay down different doctrine. They don't deal with the case of involuntary alienation, but they rest upon the Roman law.

Attison and *Dean of Faculty* for the respondents. The testator reserved a power to alter and revoke. More's *Stair*, 2d vol. Notes, p. 344, v. "Succession in moveables, executry," and cases there referred to. It is unnecessary to go into the foreign authorities cited, because we have clear authority in our own law. The cases of *Paul* and *Pagan* are in point.

The COURT took time.

19th November.

This day the case was advised.

LORD JUSTICE-CLERK. In disposing of this case, I derive no aid from, and I lay aside entirely the consideration of, the law of England. This is not properly a case of revocation of a legacy. The real question is, whether the pursuer's claim can be sustained under the trust-disposition and deed of settlement. The point relating to the £100 is immaterial. The provision in favour of the pursuer is a direction to convey a particular house. There are here no words of general bequest or gift. The trustee sold the house, and he lived for six months after, making no codicil as to this money so paid to him. The house was no part of the trust-estate. The trustees never had any right to the house. They have it not. They cannot convey it to the pursuer. He cannot

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14. 1851.

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Chalmers, &c.

claim it under the will. Hence his claim is not in terms of the trust-deed, but is for the price of the house, on the assumption that the deceased would have given him that sum of money, and wished him to get it. This is beyond doubt the real character of his claim. No such bequest was made, and the present application is neither more nor less than to ask the Court to make a bequest in favour of the pursuer. The case of *Pagan* applies *a fortiori* to the present. Evidence of the trustee's "belief and understanding" is, by the law of Scotland, wholly inadmissible.

LORD MEDWYN. I think the interlocutor is right, and it distinctly expresses the grounds on which I think so.

LORD COCKBURN. I agree that we have no occasion to go to the law of England, nor to the law of France, nor directly to the law of Rome, although our own jurisprudence is founded on the civil law. There is enough of principle and authority in our own law, as it is, on which to decide this case, which is the same as if a bequest had been made of a ring, or such like, which ceased to exist. It is not that the bequest has fallen, but that it has become inoperative. Each of the nephews got his house with his risk, and the risk has fallen on the pursuer. We cannot go into the question of intention.

LORD MURRAY. I am of the same opinion. But I consider this a very hard case, for I have not the smallest doubt that the testator intended to give the value of this house to the pursuer. But after the case of *Pagan*, we have no option.

The Lord Advocate submitted that expenses should be paid out of the testator's estate. Expenses were so given in *Pagan's* case.

LORD COCKBURN. *Pagan's* case settled the law.

THE COURT adhered to the interlocutor of the Lord Ordinary, found additional expenses due to the defenders, and granted warrant on the Union Bank to pay to the defenders the sum contained in the deposit receipt, and authorised the Accountant of Court to deliver up the said receipt to the defenders' agent.

John Cullen, W.S., Pursuer's Agent.

William Mason, S.S.C., Defender's Agent.

SECOND DIVISION.

No. 14.

November 13. and 14. 1851.

Revisal of Condescendence, 13th and 14th Vict. c. 36, § 2.—In the course of the above case of *Chalmers v. Chalmers*, the LORD

JUSTICE-CLERK said that in this, which was one of the first cases Nov. 13. and under the new act that had come before the Court, he observed ^{14. 1851.} that the revised Condescendence was an exact transcript of the Chalmers v. Condescendence annexed to the Summons, with no other addition Chalmers, &c. than a statement to the effect that the trust-deed was read in presence of the relations. This, he was sure, was not according to the spirit of the new act, and might with propriety affect the question of expenses.

FIRST DIVISION.

No. 15.

November 15. 1851.

ROBERT and JOHN BROWN v. JOSEPH DOCTOR.

Proof—Commission—Competency—Where the Court had remitted to an Advocate “to inquire into and report on the true state of the facts” in the case, his report is not conclusive, but the Court must itself consider and decide on the proof as led.

In this case, which was a competition between assignees and an ^{Nov. 13. 1851.} arrester in a multiplepoinding originally brought in the Sheriff-^{Brown or} Court of Forfarshire, the Sheriff preferred the claim of the assignees. The arrester advocated, and the Lord Ordinary (Robertson), after a debate, ordered the assignees “to lodge a minute, specifying distinctly whether they entered upon the execution of the contract” for paving a street, called Trade’s Lane, Dundee, “and performed any part of the work at their own expense,” on which facts the validity of their claim depended. The assignees lodged a minute to that effect, to which the arrester put in answers denying the statements in the minute. On this the Lord Ordinary, without farther investigation, altered the Sheriff’s interlocutor, and preferred the claim of the arrester.

The assignees reclaimed, and on 29th May 1850, the Court recalled the interlocutor of the Lord Ordinary *in hoc statu*, and, before answer, “remit to Mr W. H. Murray, advocate, to inquire into and report the true state of the facts, which he may consider material for the decision of the case, with power to call for production of such documents, and to examine such witnesses as he may think requisite.”

A report was accordingly prepared by Mr Murray, containing a full statement of the evidence on both sides, and the conclusions at which he had arrived.

Nov. 18. 1851. The case was put out to-day for advising.

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Doctor.

Shand and Inglis for the Reclaimers (the assignees), now submitted that as the report was in favour of the assignees, they ought to be preferred to the fund *in medio*.

LORD FULLERTON. Did the other party consent to this remit to Mr Murray?

Solicitor-General (with whom *Macknight*). Certainly not, and we will contend on the whole proof that the reporter's views are erroneous.

LORD PRESIDENT. When the case was formerly before us, we thought that a trial by jury was quite unsuitable in the circumstances, and therefore remitted to a member of the Bar to investigate the facts, without ascertaining which we felt we were not in a situation to decide the case.

LORD FULLERTON. I fear we cannot delegate our authority as judges, but must have the whole evidence before us, and make up our own minds upon it as we best may.

The Respondents were accordingly ordered to print the proof which had been led in the case.

L. M. Macara, W.S., Agent for Reclaimers.
James Macknight, W.S., Agent for Respondent.

FIRST DIVISION.

No. 16.

November 15. 1851.

Hook v. Hook.

Proof—Circumduction.—Where in a proof on commission, appeals had been taken, held incompetent to circumduce the term till the objections were disposed of.

Nov. 15. 1851. In the course of a proof on commission, a great many appeals were taken on both sides, all of which were reserved for after consideration. Before these were discussed, the Lord Ordinary (Robertson,) at the pursuer's instance, pronounced an interlocutor of circumduction, against which the defendant now reclaimed.

Hook v. Hook.

Neaves, with whom *Monro* for claimer. This is an irregularity. We are ready to discuss these appeals, and see how far they are good or bad. He may not need any further allowance of proof; but in the present stage of the proceedings, it is premature to grant circumduction.

Crawfurd, with whom *P. Fraser* for respondent. The effect of the interlocutor is merely to prevent the defender protracting farther a very lengthened litigation. We are ready to discuss the appeals. The proof may afterwards be reopened.

THE COURT held that it was not competent to pronounce interlocutor of circumduction before the appeals were discussed. They therefore recalled the interlocutor *in hoc statu*; and remitted to the Lord Ordinary to dispose of the objections.

Murray and Beith, W.S., Agents for Pursuer.

William Alexander, W.S., Agent for Defender.

FIRST DIVISION.

No. 17.

November 15. 1851.

JOHNSON and COMPANY v. LEES.

Interlocutor—Commission to take Oath—Bill Chamber Practice.

Lees charged JOHNSON and Company for payment of a bill. They suspended the charge on the ground of non-onerosity, and referred to the charger's oath. The Lord Ordinary (Rutherford,) on 7th October 1851, pronounced an interlocutor, in which he "sustains the reference made to the charger's oath, ordains him to depone, and grants commission to to take his deposition and to report *quam primum*," &c., the interlocutor being thus blank as to the name of the commissioner. The charger's agent received from the Bill Chamber what was called an "attested copy" of the above interlocutor, in which attested copy, the blank left in the original for the name of the commissioners, filled up with the words, "the Judge Ordinary of the bounds;" the blank in the original interlocutor still remaining unfilled up. Acting in this warrant, a diet was fixed, and the charger's oath taken by the Sheriff-substitute of Fife. On the 15th November 1851, the interlocutor was pronounced by the Lord Ordinary, and the commissioners appointed.

Nov. 15. 1851. commission being reported, the Lord Ordinary (Medwyn,) in respect the oath was negative, refused the note ; and a certificate of refusal having been obtained by the charger, he proceeded to enforce the diligence.

Against this last interlocutor, the suspender reclaimed, on the ground that there was no warrant from the Lord Ordinary to the Sheriff-substitute of Fife to take the deposition of the charger, and that the deposition was, therefore, void and inept.

At the calling to day, *Pattison*, appeared for the claimer, and *W. Peddie* for the respondent.

THE COURT were unanimously of opinion, that the irregularity was fatal to the subsequent procedure. They therefore recalled the interlocutor, refusing the note of suspension.

James Bell, S.S.C., Reclamer's Agent.
Andrew Fyfe, S.S.C., Respondent's Agent.

FIRST DIVISION.

No. 18.

November 18. 1851.

BLAIKIE BROTHERS v. ABERDEEN RAILWAY COMPANY.

Contract—Railway Furnishings—Issue—Companies' Clauses Act—Held in construction of this act, that although it is declared that a director shall not enter into a contract with the railway company, such a contract is not therefore void, but may be enforced, and the issue to try the action may be general as to the time of entering into the contract—e.g. “in the course of the year 1846.”

Nov. 18. 1851. This was an action for enforcing implement of a contract, entered into on 6th February 1846, between the Aberdeen Railway Company and the Messrs Blaikie, Brothers, merchants in Aberdeen. The contract libelled on was for the delivery by the Messrs Blaikie of a certain number of *chairs* for the permanent road of the railway. Before any of the chairs had been furnished, on 4th June 1846 the Messrs Blaikie were requested by Mr Gibb, the Company's engineer, in executing the contract, to adopt Ransome and May's patent mode of casting the chairs, to which the Messrs

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Blaikie consented. The pursuers allege that they have implemented the contract, to the extent of about two-thirds, but that the railway company refuse to receive delivery of the remaining quantity contracted for, or to pay the price, being at the rate of £8, 10s. per ton. This action has therefore been raised by the Messrs Blaikie to enforce full implementation of the contract.

When the contract was first entered into on 6th February, Provost Blaikie, one of the partners of Blaikie, Brothers, was also one of the railway directors and chairman of the company. He resigned office as director, and consequently of chairman, on the 25th of same month. The contract was entered into on behalf of the railway company by Mr Gibb, their engineer.

The railway company pleaded in defence, that Mr Gibb had no power or authority to enter into the contract on their behalf, and that even if he had, any such contract was, by the Companies' Clauses Act, §§ 88 and 89, illegal, and could not be enforced, and that, therefore, the present action is groundless.

The record having been closed, the Lord Ordinary (Ivory) appointed the parties to prepare and lodge issues in terms of the statute, which they did, the pursuers simply putting in issue the contract as having been entered into, "in the course of the year 1846." The counter issue, for the defender, proceeded on the view "whether, in the month of January and thereafter, till on or about the 25th February 1846," &c., and put in issue the alleged fact as to Thomas Blaikie, one of the Blaikie, Brothers, being at that date a director of the Aberdeen Railway Company, thereby directly raising the question as to the validity of the contract.

The issues being lodged in process, the Lord Ordinary, in respect the parties had not agreed to settle said issues, of consent, in terms of the statute, and that it seemed to him premature to dispose of the legal question specially raised by the defenders in their plea in law on the Companies' Clauses Act, so long as the ultimate form in which the issues might be cast was uncertain, made avizandum with the cause to the First Division of the Court.

In this state of the case the question came to be, was it sufficiently precise to put in issue, as the pursuer proposed, that the contract was entered into "in the course of the year 1846"? or was it necessary to go into the legal question under the Companies' Clauses Act as proposed to be raised by the defenders' counter issue.

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Nov. 18. 1851. *Young and Inglis*, for pursuers, contended that their issue was sufficiently precise. The effect of the Companies' Clauses Act, founded on by the defenders, was merely to void the office of director, not the contract. At common law, a contract between a trading company and a joint-stock company was good, although one of the partners of the trading company was a director of the joint-stock company. He may be one of fifty partners, and have no control over their proceedings. In order to create a nullity, therefore, under the statute, the words to that effect must be precise and explicit. They are not so in the statute. The one clause provides what shall *not* be, the other provides a remedy. Why should the office of director become vacant if the contract be null?

Again, the actings of Gibb are approved of throughout by the directors in their minutes. A joint-stock company is not free from such rules as apply to individuals and imply recognition of a contract, and in their minutes the directors adopt Gibb's proceedings as their own. Two directors may bind the company; but here we have the whole board of directors parties to the contract. A contract, therefore, was duly entered into, and the pursuers are entitled to their issue—*Glasgow, Airdrie, and Monklands Junction Company v. The Glasgow Waterwork Company*, 13th June 1849.

E. Gordon and Neaves.—We rely on the terminating clause of section 88. We interpret it to mean, that while the party to a contract is director, no contract can be entered into, and any such contract is therefore illegal. Otherwise, the clause is entirely nugatory. It is the policy of the law that the director is not capable of contracting where he is personally interested; and, if so, where is the impropriety of saying he shall cease to draw emoluments from this contract, and cease to fill the office of director he has perverted in this way. There is an incompatibility between buyer and seller at common law and the doctrine applicable here.

Again, where a contract is libelled on, there must be an actual contract between the parties. It will not do to have merely the minutes of the company with regard to it.

THE LORD PRESIDENT thought this was an inconvenient stage of the proceedings for discussing this question of law. As to the time when the contract was entered into, it certainly was in the course of the year 1846. It is admitted by both parties that a variation was introduced into the contract, yet it is one and the same con-

tract, therefore there is nothing objectionable to that part of the Nov. 18. 1851.
issue.

As to the effect of the Companies' Clauses Act, he could find Blaikie, &c.,
no declaration of nullity on the face of the statute that he could v. Aberdeen
give effect to. It merely says a director shall not enter into a Railway Co.
contract with the company—it does not say that such a contract
shall be void and null. Had such been the intention of the Legis-
lature, it would have been easy to say so. He did not feel war-
ranted, therefore, in putting such interpretation on it.

Then comes the objection that this contract was not entered
into as prescribed by the statute. The answer to that is to be
found in the fact that not only is Gibb authorised to make ar-
rangements with Messrs Blaikie; but other minutes of the Direc-
tors follow, giving effect to what he did on 6th February. More-
over, when I saw the contract executed to the extent of two-thirds,
I cannot give effect to such technical objection as that it is not
entered into in strict conformity with the statute.

LORD FULLERTON was of same opinion as to the point of law.
There is no nullity in such a case as the present at common law.
The general object of section 88 of the statute is to render it in-
compatible for a person having an interest in a contract with the
Company to be a Director. Section 89 provides a remedy for
such a case, and annuls not the contract but his office. On that
ground, his Lordship saw no reason for refusing the issue.

LORDS CUNNINGHAME and IVORY concurred.

THE COURT, therefore, pronounced an interlocutor approving
of the first issue (the pursuers') as adjusted and settled, and find-
ing that the circumstance of Mr Thomas Blaikie, one of the pur-
suers, having been a director of the Aberdeen Railway Company
for some months before, and on the 6th of February 1846, and
having thereafter continued to act as such, and not having resigned
the said office of director till on or about the 25th of February
1846, is not fatal to the validity of the contract as libelled, and
therefore refuse the counter issue proposed by the defender.

*Lockhart, Morton, Whitehead, and Greig, W.S., Pursuers' Agents.
Webster and Renny, W.S., Respondent's Agents.*

SECOND DIVISION.

No. 19.

November 18. 1851.

Declarator.—INGLIS v. INGLIS and OTHERS, and Suspension.—RINTOUL v. INGLIS.

Entail—Investiture—Declarator—Suspension.—Question which of two deeds of entail, the one of which was registered in the Register of Entails, and the other not, formed the basis of investiture and regulated the entail.

Nov. 18. 1851. In 1704, by mutual deed of taillie, James Craigie of Dumbarnie, ^{Inglis v. Inglis,} and John Craigie of Halhill, executed two distinct entails of their &c., and Rintoul v. Inglis. respective estates. That of Dumbarnie called to the succession James Craigie, and the issue of his body; whom failing, John Craigie, and the issue of his body; whom failing, James Craigie's heirs and assignees whatsoever. The entail of Halhill, on the other hand, was destined to John Craigie and his issue; whom failing, James Craigie of Dumbarnie and his issue; whom failing, John Craigie's nearest lawful heirs and assignees whatsoever. The entails, though contained in the same deed, are quite separate and distinct. The entail of Dumbarnie obliged the heirs to assume the name and arms of Craigie of Dumbarnie; that of Halhill obliged the heirs to assume the name and arms of Craigie of Halhill. Though alike in the fettering clauses, they were constituted by separate conveyances and procuratories; and notwithstanding the deed had the shape of a mutual contract, each entainer reserved to himself the unlimited powers of a proprietor in fee-simple. This deed was registered in the Register of Taillies. So far as regarded the estate of Dumbarnie the entail was feudalized. It was not feudalized as respected the estate of Halhill.

The entailed estate of Dumbarnie, by failure of the entailer and his issue, opened to his brother John Craigie of Halhill; and in the year 1830 he became party to a contract of marriage between his son, John Craigie, younger of Dumbarnie, and Susan Inglis, the daughter of Sir John Inglis of Cramond. In that deed he, along with his son, executed an entail of the estate of Dumbarnie and Halhill. The two estates are joined in the same clauses of conveyance, and, especially in the procuratory, they are given out together, not as separate estates, but as one estate, and under the same terms and conditions of entail. This deed differs also in various particulars from the deed of 1704. Thus the heirs taking under this entail are

bound to assume the name and arms only of Craigie of Dumbarnie, Nov. 18. 1861.
contrary to the deed of 1704; this entail confers a general power
of granting leases of the lands of Halhill for such periods as the
heir in possession may think fit, while, by the deed of 1704, leases
were prohibited of longer endurance than the setter's lifetime. Mr
John Craigie reserved no power under the deed of 1730, either as
against the heirs of the marriage, or as against the other substi-
tutes, not heirs of the marriage. He only increased the power to
charge the estate of Halhill with debt to the extent of £20,000
Scots, instead of 10,000 merks.

The deed of 1730 was never registered in the Register of Tail-
ties, but the entail, exactly in terms, entered the investiture directly
in virtue of the procuratory in the deed of 1730, that procuratory
being granted by John Craigie, partly as heir of entail of Dumbarnie, and partly in virtue of his original investment in the lands
of Halhill, of which he was not divested, no feudal title (as has
been said) having been completed to the lands of Halhill under
the contract of 1704. Both estates seem to have been held of the
Crown, and the *quaesidem* of the charter, as regards Halhill,
refers not to the procuratory of 1704, but directly to the procuratory
in the deed of 1730. The charter following the contract of
marriage, in stating the conditions of entail, refers expressly and
repeatedly, and for not less than seven times, to the contract of
marriage, and to no other deed. The following clause, however,
is also contained in the contract of marriage:—the entaller apply-
ing the clauses of entail to his nearest heirs and assignees whatso-
ever,—declares them to forfeit in the event of contravention; de-
claring that “the next in order of succession shall have right to
the same, sicklike, and in the same manner, and as freely, in all
respects, as if the person or persons so contravening were naturally
dead, and obtain those who shall contravene and come in the
contrary of the premises, denuded thereof, as accords of the law;
—they always observing these presents and conditions hereof, and
that conform to the bond of mutual taillie 1704; declaring, never-
theless, that the above conditions, restrictions, &c., shall noways
affect or burden the said whole lands of Drumeldrie, &c., above
mentioned, which are not contained in the aforesaid mutual bond
and deed of taillie, so that the said Mr John Craigie, yr., and his
heirs-male and of taillie, substitutes, and successors above-men-
tioned, shall be noways tied up nor restrained by the aforesaid
restrictions, conditions, limitations, and clauses irritant above-
mentioned, from a free disposal of the lands and others immediately

Nov. 18. 1851. above-mentioned, not contained in the aforesaid mutual bond and Inglis v. Inglis, deed of tailie." This clause was inserted *in terminis*, in the charter : &c., and Rintoul v. Inglis. and, of course, in the subsequent investiture. To explain it, it may be mentioned, that the lands of Drumeldrie had been included in the general clause of conveyance ; and, but for the exception, would have been entailed.

In 1753, a private Act of Parliament was obtained, to enable the heir then in possession, John Craigie, junior, to sell the lands of Dumbarnie, and entail in lieu of them the lands of Drumeldrie and others. This statute was acted on ;—the lands of Dumbarnie were sold—the lands of Drumeldrie and others, entailed ; a separate entail being executed in terms of the statute ; but the lands of Halhill continued to be held, and are held by the present pursuer, under the investiture completed on the deed of 1730.

The pursuer has since sold the estate of Halhill to Rintoul, and has raised the present action of declarator against the defenders, who are the whole heirs of entail called both in the deeds of 1704 and 1730, to have it found and declared that he has a right to sell it, and is entitled to the price. The suspension has been brought also for the purpose of trying the validity of the sale. These processes were conjoined.

For the pursuer it was pleaded that the deed of 1704 is not a valid and subsisting entail, so far as regards the lands of Halhill, in respect it was never followed by any feudal investiture, and because it contained a reserved power to alter and revoke, and was superseded by the marriage-contract of 1730 ; and that as this last deed constituted a new conveyance, essentially differing from the entail of 1704 in its destination and provisions and conditions and fencing clauses, it must be regarded as a new entail, which not having been recorded in the Register of Tailzies, is ineffectual to prevent the pursuer from selling his lands.

For the defenders it was pleaded that the deed of 1704 being referred to *in gremio* of every title made up to Halhill, as the basis and warrant of the restrictive clauses, is to be regarded as the regulating entail which alone required to be recorded ; and that the deed of 1730 merely propelled the succession, and did not constitute a new and independent entail forming the basis of an investiture, and superseding that of 1704.

There were other pleas, which not being insisted on in the Inner House, need not be detailed.

The LORD ORDINARY (Rutherford) (from the Note to whose

interlocutor the preceding statement of the case has been mainly taken) in the suspension repelled the reasons of suspension, and, in the Declarator, found, decerned, and declared, in terms of the conclusions of the libel.

Against this interlocutor the defenders reclaimed.

Cleghorn and the *Lord Advocate*, for the Reclaimers, in support of their pleas, referred to the cases of *Bontine v. Graham*, 1 Rob. Appeal Cases, 1, 347; *Turnbull*, 14 S. 1031; *Eglinton v. Montgomerie*, 2 Bell's Appeal Cases, 149; *Broomfield v. Paterson*, Diet. 18618.

T. M'Kenzie, with whom the *Dean of Faculty*, for the Respondents, referred to *Paterson v. Purves*, 10th March 1823, 1 S. Appeal Case, 401; *Stewart v. Lord Mansfield*, 23d May 1844, 5 Bell's Appeal Case, 139.

The LORD JUSTICE-CLERK.—The important question here is, on what deed is the charter expedie. It seems as clear a question of conveyancing as could be that it is expedie exclusively on the marriage-contract. In all its clauses it has constant reference to the marriage-contract, and the marriage-contract is a distinct and clear deed, containing within itself all the provisions and conditions of an entail; and the conveyance in the charter is with and under these conditions, and no other. The investiture is made up in virtue of the deed of 1704, (the marriage-contract), and no other. If then that deed is not recorded in the Register of Tail-ties, there is an end of the question. The entail is not binding; and the pursuer may sell. Because the investiture happens to be conform to the other deed of 1704, it does not follow that that other deed regulates the entail.

The other Judges concurred, and the Court adhered.

Rolland & Thomson, W.S., Reclaimers' Agents.
James Dalgleish, W.S., Respondents' Agent.

SECOND DIVISION.

YOUNG v. J. W. CAMPBELL & Co.

Repetition — Guarantee — Mandate — Bankrupt Estate.—Where A., a

creditor on a bankrupt estate, had granted to B., another creditor, a mandate to uplift his dividend, and the same had been appropriated by B., on the allegation that the debt had been guaranteed by A., (who was in the knowledge of B.'s claim at the time of granting the mandate :) *Held that* an action of repetition was not sustainable without proving that he had never granted the guarantee.

Nov. 19. 1851. This was an action to recover certain sums of money which the pursuer alleged belonged to him and had been paid to the defendants, to be held for his behoof.

Young, v.
Campbell, &c.

It seems that both the pursuer and the defenders were creditors of George Moodie, merchant in Glasgow. Moodie became bankrupt in the year 1845, and executed a general trust-deed in favour of James Gourlay, accountant in Glasgow, for behoof of his creditors. Both the pursuer and the defenders ranked upon his estate, the former for £617, 10s., the latter for £1230 : 6 : 3, being the price of certain furnishings which they had made to Moodie.

The defenders alleged that the pursuer had become guarantee for these furnishings to Moodie ; that he had accordingly, on a dividend being declared, agreed to allow the defenders to receive the dividend due to him in part payment of his debt under the guarantee, and granted them the following mandate, addressed to Mr Gourlay, in favour of Collie, their clerk or cashier :—“ *Glasgow, 12th Sept. 1845.—Sir, You will please pay to the bearer, Alexander Collie, the dividend due to me on the estate of George Moodie, and his discharge shall be binding on, Sir, your mo. obt. svt. ADAM YOUNG.*” The pursuer admitted he had signed this mandate ; but he denied that he had incurred any guarantee for the furnishings made by the defenders to Moodie. He admitted, however, that the defenders had asserted this guarantee, and demanded payment of the dividend due to him on Moodie's estate, towards payment of the debt under the guarantee, threatening legal proceedings if he refused to comply ; and he alleged, that, in these circumstances, and with the view of preventing annoyance (he being at the time very unwell), and knowing that the money would be safe in the defenders' hands, he had given the mandate ; which, however, had been given and taken without any view of fixing, or admitting his liability to the defenders under the guarantee, but merely that they might draw the money in the meantime. The defenders subsequently, in Nov. 1848, without any new authority, as the pursuer alleged, drew another dividend due to him out of Moodie's estate.

In September 1847 the defenders, founding upon this averred Nov. 19. 1851.
guarantee, raised an action in this Court against the pursuer for payment of £385, 4s. 6d., being the balance due in respect of ^{Young r.} Campbell, &c. their furnishings to Moodie, after deduction of the dividend drawn under their own and the pursuer's ranking, from Moodie's estate, and of those drawn under the pursuer's ranking. The present pursuer gave in defences denying the guarantee. The pursuers (defenders here) unable to establish it *habili modo* by writ, referred the whole case to the oath of the defender (pursuer here). He gave a deposition which was found negative of the reference, and his defences were sustained.

The present action was now brought for repetition of the dividends paid to the defenders under the mandate of the pursuer.

In defence it was pleaded that the dividends having been paid in consequence of an obligation in morality, and by the voluntary act of the pursuer, with full knowledge of the circumstances, no action lay for repetition.

The Lord Ordinary (Rutherford) found for the defenders, and dismissed the action. In his note he stated that in his opinion the action was a *condictio indebiti*.

Against this interlocutor the pursuer reclaimed.

Penney (with him *P. Fraser*), for the claimer. The letter to Gourlay cannot be taken as an assignment for value of the funds of the pursuer in the hands of Gourlay. If taken as such it would be substantially a bill, and would require a stamp. *Sutherland, 13th November 1847.* Being therefore a mere mandate to uplift money which belonged to the pursuer, he is entitled to repayment. True, the money is said by the defenders to have been paid in consequence of a debt under a guarantee, but that cannot be taken on their statement; and, indeed, the former action established there was *no* guarantee. The Lord Ordinary is wrong in supposing this action a *condictio indebiti*. Such an action arises where a party voluntarily pays under error, supposing the sum to be due. Here my client did not pay under any error.

T. McKenzie (with him *Neaves*.) The pursuer admits the defenders made the demand for payment of the dividend under an alleged guarantee, and that he gave the mandate knowing of this demand. The mandate is an unqualified authority to pay to the

Nov. 19. 1851. defenders. If it was meant that the money should be kept by them, subject to an accounting with the pursuer, the letter should *Young v. Campbell, &c.* have embodied that.

LORD JUSTICE-CLERK.—There is no difficulty in this case. The pursuer having admitted that he granted an unconditional mandate for payment of the money, knowing of the claim made by the defenders, and in consequence of that claim, it lies on him to prove his statement that he paid it with no intention to admit the claim, but merely that it might remain in the defenders' hands until the question of guarantee was settled. He may refer the case, if he chooses, to the oath of the defenders. This is not a case of *conductio indebiti*.

The COURT unanimously pronounced an interlocutor finding for the defenders.

Andrew Howden, W.S. Agent for Pursuer.
J. W. M'Kenzie, W.S., Agent for Defender.

OUTER HOUSE.

No. 21.

November 19. 1851.

BEFORE LORD COLONSAY.

CARGILL v. GOULD.

Suspension—Additional plea in law allowed under the new Act 13 and 14 Vict., c. 36.

Nov. 19. 1851. This was a suspension of a decree of the Sheriff of Aberdeen given on a closed record and a concluded proof.
Cargill v. Gould.

Broun, for the suspender, moved the Lord Ordinary for leave to put in additional pleas in law.

Buchanan, for the respondent, objected that this was incompetent under the recent statute, 13 and 14 Vict., c. 36.

LORD COLONSAY allowed both parties, if so advised, to lodge Nov. 19. 1851,
additional pleas in law within eight days, and, when lodged, ap-
pointed them to be boxed for the Lords of the Second Division. ^{Cargill v.}
^{Gould.}

Note. This interlocutor was pronounced under the authority of a rule proposed during last session by the Second Division, and assented to by the First Division of the Court, which states, that inconvenience having arisen from the want of additional pleas in law, although new views were intended to be brought forward, each interlocutor of the Lord Ordinary reporting the advocation (or suspension) under the recent Act, shall direct the parties to lodge additional pleas in law within eight days from the date thereof, if they intend to state any.

FIRST DIVISION.

No. 22.

November 20. 1851.

CROWE and MIDDLETON v. HUTCHINSON BROTHERS.

Demurrage.—Charterer must prove undue delay in discharging vessel, to relieve him from a claim of demurrage.

This was an advocation from the Sheriff of Edinburgh. The Nov. 20. 1851. action was originally raised in the Inferior Court at the instance of the owners of a vessel called the "Hexham" of Sunderland, Middleton v. to enforce a claim of demurrage against the Messrs Hutchinson, &c. ^{Crowe and Hutchinson,} merchants in Leith, charterers of the vessel. By charter-party, it was agreed that thirty running days were to be allowed the defenders for loading and discharging the vessel, and ten days' demurrage, over and above the said lying days, at £4 per day. The vessel so chartered arrived at Bolderaa on 25th September 1845, and commenced loading a cargo of timber on 10th October, and finished on 29th of same month, a period of twenty-six days. She arrived at Grangemouth docks on the 2d day of December, commenced to discharge her cargo on the 3d, and completed delivery on the 12th—a period of ten days; in all thirty-six days,—being six days more than the thirty running days allowed by the

Nov. 20. 1851. said charter-party. The pursuers claimed £24 of demurrage, as
 Crowe, &c. v. for six days, at the rate of £4 per day, as stipulated, which the
Hutchinson, charterer refused to pay. Proof on both sides was led, and the
 &c. Sheriff found for the pursuers.

The defenders advocated, and the Lord Ordinary (Wood) having adhered to the Sheriff's judgment, the defenders now re-claimed.

Hector, for defenders and reclaimers. The delay is imputable to the pursuers themselves, or those responsible for them By the practice of the port of Grangemouth, timber-ships are unloaded by gangs of workmen called "lumpers." Had "lumpers" been employed, no unnecessary delay would have occurred. No protest for demurrage was taken, nor any written intimation made that it was to be demanded, as was necessary if the claim was to be made. Counsel also referred to the proof, where vessels of equal burden with the "Hexham" were said to have been discharged with more despatch.

Pattison, for pursuers. The cases referred to occurred in summer, when the working hours are much longer than in December. It has not been proved that the pursuers were under any obligation to employ "lumpers," nor has anything unusual or culpable in the conduct of the master been established, so as to emancipate the defender. Protest is not necessary to found a claim for demurrage.

The LORD PRESIDENT.—The *onus* of proving that there was improper delay in discharging falls on the defenders, but there is no insinuation in the proof that any one ever remarked how slowly the delivery was going on. There is no evidence that the pursuers were bound to employ lumpers, and therefore there is no reason for altering the interlocutors reclaimed against.

LORD FULLERTON was of the same opinion. It might not be indispensable to make a formal protest in order to preserve the right to object, yet it might have been of importance had the defenders complained of delay at the time, which they did not. The defenders have failed to prove improper or culpable delay on the part of the owners of the vessel.

LORDS CUNNINGHAME and IVORY concurred.

The Court refused the reclaiming note, with expenses.

Pillans Scarth, W.S., Reclaimer's Agent.
Charles Spence, S.S.C., Respondent's Agent.

SECOND DIVISION.

No. 23.

November 20. 1851.

FINLAY v. OUTRAM.

Since this case was reported (p. 13.), it was put to the roll for Nov 20. 1851.
 adjustment of the interlocutor of the Court, and the following in-
 terlocutor, as adjusted, was this day signed.

*Finlay v.
Outram.*

Edinburgh, 15th November 1851.—The Lords, on the report of Lord Robertson, and having advised the Record and whole Process, and heard counsel for the parties thereon,—In respect that the pursuer undertook to supply a ventilating apparatus for four rooms in the defender's house, and that the apparatus so furnished by him has proved, as matter of fact, utterly useless for the purpose, repel the reasons of advocation, and remit the cause *simpli-*
citer, and decern: Find the advocator liable in the expenses incurred in this Court, allow an account to be given in, and remit to the auditor to tax the same, and to report.

(Signed) J. HOPE, I. P. D.

FIRST DIVISION.

No 24.

November 21. 1851.

SHANKS v. CALLON and ANDERSON.

Bankruptcy—Composition.—A creditor on a bankrupt estate had acceded to a composition arrangement, and admitted that he had received payment of a sum about equal to the composition offering to his debt;—Shanks v. Callon, &c. Question, whether the sum so received was to be held as a payment under the composition contract.

Nov. 21. 1851.
*Shanks v.
Callon, &c.*

Nov. 21. 1851. Advocation from the Sheriff of Lanarkshire.

Shanks, v.
Callon, &c. On 8th December 1843, George Callon and William Anderson, brewers in Airdrie, granted a bill for £43, 7s. to Henry Shanks, farmer, payable three months after date, for barley sold to them by Shanks. Immediately after the granting of the said bill, Callon and Anderson became insolvent, and offered a composition of 8s. per pound on their debts. On 6th January 1844, Shanks accepted the offer of composition, which was qualified with the condition that it was to be paid within two months after that date. On 11th March the bill fell due, and soon thereafter Shanks caused a charge to be given to Callon for payment, under deduction of £17, as having been paid to account. He thereafter proceeded with pointing for the balance, which gave rise to a summary application by Callon to the Sheriff for interdict against Shank's diligence, which was the foundation of the present proceedings.

This sum of £17 corresponded almost exactly with the amount of composition agreed to be taken by Shanks. On the one hand, Callon contended that the £17 credited in the charge must be held as payment of the composition on the said bill, and extinguished all further claim for the same. On the other hand, Shanks maintained that he got back barley to the value of £17 at the time of granting the bill, and denied that he had got payment of the composition. In his account-book he credits Callon and Anderson with £17, on the same date that he enters their bill, but the same is not marked as composition. The question therefore came to be, whether he had got payment of the composition.

The LORD ORDINARY (Cuninghame) decided that he must be held to have got payment; for if he got back £17 worth of barley, why did he take a bill for £43, 7s. instead of £26 odds, being the balance after deducting the £17; and if the £17 was the value of barley returned, he thus obtained a fraudulent preference, to the amount of £17, over the other creditors. He had not shewn, therefore, that the £17 was paid for any legitimate purpose other than the composition.

Shanks reclaimed.

Pattison and Solicitor-General for reclamer. It is denied that payment of the composition was made, and no written evidence of

the payment is produced. The only competent mode of proof is Nov. 21. 1851.
by writ or reference to oath.

Macfarlane for respondents, argued that the amount and other circumstances imported a deduction given in respect of the accepted composition.

*Shanks v.
Callon, &c.*

The LORD PRESIDENT. The question is not whether Shanks has obtained an illegal preference to the £17, but whether there is sufficient legal evidence to shew that he has obtained payment of the composition referring to the bill on which he charged. I do not feel warranted in holding that there is such evidence, but I would at same time reserve right to the parties to challenge this transaction as an illegal preference.

LORDS FULLERTON and IVORY concurred with the **LORD PRESIDENT.**

LORD CUNNINGHAME.—I must own that notwithstanding what I have heard, I retain very clearly the opinion expressed in my interlocutor and note. The facts here established—in part by the *judicial statements* of the claimer—in part by the extracts from his books—and by the fact of the delivery after bankruptcy of a commodity corresponding within a *shilling* with the composition on the amount of the defender's debt—are, to my mind, conclusive of the fact that the debt was extinguished. I cannot resist such an accumulation of evidence, and am not at all moved by the remark that the £17 worth of barley given back to the defender, is not entered in his loose memorandum book specially as *composition*. The figures themselves amount to proof; and no other feasible explanation of that irregular transaction is given by the defender.

The COURT, by a majority, held that there was no proof of the composition having been paid, which could only be done by writ or oath of party ; and there having been much litigation and various advocations, gave expenses to both parties of the advocations in which they had respectively been successful.

Campbell & Traill, W.S., Agents for Reclamer.

William Muir, S.S.C., Agent for Respondents.

SECOND DIVISION.

No. 25.

November 21. 1851.

ANDERSON v. BURNESS.

Delivery of Goods—Double Receipt—Relief.—Circumstances in which a party whose employers retained, in an accounting with him, a sum overpaid by him to a third party, was entitled to relief from that third party.

Nov. 21. 1851. This was an advocation from the Sheriff of Kincardineshire.
 {
 Anderson v. The pursuer was in the service of Alexander and Robert Smart
 Burness. and Company, grain-merchants, Montrose ; his employment being
 to receive and weigh, and grant receipts for the grain delivered
 to that Company at Gourdon, for which receipts the holders were
 afterwards paid. On the 25th November 1846, Hugh Burness,
 the defender, delivered to the pursuer a large quantity of oats,
 amounting in whole to L.28, 17s. 2d. sterling in value, and
 received a receipt for the same as the price of the oats. Some
 time afterwards, the defender obtained, by some means, a new or
 second receipt, in respect of which he received payment of another
 £28, 17s. 2d. Subsequently in looking over the receipts, Smart &
 Company observed and checked what they believed to be the error
 of the twice payment, and having failed to obtain repayment from the
 defender, they retained the sum paid in excess in settling accounts
 between them and the pursuer, whose neglect they held had occa-
 sioned the loss. The pursuer, therefore, raised his action for
 relief in the Sheriff-Court against the defender.

A Record having been made up in the Inferior Court, in which the pursuer averred and pleaded that although two receipts had been granted to the defender, only one delivery of grain had been made, while the defender alleged that he had given value in grain for both the receipts ; and a Proof having been led, the Sheriff-Substitute assoilzied the defender from the conclusions of the action, and found him entitled to expenses, which interlocutor was, on appeal, adhered to by the Sheriff.

The pursuer advocated, and on the 23d May 1851, the Lord ^{Nov. 21. 1851.} Ordinary (Ivory) pronounced an interlocutor, finding that the preponderance of the whole evidence was in favour of the pursuer's averments; that, therefore, the defender was in law liable in relief to him to the extent of the sum received in excess. His Lordship, therefore, advocated the cause, and recalled the judgment submitted to review, with expenses, both in this Court and the Court below.

The defender reclaimed.

Inglis for claimer argued that the case of the pursuer had failed.

T. Mackenzie and Neaves were for the respondent (pursuer.)

The COURT were clearly and unanimously of opinion that the Lord Ordinary's view of the case was right; they, therefore, adhered to the interlocutor reclaimed against, and found additional expenses due.

Thomas Dun, Pursuer's Agent.

William Bell, S.S.C., Defender's Agent.

SECOND DIVISION.

NATIONAL EXCHANGE COMPANY OF GLASGOW v. EASTON.

Joint Stock Company—Transference of Shares—Liability for Calls.—Circumstances in which the Court repelled defences to an action for calls in a joint-stock company, the defences proceeding on the ground that the regulations of the company, as to recording the transfer, had not been complied with.

This was an action for payment of a call on certain shares of the National Exchange Company of Glasgow, of which it was ^{Nov. 21. 1851} alleged the defender was the holder.

National Exchange Co. of Glasgow v. Easton.

Nov. 21. 1851. The National Exchange Company was established in 1845, for making advances on railways, stocks, and other securities, &c.
 National Ex-
 change Co. of
 Glasgow v.
 Easton. They were afterwards amalgamated with the Glasgow, Greenock, and Port-Glasgow Produce Investment Company; and the conditions under which the concern was carried on, were contained in the original deed of constitution of the National Exchange Company, and another deed, called a contract and deed of agreement, executed on occasion of the amalgamation with the other company. The defender, who was previously a shareholder of the company, in December 1847, purchased 110 additional shares from James Lawcock, flour merchant in Glasgow, to whom he paid the price. A deed of transfer was executed on 17th December 1847; and was duly delivered to the company.

In December 1847 it was resolved to wind up the company, and an advertisement appeared in the papers of the 22d of that month intimating this resolution, and that the board of directors had resolved to pass no transfers. In April 1848 a call was made, which was paid by Easton, as he alleges, under protest. But another call being made on 15th February 1848 he refused to pay it, and this action was raised for its recovery. The defence insisted on was, *inter alia*, that the regulations of the company as to the registration of the transfer, &c., had not been complied with, and that he had not received due notice of the call.

LORD IVORY repelled the defences, and found for the pursuers; and against this interlocutor the defender now reclaimed.

T. Mackenzie (with him the *Dean of Faculty*). There is no evidence that the shares purchased by the defender were legally transferred to him in terms of the contract. The deed of constitution of the original company requires, § 9, "that the directors shall be bound to cause the names and designations" of the shareholders, with the number of shares, to be entered "in a book to be kept for the purpose, to be signed by the secretary or other officer of the company," who shall deliver to every purchaser a certificate, specifying the number of shares he holds. By § 10, it is provided that all transferences of stock, or "an abstract thereof," "be recorded in a proper book or books to be kept for that purpose by the company, under the immediate superintendence of the secretary," or other officer, who "shall endorse a certificate of the

recording of said sale," &c., on the same; and § 11 provides that Nov. 21. 1851.
the "said books or the said certificates" "shall be the only suffi-
cient evidence of proprietorship of shares in this company," and
shall regulate the liability to calls and right to dividends. The
<sup>National Ex-
change Co. of
Glasgow v.
Easton.</sup>

transfer book required to be kept by § 10 has not been produced by the company; nor the book containing the names of the proprietors, as required by § 9. Counsel commented on an excerpt from a book called "A List of Shareholders," containing the following words—"Easton, William, Merchant, 68. St Vincent Street, 190," endeavouring to shew it was not the register of proprietors meant by the § 9, because it was signed by "James Gourlay," who had only become secretary of the company after their resolution to wind up. The defender, therefore, has not been properly registered as a shareholder, or his transfer properly recorded. He is not therefore liable to calls. He would not be entitled to dividends.

Next, § 25 requires that "eight days' previous notice," at least, shall be given of calls, by "circulars despatched through the post-office to each proprietor." We deny this notice was given, and no evidence of its having been given is produced.

Inglis and Penney for the pursuers.—The provision in § 10 as to registration regards something to be done within the company, and is a regulation for its own benefit. *Weatherly*, 3d June 1824; *Allan & Son v. Turnbull*, 7 W. and S. p. 281; *Burns v. Pennel*, Bell's Appeal Cases, VI. 541. In a question between a partner and the company as to the constitution of partnership, it cannot be founded on; and if the defender claimed to be a partner, the company could not resist his claim, on the ground it had not been complied with. In the present case, as between seller and purchaser, the contract is plainly completed. The seller cannot be made liable to the company. Is not then the purchaser? He is entitled to a certificate of registration from the company, if he chooses to ask it. Besides, the transfer has been registered in the manner in which all others are registered by the company, Counsel referred to an excerpt from a Stock Ledger of the company, in which the shares were entered under the name of Easton, with an accurate note of all deposits and calls made since the commencement of the company, and which traced the shares from their original holder to Easton. If then the defender's plea is sustained,

Nov. 21, 1851. the effect is not merely to destroy this, but every transfer that has
 been made.

National Ex-
change Co. of
Glasgow v.
Easton.

As to the objection to the notice, the agreement between the amalgamated company alters the form of notice required by the original deed of constitution. It requires only an advertisement in the papers, which was given.

The LORD JUSTICE-CLERK.—As to the second objection, the answer is sufficient. The notice was regularly given in terms of the second deed. As to the other objection, it is not necessary to give any opinion on the question, whether the regulations in question as to transfer were intended for the benefit of the company only or not; for it seems that they have been sufficiently complied with by the manner in which Easton's name appears in the books. First, the deed of transfer itself is quite regular, and was duly given to the company. The requirement in § 9 seems to have been complied with by the entry in the book signed by Gourlay, even though it was not entered till after 22d December. For the company were still, notwithstanding the resolution to pass no transfers, bound to enter the name of Easton in justice to Lawcock and the other shareholders. As to the registration of the transfer, § 10 does not declare there shall be a book for engrossing either the transferences at length, or an abstract of them, but simply, that all transferences, or an abstract thereof, shall be recorded in a proper book. Now, as to the entry in the stock ledger, the question is not whether this is a neat or convenient manner of recording transferences, (that was matter for regulation by the company), but whether it was sufficient. It was sufficient; and it was the customary mode in which transferences were recorded.

LORD COCKBURN.—If this company, instead of being unfortunate, had been successful, and this gentleman had been interested to prove he was a partner, there is sufficient evidence in the books to support his claim. There is, therefore, enough to prove his liability.

The other Judges concurred, and the Court pronounced an interlocutor, refusing the Note, with additional expenses.

Henry Tod, W.S., Defender's Agent.
James Somerville, S.S.C., Pursuers' Agent.

TEIND COURT.

No. 27.

November 19. 1851.

JOHN WHITE AND OTHERS v. THE OFFICERS OF STATE

*St Bernard's Church, Edinburgh, disjoined from the parish of St Cuthberts—
Designation of District.*

A Summons of Disjunction and Erection having been raised on Nov. 19. 1851.
 the 11th June 1851, at the instance of the pursuers, who were
 contributors to the new church and parish *quoad sacra* of St Ber-
 nards, situated and lying in the parish of St Cuthberts and county
 of Edinburgh, against the Officers of State, concluding that the
 said church of St Bernards should be decerned and erected a
 parish church in connection with the Church of Scotland, and
 should have a district marked out and designate, and should be
 disjoined from the parish of St Cuthberts, and that the minister
 and elders of the said church and parish should have and enjoy
 the status and all the powers, rights, and privileges of a parish
 minister and elders of the church of Scotland, and that the patron-
 age of the said Church and parish should be vested in the parties
 pointed out by the eighth article of the constitution, recited in the
 summons, namely, in trustees, but always with the right and pri-
 vilege of the Presbytery of the bounds to present *jure devoluto* ;
 the Lords, on the 9th July 1851, remitted to the clerk to re-
 examine into and report upon the sufficiency and correctness of
 the security of the endowment of the parish sought to be erected,
 as contemplated by the 7th and 8th Vict. c. 44, and for accom-
 plishing the purposes therein set forth.

John White
and others, v.
the Officers of
State.

Baillie, this day, moved for decree, in terms of the conclusions
 of the Summons, when their Lordships pronounced the following
 interlocutor :—

*Edinburgh, 19th November 1851.—The Lords having advised
 the Summons, Report by the Clerk, and whole process, and
 heard counsel for the pursuers, find, decern, and declare, in terms
 of the conclusions of the libel, in all respects, with the exception*

Nov. 19. 1851. of the second alternative conclusion respecting the designation of the district as follows, "or such other district as our said Lords White, &c., v. shall see fit to mark out and designate."

State.

John Marshall, S.S.C., Agent.

TEIND COURT.

No. 28.

November 19. 1851.

MRS HAY of Seggieden and OTHERS v. THE PRESBYTERY of DUNKELD and OTHERS.

Designation of District.

Nov. 19. 1851. In this case, Mrs Hay of Seggieden, and the Society in Scotland for Propagating Christian Knowledge, pursuers, sought by their summons to have the church of Tenandry *quoad sacra*, situated within the parishes of Dall, Mulin, and Blair-Athol, decerned and erected into a parish church in connection with the Church of Scotland, as more particularly set forth in the summons.

*Mrs Hay, and
Others, v. the
Presbytery of
Dunkeld, &c.*

And this day, on the motion of *Baillie*, for the pursuers, the Lords decerned and ordained, in terms of the conclusions of the libel in all respects, with the exception of the alternative conclusion respecting the designation of the district, as follows,—"or such other district as our said Lords shall see fit to mark out and designate."

William Young, W.S., Agent.

HIGH COURT OF JUSTICIARY.

No. 29.

November 17, 1851.

Before
THE LORD JUSTICE-CLERK,
LORDS COLONSAY and COWAN.

HER MAJESTY'S ADVOCATE v. WILLIAM RAIT, *Pannel.*

Indictment—Aggravations.—Mode of libelling aggravations when the major proposition includes several different charges, to all of which the aggravations do not apply.

The indictment in this case bore, "That albeit by the laws of Nov. 17. 1851. this and of every other well-governed realm, *Falsehood, Fraud, and Wilful Impostion*, especially when committed by a person who has been previously convicted of Falsehood, Fraud, and Wilful Impostion; As also *Forgery*, especially when committed by a person who has been previously convicted of Forgery; As also the wickedly and feloniously *Using and Uttering* as genuine a *Forged Order or Writing*, knowing the same to be forged, especially when committed by a person who has been previously convicted of using and uttering as genuine forged orders or writings, knowing the same to be forged; As also *Theft*, are crimes of an heinous nature and severely punishable: Yet true it is and of verity that you the said William Rait are guilty of *the said crimes aggravated as aforesaid*, or of one or more of them, actor or art and part, *In so far*," &c.

Adam, for the pannel, objected to the indictment, that the crime of theft was not properly charged against the pannel, in respect that the indictment set forth certain crimes with aggravations, and also theft, but without any aggravation, and then charged the pannel with being guilty "of the said crimes, aggravated as aforesaid;" that this charge applied only to the crimes set forth as being aggravated, but not to the crime of theft.

Young, A. D., and the Solicitor-General.—Such is the invariable style of such indictments, and referred to the case of Her Majesty's Advocate *v. M'Allum*, (Swinton's Reports, March 7, 1836,) where a somewhat similar objection had been repelled.

The COURT repelled the objection, but intimated an opinion that the pannel ought to have been charged as being guilty "of the said crimes, or one or more of them, aggravated as aforesaid," &c.

HIGH COURT OF JUSTICIARY.

No. 30.

November 17. 1851

BEFORE THE SAME LEARNED JUDGES.

H. M. ADVOCATE, v. BURNET, FISHER, AND MASTERTON, *Pannels*

Evidence.—A letter admitted to prove identity of an absent *socius*, an alleged resetter.

Nov. 17 1851. *BURNET* was charged with theft, and Masterton with resetting a £50 Bank of England note. Masterton was outlawed for non-appearance. In proceeding with the case, *quoad* the theft, the prosecutor proposed to prove and produce to the jury a letter, written by Masterton from London, where he had been apprehended on presenting the note at the Bank of England.

Brown objected that this evidence was incompetent against Burnet; that even had Masterton been at the bar the statements in his declaration could not have been received against Burnet. *A fortiori*, no letter of Masterton's could be founded on against Burnet, the only party now being tried.

Young, A. D., and the Solicitor-General, for the prosecution, explained that his only object in producing the letter was to identify Masterton with the alleged resetter in this case.

The COURT held that the prosecutor must first establish some connection or communication between Burnet and Masterton.

A witness was then called, who proved that Burnet, two or three weeks previous to the alleged theft, had been seen occasionally in the shop of Masterton, who carried on business as a spirit dealer in Edinburgh.

THE COURT held this sufficient, and then allowed the brother of Masterton to examine the letter written from London, and depone that it was in the handwriting of Masterton.

SECOND DIVISION.

No. 31.

November 22. 1851.

SUSPENSION, DUNBAR v. BELL and LEVACK.

Suspension—Consignation.—Held (in a Suspension and Interdict), that a disputed claim by the inspector and collector of poor-rates having been voluntarily consigned in the hands of the clerk, a reclaiming-note was unnecessary, and expenses of the appearance in the reclaiming-note allowed the suspender.

This was a suspension and interdict to have the respondents, Nov. 22. 1851. who are the inspector and collector of the poor-rates for the parish of Wick, interdicted "from obtaining any warrant, dis-
taint, or restraint-warrant, or from acting upon any such which may have been already obtained against the complainer, for the recovery of certain poor rates in which he had been assessed"—the ground of suspension being that the assessment was too high.

Dunbar v.
Bell, &c.

In the note of suspension the suspender intimated his willingness either to consign the sum claimed, or "if the respondents require it," "to make payment" of it to them on their "undertaking to repay the same in the event of the reasons of suspension being ultimately sustained." He was allowed to consign, which he did in the hands of the clerk. Answers were given in. Thereafter Lord Murray (Ordinary on the Bills) having considered the note of suspension, "in respect of the consignation already made," passed the note of suspension to try the question.

Against this interlocutor the respondents reclaimed, and craved the Court to recal the interlocutor, and refuse the note; "or, at least, to find that *ante omnia* the complainer was and is bound to pay over to the respondents the amount of assessment claimed from him, on their undertaking to repeat, in whole or in part, in the event of the reasons of suspension being sustained; and that the note of suspension cannot, in any view, be passed, except in compliance with the preliminary condition," &c.

THE LORD JUSTICE-CLERK.—The suspender says in his note of suspension he is willing to pay. Is he still willing?

Inglis for suspender. Quite willing; but he has not been required to do so. As soon as the Lord Ordinary's interlocutor was pronounced, the reclaiming note was brought, which prays your Lordships to refuse the note.

Nov. 22. 1851. **LORD JUSTICE-CLERK.**—The reclaimers should have written to the agents of the suspender, asking for payment of the money, and saying they were willing to concur in the passing of the note **on** payment being made. I suppose the real object of the reclaiming note is only to get the money.

Danbar v.
Bell, &c.

LORD MEDWYN.—They might have applied to the Lord Ordinary for authority to uplift the money. He is not functus.

Neaves, for reclaimers. The Lord Ordinary passed the note **on** consignation. It did not occur to us that we could apply to him for authority to uplift.

Inglis. This is not a bill passed on consignation in the ordinary sense of the term. The ordinary meaning is that the money is deposited to remain in bank.

THE COURT, in respect the respondent consents to the consigned sum being paid to the reclaimers, and that no application was made to the respondent for his consent, or to the Lord Ordinary on the Bills for payment,—found that the note need not have been presented, and supersede the note till Wednesday, the 26th current.

Nov. 26. 1851. On the case being called to-day, it was stated that the money had been handed over to the reclaimers. The Court therefore, in respect of this payment by the suspender, found him “entitled to the expense of the appearance,” which was modified to the sum of five guineas.

*Gordon, Stewart & Cheyne, W.S., Agents for Suspender.
Horne & Rose, W.S., Agents for Respondents.*

SECOND DIVISION.

No. 32.

November 22. 1851.

PETITION, TRUSTEES OF DUNDEE BANKING COMPANY AND THE TAY FERRY TRUSTEES, &c., AND FOR LEAVE TO APPEAL.

Process—Appeal.—In an action to have it declared that certain defenders had no right of ferry across a river:—leave to appeal against an interlocutor approving of issues proposed by the defenders as to their possession of the right refused, although pursuers held that, by Act of Parliament, the right of ferry had been conferred on them, exclusive of any possession by the defenders.

This was a petition for leave to appeal, presented in the fol-^{Nov. 22. 1851.}
lowing circumstances :—

The Trustees of the Dundee Banking Company, and the trustees for carrying into effect the Acts of Parliament relative to the Tay Ferries, raised certain actions against Mr Stark Dougall of Scotscraig, then proprietor of the ferry across the river Tay from Ferry-Port-on-Craig to Broughty Castle, and Andrew Christie, tacksman of said ferry, and against the Edinburgh and Northern Railway Company, in which, founding on certain statutes relating to the ferries across the Tay, and certain deeds of assignment produced in said action, they concluded that it should be found and declared that the defenders had no right to ply, and should be interdicted and prohibited from plying with ferry boats, or other vessels for hire across the river Tay, between certain points specified on either shore.

The Scottish Central Railway Company were afterwards sisted as pursuers in the said actions ; and records having been made up and closed, the whole cases were conjoined.

By direction of the Lord Ordinary, issues were prepared, which were reported by his Lordship to the Court. It was, *inter alia*, proposed, on the part of the defenders, that an issue should be directed, " whether for forty years and upwards, prior to January 1847, or for time immemorial, the defenders, or either of them, and their predecessors and authors have, by themselves, or others authorised by them, in the exercise of their said right of ferry, been in the constant and uninterrupted use of plying with boats or other vessels for the conveyance of passengers, &c., across the said river Tay, to or from various places," specified on the shores of the river.

The pursuers (petitioners here), contended, that the matters proposed in this issue, to be proved by the defenders, were irrelevant and inadmissible, seeing that the right of ferry between the points on the north shore, specified in the issue, are given to the pursuers by the statute ; and that whatever the state of the alleged fact of possession might have been, their right must be determined by the construction of the statutes. The Judges of the Second Division being equally divided in opinion, called in three Judges from the First Division. Thereafter, on 19th July 1851, it was found, by a majority of the Judges, that the defenders were entitled to an adjusted issue, in these terms,—“ Whether, for forty years and upwards, prior to 2d July 1819, the predecessors

Petition, Trustees of Dundee
Banking Company, &c.

Nov. 22. 1851. and authors of the defenders (the respondents here), by themselves or others, &c., were in the uninterrupted use of plying with boats Petition, Trustees of Dundee or other vessels, for the conveyance of passengers, &c., across Banking Com- the river Tay, to and from the north shore or beach of the said pany, &c. river," between certain specified points.

The pursuers now craved leave to appeal against this interlocutor, as they intended to maintain that the proposed inquiry was altogether excluded by the statute, which gave the right of ferry to the petitioners, and if this question were determined in their favour a jury trial would be unnecessary.

G. Young and Inglis for defenders objected. Appeal should not be allowed at this stage. The question to go to proof is one to be established by the evidence of old witnesses, viz. possession for forty years before 1819. If appeal is allowed at this stage, the defenders may lose some important witnesses, and their case be seriously prejudiced. No special cause has been shewn to entitle the petitioners to appeal at this stage, and without such special cause, appeal is incompetent.

Patton for petitioners answered, If our construction of the statute be correct, a trial will be unnecessary; *Torrie v. Duke of Athol*, 13th February 1850, 22 Scot. Jurist, 248. Nor need any evidence be lost; for we consent to material evidence being taken on commission, and kept *in retentis*. The reason for requiring the consent of the Court to appeal, is to prevent vexatious appeals, but this cannot be called vexatious. The Judges of the Second Division were equally divided on the relevancy of the proposed proof, and the other Judges thought the case one of great difficulty. He referred to *Adam v. Allan*, 3d February 1841, 3 D. 1147, where appeal was allowed at same stage.

LORD JUSTICE-CLERK.—But Mr Anderson and I, who were counsel in that case, were told by Sir William Follett, it would be useless to present the appeal, as the House of Lords would not consider the question of relevancy before the determination of the facts. The general rule is, that the trial of fact should precede the question of relevancy. The point in this case may be raised at the trial on a bill of exceptions. The matter will thus both gain precedence in the House of Lords, and the question will be raised with a full knowledge of the facts. Depositions in such a case as this are not satisfactory.

LORD COCKBURN.—The petition should be refused, on three grounds;—first, the Judges think the matter of fact affects the question of the legal construction of the statute; next, the examination by interrogatories is not a good substitute in such a case for the testimony of the living witness. Besides, after taking these interrogatories of old witnesses, the most material witnesses may be lost. They may be young, and it is not to the old only that death comes. Lastly, the trial may be got over before Parliament meets, and then the question be brought before the House of Lords in a much more satisfactory state, and be more quickly disposed of.

LORDS MEDWYN and MURRAY concurred:

And the COURT refused the prayer of the petition.

Graham and Webster, W.S., Petitioners' Agents.
William Millar, S.S.C., Respondents' Agent.

SECOND DIVISION.

HAY v. DINWIDDIE.

Process. Expenses. Condescendence of Res noviter.

The question in this case regarded the expenses of a condescendence of *res noviter* lodged by the defendant.

The action was raised by the pursuer, who is inspector of the poor for the burghal parish of the city of Edinburgh against the defender, who is inspector of the poor for the parish of Dumfries, for relief to the pursuer of certain sums paid by the burghal parish of Edinburgh, for behoof of certain paupers.

The principal claim was for relief afforded to a woman of the name of Jane Hogg or Lightbody, and the case proceeded on the footing that she was the wife of James Lightbody, as alleged by

Hay v. Dinwiddie.

Nov. 22. 1851. the pursuer. The defender lodged a condescence of *res noviter*,
 Hay v. Dinnie. stating that he had learned that the woman was not in reality wife
 of Lightbody, but of another person of the name of Bryson,
 belonging to the parish of Duddingstone, and who was still living.

The pursuer lodged a minute, stating that he had found, on inquiry, the facts set forth in the condescence of *res noviter* to be true, and abandoned his claim, reserving right to expenses.

The Lord Ordinary (Cowan), assizied the defender; found him entitled to expenses, subject to modification, and modified the same to two-thirds of the amount, as the same shall be taxed.

The pursuer reclaimed.

A. R. Clark, and with him *T. Mackenzie* for claimer, contended, that the defender should have made his inquiries sooner, and not allowed the case to proceed on the footing that Hogg was the wife of Lightbody, and that therefore he must be held liable in expenses.

G. Young, with whom *Inglis*, for respondent. The pursuer should have made inquiry before raising his action. He was not entitled to throw this burden on the defender. Had inquiry been made, the action would not have been instituted.

The COURT unanimously refused the reclaiming note, and adhered to the Lord Ordinary's interlocutor, with additional expenses.

* *James Morgan, S.S.C., Agent for Pursuer.*

FIRST DIVISION.

No. 35.

November 25. 1851.

PETITION, MRS ELIZA HAY RAEBURN OR FRASER AND OTHERS.

Factor loco tutoris—Expenses.—Where two parties had proposed different persons as Factor *loco tutoris*, neither of whom the Court appointed, but nominated a third person to the office,—Expenses allowed both parties out of the pupil's estate.

In August last, Mrs Fraser presented a petition to the Court, Nov. 25. 1851. praying for the appointment of Mr James M'Andrew, accountant in Edinburgh, as factor *loco tutoris* to Donald Simon Fraser, ^{Petition, Mrs Raeburn, &c.} eldest son of her deceased husband by a former marriage. This petition having been served on Mrs Stewart, paternal aunt to the pupil, she and her husband lodged answers in which they submitted that the person to be appointed factor *loco tutoris* to the pupil ought not to be a person suggested by Mrs Fraser, on the ground that she, as executrix of her deceased husband, had to account to the pupil for her husband's funds, and thus had an adverse interest to the pupil, adding, that while they had no objection to the nomination by the Court of any properly qualified neutral person to be factor *loco tutoris* to the pupil, they suggested as a fit person to be appointed Mr James Davidson, solicitor in Inverness.

Parties appeared before Lord Medwyn, who signified his opinion that the factor should not be a person nominated by the widow, but that he would appoint any person on whom the parties might agree. The appointment was left by the parties to his Lordship, who named Mr John Hamilton, accountant in Edinburgh, to be factor *loco tutoris ad interim*, this appointment to endure till the fifth sederunt day in November; and of this date, 13th November, the Court confirmed Mr Hamilton's appointment.

In these circumstances, the parties by joint note now prayed the Court that as the appointment of a factor *loco tutoris* was necessary for the protection of the pupil's interests, and the opposition to the individual suggested in the petition was given effect to by Lord Medwyn, and led to the appointment of a neutral man, and there having been no unnecessary discussion whatever, the expenses incurred by both should be paid out of the pupil's estate.

Pattison appeared for the petitioners and *Currie* for the respondents.

THE COURT granted the prayer of the petition, and authorised the factor *loco tutoris* to make payment to both parties of their respective expenses, and take credit therefor in his accounts accordingly.

John Rogers, S.S.C., Petitioner's Agent.

John Paterson, S.S.C., Respondent's Agent.

FIRST DIVISION.

No. 36.

November 25. 1851.

UNIVERSITY OF EDINBURGH v. THE MAGISTRATES AND TOWN-COUNCIL OF EDINBURGH.

University—Patrons—Curriculum—Degrees.—The general law relating to Universities does not apply to the University of Edinburgh, which has a peculiar constitution of its own, and under that constitution, the Magistrates and Town-Council of Edinburgh have the right to issue regulations prescribing the course of study to be pursued by candidates for degrees.

Nov. 25. 1851. This was a conjoined process of suspension and interdict and declarator, by which it was sought to ascertain the relative rights and position of the principal and professors of the University of Edinburgh, forming the Senatus Academicus, and the Lord Provost, Magistrates and Town Council, as patrons of the University.

University of Edinburgh v. The Magistrates, &c. of Edinburgh. The facts which gave rise to the litigation appear to have been these: On the 11th of November 1845, the Senatus Academicus made certain alterations on the rules for graduation in medicine, by which it was declared that no one should be admitted to the examination for the degree of doctor of medicine, who had not been engaged in medical study for four years, during at least six months of each year, in the University of Edinburgh, in the Hospital Schools of London, or in the School of the College of Surgeons in Dublin, unless, in addition to three medical sessions so constituted, he had attended during at least six winter months the medical or surgical practice of a general hospital, wherein at least eighty patients were accommodated. The defenders, however, not being satisfied of the propriety of excluding all schools and colleges other than those of London and Dublin, as specified by the *Senatus*, approved of and sanctioned a statute, by which, besides the schools of London and Dublin, attendance on the lectures of teachers of medicine in Edinburgh, recognised as such by the Royal College of Surgeons of Edinburgh (the fee for whose ticket to be the same as that paid to the University professors), was declared equivalent to attendance in a university; and this regulation was accordingly ordered to be submitted to the *Senatus*, the two Royal Colleges, and the extra-academical teachers for their information and guidance.

The pursuers declined compliance with this regulation, which Nov. 25. 1851. they sought to have suspended and interdicted, and they at the same time brought their summons of declarator, concluding for University of Edinburgh v. their exclusive jurisdiction in regard to degrees, and against the the Magistrates, &c., of interference of the defenders. The Magistrates and Town Council, Edinburgh. as patrons, defended, and a record was made up, in which the peculiar history and constitution of the University of Edinburgh was averred, and pleaded, on the one hand; and the traditional rights and authority of the defenders, as patrons of the University, were set forth on the other;—the pursuers maintaining by their pleas in law, *inter alia*, that the right of conferring and of prescribing the course of study for degrees, was their proper privilege as a Senatus Academicus, and that the attempt complained of in this action of communicating to teachers, not members of the college, without the consent of the Senatus, the privilege of teaching, so as to qualify for an academical degree, is an invasion of the rights of the pursuers under their commissions as professors, and ought to be recalled and rescinded. The defenders, besides their rights and powers as patrons, pleaded *res judicata*, inasmuch as by a final judgment of the Court, dated the 25th of January 1829, (Magistrates of Edinburgh v. the Principal and Professors of the University, 7 S. and D. 255) it was decided, that they have the right “of making regulations or statutes for the college of King James, and that in respect of the studies to be pursued in the college, and course of study for obtaining degrees, as well as in other respects.”

The case having been debated before the Lord Ordinary (Dundrennan), his Lordship, on the 20th July 1850, pronounced an interlocutor, by which he, “in the suspension and interdict, repels the reasons of suspension, recalls the interdict, and decerns; and in the declarator, sustains the defences, assoilzies the defenders from the conclusions of the libel, and decerns; finds the suspenders and pursuers liable in expenses in the conjoined actions.”

In a note to this interlocutor, the Lord Ordinary explained that he had disposed of this case on the authority of the case above referred to, 1829. He added that he concurred entirely in that decision, and that, had the question been now open, his judgment would have been the same.

The pursuers reclaimed, and last summer session *Boyle and Inglis* for the reclaimers (pursuers), and *Logan and the Lord Advocate* for the respondents (defenders) argued the case before the Court.

Nov. 25. 1851. The Court took time ; and this day advised the conjoined processes.

University of
Edinburgh v.
The Magis-
trates, &c. of
Edinburgh.

The LORD PRESIDENT. I am of opinion that the interlocutor of the Lord Ordinary in this case should be adhered to, as I hold that the right of the Town Council in the matter is *res judicata*, by the decision of the Second Division in the case of 1829. I have seen no reason for arriving at any conclusion other than that the judgment of 1829 most precisely and correctly defined the limits of the powers of the patrons of the University, and that it is thoroughly founded on the evidence of the history of the College and University from their first institution. The ground of argument on which the pursuers chiefly rely for obtaining a different judgment rests on what they hold as the undoubted characteristics of a University ; which, from its very nature, they say, has the inherent and absolute power of making all regulations as to academical degrees, and of deciding what should be the qualifications and the course of instruction requisite for graduates. But that cannot avail in regard to the limitations which exist under the constitution of the University of Edinburgh ; for it appears, beyond all question, that, from the institution of the College in Edinburgh, which came afterwards, no doubt, to receive the denomination of a University, its powers and privileges were very limited in their nature, and placed on the manifest basis of all its functionaries being in subordination to the patrons, the Town Council and Magistrates of the city of Edinburgh, who have continued to control its affairs with undoubted sway, while no attempt at resistance or assertion of independence on the part of those holding the position of the *Senatus Academicus* has ever been attended with success. It is manifest, however, that the other universities of Scotland stand in a different situation, inasmuch as they have foundations of a very comprehensive character, and powers never conferred on the University of Edinburgh, while they were not trammelled by any one claiming a right of superintendence or control. This will be found fully detailed in the report of the Royal Commissioners in 1826.

As to the other branch of the pursuer's argument, I cannot hold that the regulation complained of, in merely admitting attendance on the extra-mural teachers of medicine in Edinburgh is itself an illegal or an improper exercise of the powers of the patrons, as these powers are declared in the judgment of 1829. The pursuers have not objected to the attendance at the London

and Dublin schools, and I presume they will not object, because Nov. 25. 1851.
to do so might diminish the value, and lessen the number of the University of
degrees; but, when such a departure is allowed from their ex- Edinburgh v.
clusive medical tuition, they cannot be held to be very consis- The Magis-
tent in their opposition to the patrons as regards the Edinburgh. Edinburgh.
burgh teachers of medicine. While the pursuers are no doubt
entitled to conduct the previous examinations, and to have the
sole power of granting medical degrees, I am of opinion that it
must be held as clearly fixed that the defenders, under their
rights as patrons, are invested with the power of regulating the
nature and extent of the curriculum of medical study, and, there-
fore, that the present action of declarator cannot be sustained;
that the defenders ought to be assailed from its conclusions;
and that the interlocutor of the Lord Ordinary ought to be sus-
tained.

LORD FULLERTON.—The present action raises two questions—
one general, another more limited. The first question is,
whether the Senatus, as the administrative body of the University,
have the sole power to determine the education necessary for con-
ferring degrees; and the second is, whether the patrons have the
power to substitute the prelections of teachers without the walls
for the lectures of teachers within the University. On the first of
these questions we have had but little argument from the pur-
suers, as they seemed aware that the point was decided against
them in the judgment of 1829; but, in regard to the next and
more limited question, I do not think it was embraced in the
former judgment. That question is—whether it is imperative
on the Senatus Academicus to admit, for examination for medical
degrees, students who have not followed the course of instruction
in the College. I do not think that the pursuers, in admitting
certain extra-academical education, necessarily admitted the lega-
lity of that to which they now object, namely, attendance on the
private teachers of medicine in Edinburgh. The foundation of the
College, no doubt, flows from the town of Edinburgh, in virtue of
the powers conferred by the Crown; but the power of granting
degrees does not flow from the founders. It is an inherent qua-
lity of the institution, according to the public law of this and of
every European country. The whole principle of the establish-
ment is, that the best possible instruction is to be furnished
within the College, so that no extraneous teaching whatever may
be required. Private medical teachers in Edinburgh stand in a
different position from those connected with the hospital schools of

Nov. 25. 1851.
University of Edinburgh v. The Magistrates, &c. of Edinburgh. London and the school of the College of Surgeons in Dublin. Whether the regulation may or may not tend to the improvement of medical science, is a question into which the Court cannot enter. The extra-mural teachers in Edinburgh may be quite as competent to give instruction as the Professors within its walls; but most unquestionably this is no part of the constitution of the University of Edinburgh. It is a strange sort of right to rear up a body in direct rivalry to that institution; and I cannot but regard the putting of this extra-academical teaching on a par with the academical, as a most flagrant interference with the rights of the College.

LORD CUNNINGHAME.—I concur in the opinion of the Lord President. On the one hand, I feel bound to bow to the unanimous decision of the Court in 1829, but feel anxious that that precedent shall not be misapplied so as to subject the Professors, in the dispensation of academical honours, implicitly to the mandates of the patrons. Universities are corporations; and whether they are corporations under the Crown, or, like the corporations of a burgh, subordinate to the magistrates or founder, the law of corporations is generally applicable to them. Bell's Principles, 4th edition, § 2193. That doctrine was well illustrated in the case of the University in 1829. By prescribing exclusive attendance on their own classes as an indispensable condition of trial for degrees, the pursuers have, I think, exceeded their powers, and violated the legitimate authority of the visitors. And as the regulations now libelled are not arbitrary, or without sufficient cause, but conformable to ancient usage and practice, I am of opinion that they are within the defender's powers, and have been properly sustained by the Lord Ordinary.

LORD IVORY.—I am also of opinion that the Lord Ordinary's interlocutor should be adhered to, and in support of this judgment I do not deem it now necessary to fall back upon first or abstract principles. The case, in so far as it raises a merely legal question, appears to be ruled by what was formerly decided between the same parties in 1829. This is certainly the case as regards more especially one set of the conclusions in the summons of declarator relating to the exclusive claim of the pursuers to determine the previous education of candidates for degrees, and to this extent, therefore, it seems to me that the present action is met and excluded by clear and absolute *res judicata*. I was at first not a little impressed with the argument impugning the right of the magistrates to extend the operation of their

orders to matters which, in a certain sense, are perhaps to Nov. 25. 1851.
 be considered as more properly extra-mural. But, upon further ^{University of Edinburgh v. The Magis- &c., of Edinburgh.}
 consideration, I have come to be satisfied that there is not enough of substance in the very special ground now adverted to, to support a departure in any respect from the former judgment of the Court. I see nothing in the new regulations as illegal or *ultra vires* of the magistrates, unless the same sweeping condemnation is to be extended to each and all of the more ancient regulations as to attendance on other Universities or hospital schools, and everywhere else beyond the limits of our own University. If it be not *ultra vires* to sanction attendance upon the teachers of medicine in the schools of London and Dublin, why should it be so in regard to attendance on duly authorised teachers of medicine in Edinburgh. The regulation in itself may be a wise and prudent regulation or the reverse. But as to the mere question of *power* in the magistrates to order it, I cannot refuse effect to the recent regulation.

THE COURT, by a majority, adhered to the interlocutor of the Lord Ordinary, and found the pursuers liable in additional expenses.

W. & J. Cook, W.S., Agents for the Pursuers.
Patrick Graham, W.S., Agents for the Defenders.

SECOND DIVISION.

KERR v. BAIRD AND MUIRHEAD.

Interlocutor—Plea of Prescription.—In an action for payment of an account in which, among other pleas, the triennial prescription was pleaded in defence, the Lord Ordinary assailed the defenders without inserting in his interlocutor any special finding as to the plea of triennial prescription. Case remitted back to him to dispose of that plea.

This was an action for payment of an account alleged by the Nov. 25. 1851.
 pursuer to have been incurred to him by the defenders, who are writers in Glasgow, in the year 1845 for his making, under their employment, or under the employment of one of the partners of their company, a survey of part of a projected line of railway. Kerr v. Baird and Muirhead.

The defenders denied that they had employed the pursuer to

Nov. 25. 1851. do the work in question; and besides pleas founded on this denial, they also pleaded the triennial prescription.

Kerr v. Baird and Muirhead. The Lord Ordinary (Wood) pronounced the following interlocutor:—"Having heard parties' procurators, and made avizandum, and considered the closed record and process, asoilzies the defenders from the conclusions of the action, and decerns: Finds the defender entitled to expenses, &c."

Against this interlocutor the pursuer reclaimed.

T. M'Kenzie and the *Dean of Faculty* were for the reclaimers.

G. Young and *Logan* for the respondents.

LORD JUSTICE-CLERK.—I see the defenders plead prescription. If they mean seriously to insist on that plea the case should go back to the Lord Ordinary to dispose of it, which he has not done.

Logan.—We do insist on that plea; but the Lord Ordinary meant by his interlocutor to dispose of all the pleas.

The COURT pronounced an interlocutor, by which "in respect the plea of prescription is seriously insisted on by the defenders, and not disposed of by the Lord Ordinary, they recal the interlocutor reclaimed against *in hoc statu*, and remit the case to the Lord Ordinary to dispose of the said plea."

John Paterson, S.S.C., Agent for Pursuer.

Lockhart, Morton, Whitehead, and Greig, W.S., Agents for Defendants.

SECOND DIVISION.

No. 38.

November 25. 1851.

MAYER and MORTIMER v. LENNARD.

Triennial Prescription—Oath of Reference.—A judgment by a Sheriff in an action where prescription has been pleaded, finding that a letter founded on as eliding the prescription does not prove the debt if not acquiesced in, must be immediately advocated, and the pursuer will not be entitled to found upon the letter in an advocation against a judgment holding an oath in reference negative.—Circumstances in which an oath in reference held negative.

This was an advocation from the Sheriff-court of Bute. The Nov 25, 1851. action was raised for the recovery of an account for furnishings made by the pursuers (who are tailors and clothiers in Meyer and Edinburgh) to the defender, from 4th June 1840 to 12th August Lennard. 1841, amounting to £20, 18s. The defender admitted that he had received the furnishings, but denied his liability for the price. He alleged that the party liable was his father-in-law, the late Mr Nairn of Dunsinnan, on whose credit they had been furnished, and that accordingly the pursuers had never claimed payment from him till after Mr Nairn's death, and his executors' refusal to acknowledge the debt. In support of this defence he pleaded the triennial prescription. The pursuers acknowledged they had made no application to the defender for payment till after the refusal of Nairn's executors to pay, but they denied that the defender was not himself liable. They pleaded also that prescription was elided by a letter, which they produced, written to them by the defender in answer to their application to him for payment. This letter contained the following words:—"I expect to see Mr Clark in the course of next month, when I hope to arrange the matter, and, in the meantime, I think you should, if it is insisted upon, abstract the amount from Mr N.'s account, and take the principal sum; as, if it is made a matter of legal question, of course I must resume the responsibility. This would be more satisfactory to me, as, of course, any resistance on my part would be very unpleasant."

The Sheriff-substitute found that the account had undergone the triennial prescription, and could be proved only by the writ or oath of the defender; that no writ sufficient to establish the debt had been produced or offered by the pursuers; and allowed the pursuers to refer to the defender's oath. The pursuers appealed to the Sheriff against this interlocutor, but the Sheriff adhered. A minute of reference to defender's oath was then given in by the pursuer. This oath was accordingly taken, but it is unnecessary to quote it at length. He deponed, *inter alia*, "that the pursuers furnished deponent with various articles of clothing during the years 1840 and 1841. Being shown the account libelled on, and asked whether he was furnished by the pursuers with the articles therein specified, depones, "that at this distance of time, he does not recollect specifically the particular articles he received." "Interrogated, Whether the pursuer, John Mortimer, now present, some years after the articles charged in the account libelled on were furnished, informed the defender that the late Mr Nairn

Nov. 25. 1851. had, shortly before the pursuer made that communication, said to that pursuer that he, Mr Nairn, would pay for the articles included in said account, if the pursuers did not get payment from the defender? depones in the negative." The letter above referred to was shown and read to him, and an explanation asked of its meaning—"depones that the letter explains his meaning as clearly as he could do in words. Depones, that deponent has not paid the account pursued for. Depones further, in explanation of the letter No. 10 of Process, That he felt extreme surprise at receiving the application at all, being perfectly aware that for years Mr Nairn had been under the impression that the account was paid by him, having frequently expressed the same to many members of his family; and depones, that by desiring the pursuers to take out the account libelled from the executors' account, his meaning was, that they might not lie out of payment of the account so far as admitted any longer, but that, on the winding up of Mr Nairn's affairs, he had no doubt the account libelled on would be paid by them. Depones, that by the words in the letter, "any resistance on my part would be very unpleasant," he meant that it would be disagreeable for him to take any measures against the executors of Mr Nairn. Depones, that the debt pursued for is not resting-owing by the deponent.—All which he depones to be truth, &c."

The Sheriff found the oath proved negative of the reference, and the present advocation was brought. The Lord Ordinary (Robertson) repelled the reasons of advocation, and the pursuers reclaimed.

E. S. Gordon, for the reclaimers, referred to Ersk. IV. 2, 4, Turnbull, 12th May 1830; Stevenson, 12th May 1830; Macandrew, 18th February 1851; and in the course of his argument endeavoured to show that the terms of the letter imported an acknowledgment of the debt.

Pattison was for the respondent.

LORD JUSTICE-CLERK.—We cannot, under this reclaiming note, look at the letter. Both the Sheriff-substitute and Sheriff decided that it did not amount to an acknowledgment of the debt, and that judgment was submitted to. The only question for the Court is as to the import of the deposition, and whether, independently of the letter shewn to the defender *narrative*, there is enough in his oath to establish the debt. First, does the oath establish the

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constitution of liability? To do this, it is not enough that on Nov. 25. 1851 oath a party admits that goods were sent to him,—he must further admit them to have been sent on his credit and responsibility. Is there any admission of this risk in his oath? There is not. Further, is there any admission that the debt was resting-owing? On the contrary, he says, in answer to the last question, it "is not resting-owing;" and there is nothing in the oath to entitle us to disregard these positive statements, and to say that, notwithstanding them, enough is admitted to establish the debt.

LORD MEDWYN concurred. It is incompetent for us to go back on the finding of the Sheriff-substitute, that "no writ of the defenders, sufficient to establish the debt, has been produced or offered by the pursuers." The pursuers were bound, if they were dissatisfied with that interlocutor, to have advocated at the time. By not reclaiming then, they gave up their privilege.

That being the case, we must look at the deposition alone, and see first whether the debt claimed is constituted, and secondly, if it subsists. He was of opinion it was not so.

LORDS COCKBURN and MURRAY concurred; and

The COURT refused the reclaiming note, with additional expenses.

James Buchanan, S.S.C., Advocate's and Reclaimer's Agents.

Campbell and Traill, W.S., Respondents' Agents.

FIRST DIVISION.

No. 39.

November 26. 1851.

WHYTE v. SCOTT and OTHERS.

Burgh Election, 3 and 4 Will. IV. c. 76.—Held, on construction of this Nov. 26. 1851. statute, that the provost of a royal burgh holds office for three municipal years, and not for three natural years; that on the expiry of the three years, he goes out of office both as councillor and as provost, on the first Tuesday of November, the day fixed by the statute for the annual election of councillors. Therefore an election of councillors, and subsequent election of magistrates, &c., following thereon, declared null, and reduced, in consequence of the former provost who went out of office on the first Tuesday of November 1847 having illegally presided at and declared the result of the annual election of councillors on that day.

Burgh elections are now regulated by the 3 and 4 Will. IV.,
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Nov. 26. 1851. cap. 76, which provides, sections 15 and 16, One third part of the council shall annually go out of office, and be capable of being re-elected, and upon same day the election of new councillors shall take place. Section 17 provides that upon the third lawful day after the election of the whole number of councillors, the council shall assemble in the town-hall, and elect a provost, treasurer, and other office-bearers. And section 24 provides, that "when any magistrate or office-bearer (other than the provost or chief magistrate and treasurer) shall be in the third of the council going out of office," his place shall be supplied by election by the council, so soon as the full number thereof shall have been completed by the annual election of the third—"provided always, that the provost or chief magistrate and the treasurer shall always remain in office for the period of three years," and shall be capable of being re-elected.

In the year 1844, the whole number of councillors of the royal burgh of Banff, was not completed until the 13th of November, and so the election of provost and treasurer was not proceeded with until the 14th, when two of the defenders, William Scott and Alexander M'Laren, were respectively chosen to fill these offices. Scott, who was thus elected as provost, went out of office as councillor by rotation on the first Tuesday (the 2d) of November 1847. Notwithstanding this, he presided at and declared the result of the annual election of councillors, which took place on that day, although warned that he was no longer provost, and that he was therefore acting illegally, and although a protest was taken by the pursuer against the validity of the election so presided over. On the 4th of November, the elected councillors, among whom was Scott, declared their acceptance, and, on the 5th, after being sworn in by the senior bailie, Scott was elected as provost, and certain other parties as magistrates, &c. The pursuer thereafter, as a duly qualified and registered voter in the said burgh, raised an action of reduction and declarator against the whole councillors and magistrates so elected, and against the parties therein named, the town-council of the burgh of Banff, for the purpose of reducing the said elections, on the ground that, according to a sound construction of the statute, Scott went out of office as councillor on the first Tuesday of November 1847; that he also went out of office as provost at the same moment; and that, therefore, his presiding and acting as provost vitiated the election, and subsequent proceedings connected therewith. There was also a conclusion against Scott for the statutory penalty of £300 for wilful contravention of the statute, which was not insisted in.

The defence was, that according to the 24th section of the Act, Nov. 26. 1851. Scott was entitled to hold office, and act as Provost for three full years from the date of his election, that is, until 14th November 1847, or, at all events, that according to the practice and usage of the burgh he was entitled to retain his situation until his successor was elected.

The Lord Ordinary held that by the 24th section it was not meant that the Provost should remain in office three natural years, counting from the day of his election, but only that he should remain in office for a period of three statutory annual elections, so that, at the annual election, parties going out of office, must go out, not merely as councillors, but also in their respective official capacities. He, therefore, found, that Scott having been elected Councillor and Provost in 1844, went out of both offices on the expiry of the three municipal years, that is, on the first Tuesday of November 1847; that he was not entitled to preside or act as he had done, and that his having done so vitiated the election and whole proceedings. His Lordship, therefore, reduced, decerned, and declared, in terms of the libel, (except as to the conclusion for the statutory penalty of £300 against Scott, which the pursuer did not insist in) and found the whole defenders, for whom defences were lodged, personally, and jointly, and severally, liable in expenses.

The defenders reclaimed.

Sandford, and the *Solicitor-General*, appeared in support of the reclaiming note, and of the pleas maintained by the defenders. They also contended that, in any view, the expenses should, in a case of this kind, be paid out of the common good of the burgh.

D. M Kenzie supported the construction of the statute on which the action was founded, and which had been adopted by the Lord Ordinary, and referred to the opinions of the Court in *Fleming v. Dunlop*, 16 Shaw, 254, on the construction of the statute, which were not affected by the judgment of the House of Lords, reported in *Maclean and Robertson*, p. 547. The burgh is not liable in expenses in a case of this sort. *Muirhead v. Magistrates of Haddington*, 12th July 1748; *Elchies v. Burgh Royal*, No. 28.

The **LORD PRESIDENT** was of opinion that the Lord Ordinary had put a just and legal construction on this act, and any other would totally defeat it. It is a clear proposition, that as soon as the person who holds the office of Provost goes out of office

Nov. 26. 1851. with a certain number of councillors, his functions as a magistrate cease and determine. He could only remain in for the purpose of interfering with the election, which, however, the Legislature has wisely provided against. It is said that there are magisterial functions attaching to the office of Provost which he could exercise, although his term of office as a councillor had expired; but this distinction is totally unfounded. His term of office is regulated by the municipal year.

The case now resolves into a question of expenses. There is no ground for altering that part of the Lord Ordinary's interlocutor finding the defenders personally liable in expenses. No countenance can be given to the idea that they are to lay their hands on the funds of the burgh for these expenses.

LORDS FULLERTON and CUNINGHAME were of same opinion, **LORD IVORY** also adhering to his judgment as Lord Ordinary.

The COURT, therefore, adhered to the Lord Ordinary's interlocutor submitted to review, with additional expenses.

Inglis and Burns, W.S., Reclaimer's Agents.
John Tod, S.S.C., Pursuer's Agent.

FIRST DIVISION.

No. 40.

November 26. 1851.

EWING v. AIRDRIE AND BATHGATE JUNCTION RAILWAY COMPANY, AND BANKIER, BLACKBURN AND OTHERS.

Railway Company—Shareholder—Contract—Title to Sue—Under a Statute two Railway Companies had entered into negotiations with the view of transferring the right of the one line to the other Company which had not been implemented—*Held* competent for a Shareholder to raise action with the view of compelling implement.

Nov. 26. 1851. This case came before the Court for the adjustment of issues. The pursuer is a shareholder of the Airdrie and Bathgate Junction Railway Company, and a proprietor of land through which the line was intended to pass, and this action was raised by him to compel implement of an alleged obligation to complete the

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Railway Co.,
&c.**

line, and it concludes against the directors personally for £10,000 Nov. 26. 1851.
of damages, in case of their failure.

By act 9 and 10 Vict. c. 377, the Airdrie and Bathgate Company are empowered to make over to the Edinburgh and Glasgow Railway Company, or to call upon them to purchase their line of railway, or the right to make it; and on a requisition from either company to that effect, the other company was bound to enter into the purchase and conveyance of the said railway. On such requisition and conveyance, the Airdrie and Bathgate Railway Company is declared to be dissolved, the other company taking the place and assuming the rights and liabilities thereof in all respects. In this event, the Edinburgh and Glasgow Railway Company were empowered (§ 44) to create new stock to be allotted to the shareholders in the Airdrie and Bathgate Company, who were to be entitled to a preferable dividend of 6 per cent.; and it was farther enacted (§ 48), that within three years after the date of the requisition, the Edinburgh and Glasgow Railway Company should call up such portion of the new stock as should be necessary for the execution of the main line of railway from Airdrie to Bathgate, and apply the same for that purpose.

On this footing, the Edinburgh and Glasgow Company, on the 28th September 1846, made requisition, and took measures to effect such a statutory transfer,—their obligation, however, in respect of which they failed to perform; and on the 29th October 1847, the Bathgate and Airdrie Company, after requiring the Edinburgh and Glasgow Company to implement their statutory contract, and protesting for damages and other remeid in law, in case of failure, raised, in October 1847, a summons of declarator, implement and payment before the Court of Session, and obtained decree on 18th March 1848, against the Edinburgh and Glasgow Railway Company, finding and declaring their obligation to accept the transfer, in terms of the statute. The conveyance, however, was not executed; and the pursuer alleges that the Edinburgh and Glasgow Railway Company having acquired right to a large portion of the stock of the Airdrie and Bathgate Railway Company, have availed themselves thereof to control its direction, and that thus aided and abetted by the directors of the Airdrie and Bathgate Railway Company themselves, they have evaded the obligations found by said decree to be incumbent on them, thus defeating the very object for which the Airdrie and Bathgate Company was incorporated, and its act obtained.

In these circumstances, the present pursuer, who was at one

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Nov. 26. 1851. time a director of the Airdrie and Bathgate Company, and its
 Ewing v. chairman, and is still a large shareholder, raised two actions—one
 Airdrie and against the Directors of the Edinburgh and Glasgow Railway
 Bathgate Company, and the other against the directors of the Airdrie and
 Junction Rail- Bathgate Company, of the nature before mentioned; which two
 way Co., &c. actions, were conjoined, and on closed record, reported to the First
 Division of the Court. On 4th July 1841, the Court, before far-
 ther answer, allowed the pursuer to lay before them such issue
 or issues as he considers himself entitled to under the conjoined
 summonses and record; which issues having been lodged, the
 case was now put out to be advised.

The Court directed its attention to two points, whether the pursuer has title to sue; and whether the summons was relevant to support its conclusions.

On the latter point the Court were equally divided; and on this point, therefore, the case was delayed to consult three Judges of the Second Division. But on the question of title

The LORD JUSTICE-GENERAL, while entertaining no doubt whatever, that unless he has precluded himself by his own conduct, the pursuer has a right, under the statute, to compel completion of the railway, not as one of the public, but as a shareholder and landholder, was of opinion that the title of the pursuer to appear in this action, is founded on recognised principles of our own law, and which were given effect to in the decisions of Hill *v.* The College of Glasgow, Nov. 1, 1849, Dunlop, vol. 12, p. 53; Balfour's Trustees *v.* Northern Railway Company, June 8. 1848, D. 10, p. 1240; Anstruther *v.* East of Fife Railway Nov. 17. 1849, Dunlop, vol. 12, p. 130; Torrie *v.* Duke of Athol, December 12. 1849, Dunlop, vol. 12, p. 335.

In this opinion as to the pursuer's title, the rest of their Lordships unanimously concurred.

Thomas Sprot, W.S., Pursuer's Agent.

Clason and Clark, W.S., Agents for Bankier & others, Defenders.

*George Wedderburn, W.S., Agent for the Airdrie and Bathgate Com-
 pany, and Blackburn & others, Defenders.*

OUTER-HOUSE—JURY-COURT.

Before LORD COLONSAY and a JURY.

No. 41.

November 26. 1851.

Reduction—NAPIER v. NAPIER or SMITH and her HUSBAND.

Jury Trial—Reduction—Evidence.—In an action of reduction, on the ground of insanity and circumvention, parole proof of a transaction relating to heritable property, to which the grantor of the deed under challenge was a party, although not evidence of the transaction itself, is good evidence to go to the jury on the question of capacity and circumvention.

This trial arose out of an action to reduce a conveyance of an interest in a tack of certain lands near Shotts. The following issues went to the jury.

“ 1. Whether the alleged conveyance, bearing to be made and Nov. 26. 1851. granted by the deceased James Napier, sometime gardener at ^{~~~~~} Chantinghall, afterwards residing at West Baton, in the parish of ^{Napier v. Na-} Shotta, on the 4th day of May 1849, is not the deed of the said deceased James Napier ?

“ 2. Whether the said deceased James Napier was, on or about the said 4th day of May 1849, a person of weak and facile mind, and whether the defenders, or either of them, taking advantage of his said facility, did, by circumvention, impetrare and obtain the said conveyance from the said deceased James Napier, to the lesion of the pursuer ?

In the course of the trial, it was proposed by the defender to prove by a witness, that sometime prior to the date of the deed in question, viz., the 6th December 1848, the transference of the lease and its terms had been discussed in his presence by the grantor of the deed and the defenders, and the money then paid over by the latter.

Patton (with whom *Wood*) for pursuer, objected. It is proposed to prove by a witness an alleged contract or agreement, or rather a sale. Now, first, there is no statement of such a transaction on record. On the contrary there is a statement on record that the conveyance bears an acknowledgment of the money *as instantly*

Nov. 26. 1851. paid over on the 4th May, which is its date. Next, a contract in regard to heritable subjects must be proved *scripto*; parole evidence is inadmissible.

Lord Advocate (with whom *W. Ivory*) for defenders. It is put in issue whether the conveyance in question was obtained by circumvention. Now our object is to prove that the transference of the lease was not a new idea; and next, as the capacity of the grantor is called in question, that he had capacity to discuss this matter of business, &c.

LORD COLONSAY.—I think the evidence must be received. The enquiry proposed is an enquiry into the capacity of the grantor, and has not for its object to shew that there were various transactions between the parties. The issues being tried are as to his capacity, and whether or not he was circumvented. Is it not an important element in determining these questions that at a period previous to granting the deed under reduction the grantor discussed the transaction? That is surely germane to the question whether the deed was obtained by circumvention. Further, whether he deported himself intelligently on the occasion, and shewed a knowledge of his affairs, will go to throw light on the question of capacity. We have it relied on by the pursuer as a piece of evidence, that the grantor accepted a price totally inadequate to the value of the subjects. Now, if at the time when he was quite capable, he formed an opinion on that point, is that not important?

The verdict was for the pursuer.

Robert Oliphant, S.S.C., Agent for Pursuer.

William Lorimer, S.S.C., Agent for Defenders.

OUTER HOUSE.

No. 42.

November 26. 1851.

BEFORE LORD COLONSAY.

QUEEN'S REMEMBRANCER v. BLACKWOODS.

Nov. 26. 1851.

Process—Statute 13 and 14 Vict., c. 36—Closing Record.

Queen's Remembrancer DEFENCES having been lodged in this case, and the pursuer finding it necessary to make merely a short marginal addition to his

condescendence, which was answered by a similar addition on the Nov. 26. 1851 defences, the record was closed as a summons and defences, with ^{the usual minute on the defences by the pursuer's counsel.} Queen's Re-membrancer v. Blackwoods.

LORD COLONSAY.—I think, in a case like this, where the additions are so slight, new processes may be dispensed with, and the record closed on summons and defences, although the statute does not directly authorise this course; but the pursuer's *counsel* had better subscribe the condescendence.

P. Shand and Ross.

FIRST DIVISION.

No. 43.

November 27. 1851.

COLQUHOUN v. GREIG.

Process—Division of Inner-House.—Where an action had been enrolled as a First Division cause, and decree in absence opened by a note of suspension, marked Second Division: Held that the proceedings following thereupon were to be considered as still in the First Division.

This was a reclaiming note against a final interlocutor by Lord Rutherford in an action for payment of an account. The reclaiming note appeared in the Single Bills to-day, when an objection ^{Nov. 27. 1851.} Colquhoun v. Greig. was taken by

Macfarlane, for respondent:—This is properly a Second Division cause, and should be transferred there. The action was originally enrolled as a First Division cause by the respondent, who was pursuer in the Outer-House. He there obtained decree in absence, which decree was opened by the defender (reclaimer here) presenting a note of suspension to be reponed in terms of 1 and 2 Victoria, cap. 86, sect. 5. This note was marked and called as a Second Division cause, and all the subsequent proceedings had taken place in the suspension, and not in the original action. On a sound construction of the Act, therefore, the cause now before the Court is the suspension and not the original action, and therefore it should go to the Second Division.

Macknight and Craufurd, for reclaimer.—The note of suspension was marked Second Division by a clerical error, but

Nov. 27. 1847. *Colquhoun v. Greig.* that does not affect the question,—the Lord Ordinary having pronounced an interlocutor passing the note in terms of the Act, and appointing defences to be given in to the original action,—not answers in the suspension, which is only the statutory form of re-pounding. There is no similarity between the suspension of a decree in absence, and an ordinary suspension where answers require to be lodged. The respondent's argument is dangerous, because, if sustained, it would amount to this, that in every case where a pursuer has exercised his privilege of selecting one Division of the Court, the defender, by allowing decree in absence to be taken, and marking his note of suspension as in the other Division, might thus deprive the pursuer of his constitutional and statutory right.

The COURT were unanimously of opinion that this was a First Division cause, and refused the motion of the respondent.

James Macknight, W.S. Agent for Reclamer.

Lockhart, Morton, Whitehead and Greig, W.S., Agents for Respondent.

FIRST DIVISION.

No. 44.

November 27. 1851.

MARTIN AND SIBBALD v. WILSON.

Process—Reduction—Res Judicata—Expenses.—Where an action was dismissed by the Sheriff as incompetent, but no expenses found due to the defender, and the Sheriff's interlocutor, so far as it related to expenses was altered by the Circuit Court on appeal:—*Held* that the defender was not entitled to plead *res judicata*, in respect of this judgment to a subsequent action of reduction of the Sheriff's decree.

Nov. 27. 1851. *Martin &c. v. Wilson.* This was an action of reduction of a decree by the Sheriff of Fife, sustaining an objection to the pursuers' title in a former action at their instance against the present defender.

Upon 5th April 1848, a petitory action was raised in name of Martin and Sibbald before the Sheriff of Fife, concluding against Wilson for payment of £7, 19s. 1d. To this action Wilson pleaded, as a preliminary defence, that the action was incompetent, in respect of defective instance.

The deed of copartnery between Martin and Sibbald specially Nov. 27. 1851. stipulated, that upon the death of either partner, the name of the firm should no longer be used ; but that the survivor should, after being authorised so to do by the representatives of the predeceaser, raise all actions, and use diligence necessary for recovering the outstanding accounts of the company, in his own name. In consequence of the death of Martin, the firm was dissolved, and the petitory action above referred to having been raised in the name of the firm, Wilson pleaded that the action ought to have proceeded, not in name of the firm, but of Sibbald, as the survivor duly authorised to raise such action. The Sheriff sustained the defence, but refused expenses ; and this judgment, so far as it concerned the question of expenses, was appealed by Wilson, the defender, to the Circuit Court of Justiciary at Perth in October 1848. The case was heard before the Lord Justice-Clerk, who sustained the appeal, and found Wilson, the defender, entitled to expenses.

Meantime this summons of reduction of the Sheriff's decree had been raised by Sibbald in name of the firm, and had been executed in August 1848. In November Wilson lodged preliminary defences, pleading, *inter alia*, that the action was incompetent, in respect of *res judicata*, by reason of the judgment of the Circuit Court at Perth. This defence the Lord Ordinary (Cuninghame) sustained ; and in the note to his interlocutor, his Lordship explained, as the grounds of his decision, that at Perth the Court, " besides adhering to the interlocutor of the Sheriff on the merits, subjected the pursuers in the expense of the preliminary defences. That was equivalent to a judgment of affirmance by the Supreme Court of the interlocutor of the Sheriff under reduction."

Against this interlocutor the pursuers reclaimed.

Young and Inglis for reclaimers.—There is here no *ess judicata*. There was nothing appealed to the Circuit Court, but what related to expenses. The Lord Justice-Clerk, therefore, did not, and could not deal with the merits. But, assuming the interlocutor of the Sheriff to be in other respects right, he altered that part of it appealed against, and awarded expenses in accordance with the rule established by a series of decisions, that where an action is dismissed on the ground of incompetency, it carries expenses as a matter of course. The Lord Ordinary had fallen into a misconception as to what had been brought under review.

Nov. 27. 1851. *P. Fraser and Solicitor-General.* It is here impossible to separate the question of expenses from the question on the merits, and before the Lord Justice-Clerk could give expenses, he must have been satisfied that the judgment of the Court below was right.

Martin &c. v. Wilson.

The LORD PRESIDENT. This process of reduction is not *res judicata*. When an action is dismissed as improperly laid, the defendant is entitled to say, I am dragged into Court, and am entitled to my expenses. The Lord Justice-Clerk merely awarded expenses where an action had been so dismissed : he did not decide on the merits.

LORD FULLERTON was of same opinion. The case was not appealed on its merits ; and, therefore, the judgment of the Court could not be held to be *res judicata*. It does often happen that the Court looks to the merits of the case in awarding expenses ; but there is a class of cases in which expenses follow as a matter of course, viz., where the case is dismissed on the ground of incompetency.

LORD CUNNINGHAME adhered to his former opinion. His view of the appeal was, that being acquiesced in by the respondents, it was equivalent to superseding the action of reduction.

LORD IVORY agreed with the majority, and on the same grounds. The only point before the Circuit Court was a question of expenses ; and, taking the Sheriff's judgment as they found it, the Court held that the Sheriff was wrong in not awarding expenses. Beyond this the Court had no jurisdiction. There could be no judgment on the merits.

The COURT, therefore, by a majority, recalled the interlocutor of the Lord Ordinary reclaimed against, repelled the defence of *res judicata*, and remitted to Lord Cowan as Ordinary, in room of Lord Cuninghame, to proceed farther in the cause as shall be just.

*Alexander James, S.S.C., Pursuers' Agent.
Andrew Webster, S.S.C., Defender's Agent.*

SECOND DIVISION.

FORBES AND OTHERS (NAPIER'S TRUSTEES) v. MORRISON AND NO. 45. OTHERS.

Jury Trial—Expenses.—A jury found a verdict for defender on the facts, under reservation of a question of law for the Court, on considering which, judgment was entered for the pursuer:—Held that the defender was entitled to the expenses of the trial, and the pursuer to the expenses of the discussion on the point of law reserved.

In this case, which was an action of declarator to have it found and Nov. 27. 1851. declared that certain roads passing through the estate of Ballikin-
rain, belonging to the pursuers in trust, were private roads, the following issues went to a jury :—“ whether the three roads,” A, B, and C, “ or one or more of them, are situated on the said lands; and whether, for forty years prior to 29th May 1849, or for time immemorial, the said roads, or one or more of them, have not been possessed uninterruptedly by the public as public foot-roads ”

Forbes and
Others, &c., v.
Morrison and
Others.

In the course of the trial evidence was given for the pursuers, from which it appeared that one of the roads in question, B, had been originally made as an avenue or approach by the proprietor of the lands for his own use. This had not been stated by the pursuers in their summons, nor had it been founded on in their pleadings. But it now became a question whether, even though the evidence should satisfy the jury that possession by the public for the requisite time had been proved, it would be sufficient to establish a right of way in their favour along the road B, or along the road C, which communicated with and terminated in B. In these circumstances parties agreed, on the recommendation of the Judge (the Lord Justice-Clerk), that the jury should return a special verdict, to the effect that, “ in respect of the matters proven before them, they find for the defenders, with leave to the pursuers to move for judgment in their favour, if, on the facts in the Judge's notes, it shall be held by the Court that the defenders could not acquire a legal right to a public footpath along the said roads, or either of them; it being admitted that the term as “ public foot-roads ” in the issue, relates only to the uninterrupted use of the same by the public, and does not bear on the question of title to acquire the legal right.”

The case subsequently came before the Court on a motion by the pursuers to have the verdict applied, and judgment given in

Nov. 27. 1851. their favour. They assailed the defenders from the conclusions of the summons, which related to the road marked A, but *Forbes and Others, &c., v.* found that judgment must be pronounced for the pursuers as to the *Morrison and Others.* line of footpath along the two roads B and C.

The case was now on the roll to determine the question of expenses.

W. G. Dickson and Macfarlane were for the pursuers, and *Tyler and Logan* for the defenders.

THE LORD JUSTICE-CLERK.—As to the expenses of the trial the defenders are entitled to them. The pursuers were bound to understand their own case, and state it in the summons. But they bring their action without stating that the road B was formed by the former proprietor as a private avenue, and the case goes to the jury on the footing that the question is one as to possession by the public merely. I think, therefore, as the defenders have succeeded entirely in regard to one of the roads, and the pursuers failed to bring out the true question in regard to the other two, the defenders should have the expenses of the whole trial. As to the discussion on the application of the verdict, the defenders having failed, I think the pursuers are entitled to expenses. In regard to the expenses of the record, each party should pay their own.

The other Judges concurred.

H. G. Dickson, W.S., Pursuers' Agent.
A. Cassels, W.S., Defenders' Agent.

FIRST DIVISION.

No. 46. PETITION, MICHAEL FRANCIS GORDON, ESQUIRE of Abergeldie.

Act 11 and 12 Vict., c. 36.—In a petition for authority to grant forty years' lease of entailed estate:—*Held* that although the heir had judicially sold his interest in the estate he was still the heir of entail in possession in the sense of the statute; 2d, That the affidavit is lodged *tempestive*, although lodged after a remit by the Lord Ordinary to a professional person to report on the petition; 3d, That the residence of the consenting heirs was sufficiently set forth, as “Lieutenant in the East India Company's Madras Army,” or “Captain in the Royal Navy.”

Nov. 28. 1851. This petition was presented under the Act 11 and 12 Vict., c. 36, for authority to grant a forty years' lease of the entailed estate

of Abergeldie. A process of ranking and sale having been some-^{Nov. 28, 1851.} time ago instituted against the petitioner by certain of his creditors, Michael Fran-
his life enjoyment in the lands of Abergeldie and others was, in the ^{cis} Gordon,
course of said process, judicially exposed to sale, and sold to his ^{Esq.} of Aber-
geldie.
eldest son and next heir of tailzie, Francis David Gordon, who
having obtained decree of sale, was, in virtue thereof, duly infest
in, and is now in the actual possession of, the estate. The said
purchase was made in furtherance of an agreement between the
petitioner and his Royal Highness Prince Albert, whereby it was
agreed that a lease should be granted in favour of his Royal High-
ness of the foresaid lands for the space of forty years, as from and
after the term of Whitsunday 1849. The consent of the three
nearest heirs of entail having been obtained, and lodged in pro-
cess, the authority of the Court was now asked to be interposed
to this lease, as required by the statute.

The Court remitted, in usual form, to the junior Lord Ordinary (Colonsay), to inquire into the facts, and report. His Lordship thereupon remitted to Mr William Campbell, W.S., to report if the requirements of the Act had been complied with, and upon the matter set forth and prayed for in the petition. That report his Lordship ordered to be printed and boxed, with a view to being now reported to their Lordships of the First Division.

The Lord Ordinary stated, that the report specially called attention to three points.

1. By section 4 of the Act 11 and 12 Victoria, cap. 36, it is enacted, "That it shall be lawful for any heir of entail, being of full age, *and in possession of an entailed estate in Scotland*," &c., "to lease such estate in whole or in part." The first point, therefore, was, whether the petitioner, after the sale and disposal already mentioned, of his life interest in the estate, is *in titulo* to make the present application, and to obtain, on the consents in process, the authority prayed for?

2. By the 6th section it is enacted, that the petitioners shall produce, in the application, an affidavit in the terms there set forth, of the debts affecting the estate, and that "the Court shall not proceed with such application until such affidavit is lodged." In the present case, the affidavit had not been lodged till after the remit by Lord Colonsay (Ordinary) to Mr Campbell to report; therefore, the second point was, whether the affidavit by the petitioner was lodged in time?

3. By the 33d section of the Act, it is enacted, that petitions

Nov. 28. 1851. to obtain the authority of the Court under the provisions of the
 Michael Francis Gordon,
 Esq. of Aber-
 geldie. Act, shall set forth, *inter alia*, "the names, designations, and
places of abode, so far as known to the petitioner, of the heirs-sub-
 stitute of entail (if any), whose consents are required to such pe-
 tition." In the present petition the place of abode of one of the
 consenting heirs is no farther set forth than is implied in the fol-
 lowing description of him :— "Francis David Gordon, Esquire, younger
 of Abergeldie, lieutenant in the Honourable the East
 India Company's Madras native infantry;" and of another con-
 senting heir, "Robert Gordon, Esquire, Captain in the Royal
 Navy;" therefore, the third point was, whether any objection ex-
 ists to the proceedings from the places of abode of Francis David
 Gordon, and Captain Robert Gordon not being more specifically
 set forth?

Macfarlane for the petitioner, argued, that any doubt as to
 whether any one in Mr Gordon's position was heir of entail in
 possession, was removed by the case of *M'Leod v. Mackenzie*,
 6 Shaw, p. 77, 17th November 1827.

The LORD PRESIDENT. As to the two last objections stated, we have good grounds for disposing of them. In the case of Stewart, 22d June 1849, S. and D. xi. 119, it was decided that the affidavit might competently be lodged after the date of the interlocutor ordering intimation. In this case the affidavit has been lodged a stage later, yet nothing of importance had been done, and therefore we must hold it to have been lodged *temp estiré*.

As to the residence of the consenting heirs, it cannot be more precisely set forth as regards these two gentlemen than it has been; and therefore the Act of Parliament is sufficiently complied with.

And with regard to the first objection, if it should be sustained, the difficulty arises that there would be an entailed estate, and no heir of entail in possession. The petitioner is here substantially the heir of entail, though his right is of a limited nature. He is nevertheless the heir of entail in possession in the sense of the statute.

LORDS FULLERTON and CUNINGHAME concurred.

LORD IVORY was of the same opinion. He held that the heir in possession means the heir in right of the estate for the time.

The COURT, therefore, having considered the special circum-
 stances referred to in Mr Campbell's report, interposed their
 authority, authorised the petitioner to execute the lease men-

tioned in the petition, approved of the draft of the same, and remitted to the Lord Ordinary to see the same executed, and to report.

Pollock & Stewart, W.S., Agents for Petitioner.

Nov. 28. 1851.
Michael Francis Gordon,
Esq. of Aber-

geldie.

SECOND DIVISION.

HILL v. M'INTYRE and KEMPSTER.

No. 47.

Sequestered Estate—Poinding Creditor—Diligence—Sheriff-Officer.—Circumstances in which a poinding creditor and a Sheriff-officer who had proceeded with diligence against a debtor, intimation of his bankruptcy not having been made to them, were held to have incurred no liability to the trustee on the bankrupt estate.

This was a conjoined process of suspension and interdict at the instance of Hill, and of suspension at the instance of the other two parties, in which the relative rights and duties of a trustee on a sequestered estate, and the regularity of diligence against the bankrupt, raised without intimation of his bankruptcy, came to be considered. On 10th September 1849, the estates of Alexander Elder were sequestered on two conjoined petitions for sequestration, the first, without his concurrence, and another at the instance of the bankrupt himself. John Elder, the brother of the bankrupt, on the 15th of August previous, obtained against the latter a small-debt decree before the Sheriff of Edinburgh for the sum of £8 : 6 : 8, with 4s. 1d. of expenses, containing warrant for poinding and sale. Under this warrant Kempster, a Sheriff's officer, poinded the effects of Alexander Elder ; and on the 10th September, the same day as that on which the sequestration had been awarded, he (Kempster) sold them by public roup to John M'Intyre for the sum of £6, 11s.

After the sale, but before the price was paid, a verbal intimation was made to M'Intyre and the other parties that Alexander Elder's estates had been that day sequestered. M'Intyre therefore declined to pay the price, or to accept delivery of the goods, until he was in a position safely to do so. Kempster then raised an action in the Small-Debt Court against M'Intyre for payment of the goods sold to him, and the latter, by direction of the Sheriff, consigned the price with the Clerk of Court. The Sheriff farther directed, that a multiplepoinding should be raised in the Clerk's name to ascertain the rights of parties, and under this multiple-

Nov. 28. 1851. poinding M'Intyre was, on the 31st October 1849, preferred to the consigned sum, and the money was accordingly paid back to him. At the same time the Sheriff assuizied M'Intyre from the conclusions of Kempster's small-debt action.

A process of interdict had meanwhile been instituted in the Sheriff Court at the instance of W. and R. Tofts, printers in Edinburgh, designing themselves as concurring creditors in the sequestration of Alexander Elder, against the carrying away or disposing of the effects of the debtor. Intimation of this proceeding having been made to Hill, the trustee, he sisted himself a party, and this process of interdict is still in dependence.

Irrespective of this interdict before the Sheriff, and after the Sheriff's decision in the multiplepoinding on the above 31st October had been pronounced, M'Intyre and Kempster were, on the same day, served with copies of a note of suspension and interdict in the Court of Session at the instance of Hill, as trustee on the sequestered estate of Alexander Elder, against them and John Elder, praying that they might be interdicted from removing or interfering with the goods poinded and sold as aforesaid. Nothing farther appears to have taken place until the 7th of May 1850, when M'Intyre and Kempster were charged to pay respectively the sum of £11 : 4 : 9 as the expenses of the interdict, with 13s. 10d. as the dues of extract.

These charges M'Intyre and Kempster now also sought to have suspended.

In this state of the case, Hill, M'Intyre and Kempster pleaded their several pleas in law; but the question appeared to have resolved into one of expenses, as there was now no dispute as to the facts, and Hill, the trustee, had no desire to prosecute the action further.

The Lord Ordinary, by interlocutor, dated the 6th June 1851, "in the suspension and interdict, sustains the reasons of suspension, suspends, interdicts, prohibits and discharges, in terms of the note of suspension and interdict, declares the interdict formerly granted perpetual; and in the suspensions at the instance of Thomas Kempster and John M'Intyre, repels the reasons of suspension,— Finds the charge orderly proceeded, and decerns: Finds the charger (William Hill) entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax and to report."

Kempster and M'Intyre reclaimed.

The Solicitor-General (with whom W. Ivory), for Kempster, sub-

mitted that, in the circumstances, expenses ought not to be allowed Nov. 28. 1851.
to the trustee. Kempster was not to blame,—he had merely done ^{~~~~~}
his duty as an officer of the law. ^{Hill v. M'Intyre, &c.}

Inglis (with whom *Buchanan*), for M'Intyre, argued that the latter had done all that he was called upon by consigning in the hands of the Clerk.

Gifford and the *Lord Advocate*, for Hill, the trustee. M'Intyre and Kempster must be held as *in mala fide*. The moment the intimation of the sequestration was made to them, their proceedings should have stopped.

This day the case was advised.

LORD JUSTICE-CLERK.—This case turns exclusively on the question whether the trustee was justified or called upon to present this suspension and interdict against the reclaimers, and to go on for decree for expenses on the passed note. I am of opinion that he was not. M'Intyre, against whom no collusion whatever is proved, consigned the price in the hands of the Clerk of Court, and this was exactly what any skilful person would have advised him to do, as there was a dispute as to the sale. Then a multiple-pounding is raised by the Clerk of Court, and the price given back to M'Intyre. That proceeding alone terminated the whole matter, so far as he was concerned. There remained no ground whatever for any suspension and interdict against M'Intyre; and I am of opinion that as a decree for expenses was taken against him (he not opposing any interdict, or appearing), he is entitled to have the charge on that decree suspended, with expenses.

Then as to Kempster, the officer, I do not blame him for raising the action against M'Intyre on the day of the sale. I think it was a fair proceeding, though he might have left his employer to do that. But more than that Kempster had no right to do. He had no business to take part in the discussion between the general creditors and his employer, the pounding creditor, or to become a litigant along with the latter, to defend and support his employer's interests and alleged preference. So far I go along with the view taken of his conduct by the Lord Ordinary. But the question remains, was there any reason for the trustee resorting to a suspension and interdict in this Court as a measure rendered at all necessary? There was no ground for such a multiplication of actions. I am, therefore, for suspending the charge against him, with expenses.

The other Judges concurred, and the Court pronounced an

Nov. 28. 1851. Interlocutor by which they found that there was no ground for the suspension and interdict at the instance of the trustee, William Hill; they, therefore, repelled the reasons, found the reclaimers entitled to their expenses; granted warrant on the Bill-Chamber Clerk to pay over to the reclaimers respectively the consigned sums on which the reclaimers were reponed against the decree originally taken in absence, and decreed.

James Marshall, S.S.C., Agent for Kempster.

John Cullen, W.S., Agent for M'Intyre.

James Bell, S.S.C., Agent for Hill.

FIRST DIVISION.

No. 48.

KENNEDY ERSKINE of Dun, Petitioner, v. ABERDEEN RAILWAY COMPANY, Respondents.

Clauses Act—Consigned Money—Petition to Uplift—Heir of Entail

—Expenses.—In application by heir of entail for warrant to uplift price of land consigned by a railway company: *Held* that he is entitled to the expense of the application, but not to the expense of constituting against heirs of entail his right to the sum consigned.

Nov. 29. 1851. On the 20th of May 1851, Mr Kennedy Erskine of Dun presented a petition under the Lands Clauses Consolidation (Scotland) Act, 1845, and the Entail Amendment Act, for a warrant to uplift the sum of £675 : 15 : 9, which had been consigned by the Aberdeen Railway Company as compensation for a portion of his estate required for the purposes of the Company, and to apply the same in payment of certain improvements executed by the petitioner since his succession to the estate.

The petition set forth that the Lands Clauses' Act authorised the application of such sums to certain purposes specified in the Act, the party interested making application for such authority to the Court of Session, and the Company being liable for the expense of obtaining the proper orders, and "all moveable charges and expenses incident thereto."

It was further stated that the Entail Amendment Act had authorised the heir in possession of an entailed estate, in respect of which any sum of money had been consigned by a Railway Company, to apply to the Court, in the form established by that Act, for leave to apply such sums to other purposes than those specified in the Lands Clauses Act, and among others to the payment of improvements executed by such heir of entail.

The present petition was accordingly prepared in terms of the

*Kennedy
Erskine v.
Aberdeen
Railway Co.*

Entail Amendment Act, and prayed for the intimation and service Nov. 29. 1851.
 declared by it to be necessary ; and it further prayed the Court
 "to make inquiry into the facts" set forth in the petition, and "to find the said Aberdeen Railway Company liable in payment of the whole expense of this application, and proceedings under the same."

After the usual procedure the Court, on the 18th of July 1851, granted the required authority, and, on the matter of expenses, pronounced an interlocutor finding the Aberdeen Railway Company liable to the petitioner in the expenses of the present application and procedure therein.

The Railway Company made appearance before the Auditor, and contended that he was bound to give effect to the judgment of the Second Division on the 19th of July 1851, in the case of Lord Torphichen v. the Caledonian Railway Company (23 Scottish Jurist, p. 653), by which it was found in a discussion previous to the remit to the Auditor, that an heir of entail, on presenting such an application as the present, was entitled to the expense of presenting the application, and obtaining warrant for uplifting the sum consigned, only in the same manner and to the same extent as if, at the date thereof, he had held a decree against the heirs of entail for the value of the improvements ; but that he was not entitled to any part of the expense of constituting against the heirs of entail his right to that sum. The Auditor, however, reported in a note to the Court, that, as the finding as to expenses in the present case had not been limited, as in the case referred to, he had not considered himself entitled to give any effect to the objection. He accordingly taxed the expenses at £47 : 17 : 3, of which £21 : 2 : 3 had been incurred in the intimation of the petition to the heirs of entail, and in the Gazette and newspapers, and in the inquiry as to the validity of the claim for improvements as a debt against the entailed estate.

Patton was this day heard in support of the objection.

Boyle, for the petitioner, argued, 1st, That the view of the Auditor was correct, and the Court were precluded from going back on their final decree, by which they had found the petitioner entitled to the "expenses of the present application and procedure therein." It was not denied that the expense objected to had been properly incurred in the course of the application and procedure therein. He contended, 2dly, that the judgment of the Second Division, if applicable to the present case, was erroneous.

Nov. 29. 1851. But the Court held that their finding as to the expenses must be construed to mean that the petitioner was to get all the expenses allowed by the statute ; and they intimated that they were not disposed to distrust the judgment of the Second Division in the case relied on. They accordingly sustained the objection by the Railway Company to the Auditor's report, which was approved of *quoad ultra*; but in respect that the Railway Company had not appeared in the case until it had been remitted to the Auditor, they refused to give them the expense of the discussion.

Kennedy
Erskine v.
Aberdeen
Railway Co.

Mackay and Howe, W.S., Petitioners' Agents.
Webster and Rennie, W.S., Respondent's Agents.

FIRST DIVISION.

No. 49. GILKISON, MARSHALL'S TRUSTEE, v. RAMAGE AND SON.

Patent—Principal and Agent.—Accounting. Held that where an agent for the sale of a patent article was entitled to use it in his own trade, he was not bound to account for the nett profits of each job in which he so used it, but only for the market value of the article itself as fixed by the patentee.

Nov. 29. 1851. THE question involved in this case was one of accounting as between principal and agent. The facts of the case were these : Mrs Marshall obtained letters patent for a plaster composition, or cement, to which she gave the name of Intonaco. This cement consisted of two parts, the one called the *base*, the other, which was the most important, called the *bind*, being in a proportion to the *base* of somewhat less than one to a hundred. The *bind* was sold by the patentee separately from the ingredients constituting the *base*, with which it is united before being put to use ; and when thus sold, printed directions were given to the purchasers, instructing them how it was to be mixed with the *base*, which, consisting of stucco and such like substances, could, for the most part, be easily procured. The value attached to the *bind* in that uncompounded state was at the rate of four shillings per gallon.

Gilkison v.
Ramage and
Son.

The defenders in this action are plasterers in Edinburgh ; they were appointed agents for the patentee by the following letter addressed to them by Gilkison, then her agent, and now pursuer in this action, as trustee on her sequestrated estate :—“*Port-Glasgow, 27th May 1845.—Dear Sirs,—With reference to the conversation*

I had with you in Edinburgh lately, I now beg to offer you the agency of the patent Intonaco for your good city, upon condition that you do all in your power to promote and introduce it, for which I agree to pay you at the rate of 15 per cent., say fifteen per cent. commission, you guaranteeing the sales, of which you will render to me an account at the end of every quarter. I shall be glad to know if this offer meets your approbation. I am," &c. "P.S.—I shall be able to forward you a quantity of the Intonaco in the course of a few days."

Nov. 29. 1851.
Gilkison v.
Ramage and
Son.

The Intonaco was not sent to the agents as apparently contemplated by this letter, but the patentee instructed her agents in the manufacture of the *bind*, which they sold in its uncompounded state to third parties with directions for use; and these sales were recognised and adopted by the patentee. They also manufactured it for their own use as plasterers, and in both instances accounted to the patentee for the same at the above-mentioned rate of four shillings per gallon, under deduction of the price of materials used in its manufacture, and fifteen per cent. commission on the whole quantity, either sold or manufactured for their own use. This the patentee held to be an encroachment on her right of patent, maintaining that Ramage and Son, as agents, were not empowered or privileged to sell or use the *bind* separately, but only in its compounded state as Intonaco, except in the case of sales to parties at a distance, when they were entitled to sell the *bind* alone, with printed instructions for use; and that they were bound to account to her for the profits calculated upon the whole cement as compounded when sold, and upon the whole job when used by them as plaster, under deduction merely of fifteen per cent. commission as agents. The patentee admitted the right of the agents to use the Intonaco in their own trade, but the parties differed as to the principle upon which the agents were to account for the quantity so used.

Ramage and Son brought an action against Mrs Marshall in the Sheriff Court for an alleged balance in their accounts of £24, 3s 9d., for work done, articles furnished, and money advanced, and including their commission on sales of Intonaco. Mrs Marshall brought a counter action against Ramage and Son, proceeding on the above principle of accounting. Proof was led by both parties, and the Sheriff found for Mrs Marshall.

On advocation, both actions were conjoined, and the Lord Ordinary (Wood) found that it had not been proved that Ramage and Son had not the right to sell the *bind* separately to third parties in Edinburgh; that in such sales the profit appertaining

Nov. 29. 1851. to the patentee was the balance of the price remaining, after deducting the materials and labour supplied by Ramage and Son, together with fifteen per cent. of commission; and that, in plastering jobs in which the compounded cement was applied, Ramage and Son were not liable to account for the profits of the whole job, but merely for the price of the *bind* at the rate of four shillings per gallon, subject to the above deductions.

Gilkison v.
Ramage and
Son.

Against this interlocutor Gilkison reclaimed.

Simpson and Dean of Faculty for claimer. This is a case of pure agency. Gilkison's letter confers nothing beyond a general agency, and that limited to the city of Edinburgh. The agents must therefore account for the whole profits. The fact of Mrs Marshall having sold the *bind* separately to third parties, and recognised the sale of it by her agents to parties at a distance, did not entitle Ramage and Son to use the Intonaco in their own trade, and account as for the *bind* alone. The patentee left the nature of the agency to be settled by the law of principal and agent, Paley, 3d ed. pp. 33, 37, 51, 107; Story's Commentaries on the law of Agency, sec. 107-8. The principles there laid down have been recognised in many decisions, amongst others, *Anderson v. Shand*, 8th June 1833, 11 S., 688; *Campbell v. Little*, 13th November 1823, 2 S. 484; *Richardson v. Roscoe*, 18th May 1837, 15 S. 952.

Wood and Inglis for respondents.—There is no doctrine in law to support the principle of accounting here contended for, which practically amounts to this, that the patentee was to be a partner in the business of Ramage and Son on the footing of drawing eighty-five per cent. on the profits, and being liable to none of the loss. The letter established nothing of this sort, and no tradesman would accept an agency on so unreasonable terms. The law referred to applies only to the case where the agent is not entitled to use the article in his own trade. But it is admitted that Ramage and Son were entitled to do so. They propose to account for what was so used, on the same footing as if it had been sold to a stranger plasterer. Ramage and Son received no Intonaco from the patentee, but only *bind*. There was not even a price fixed for the sale of Intonaco when compounded; and the whole circumstances, therefore, shew, that they were entitled to use and account for the *bind* when received from the patentee, or manufactured by themselves, as they had done.

The LORD PRESIDENT.—This agency was established for the

purpose of increasing the sale of the patent article, and the pro- Nov. 29. 1851.
 position of Gilkison is, that the agents were precluded from ^{Gilkison v.}
 using it in their own trade, without accounting for the whole ^{Ramage and}
 profits of the jobs in which it was used. There was no ground ^{Son.}
 for holding this. The *bind*, being capable of being put up
 in small bulk, was what the patentee herself transmitted
 to purchasers, with directions for using it with the *base*.
 The agents were entitled so to sell it; and it could not be
 supposed that they were to be placed in a worse position than
 other tradesmen of Edinburgh, by themselves being precluded
 from using it.

As to the mode of accounting, no specific value had been attached to the Intonaco; but the market-price of the *bind* had been fixed by the patentee at four shillings per gallon. That must be held, therefore, to be a fair remuneration to her for the substance compounded. It must be taken as the basis upon which Ramage and Son were to account to her; for if you get rid of the *bind* as a test of the price, you have no fixed price at all. No other principle of accounting had been established by the patentee, upon whom the *onus* of proof was laid.

The other Judges concurred.

THE COURT, therefore, adhered to the interlocutor reclaimed against, and remitted to the Lord Ordinary, with power to dispose of all questions of expenses.

John Walls, S.S.C., Reclaimers' Agent.

Lothians & Finlay, S.S.C., Respondent's Agents.

FIRST DIVISION.

CARGILL v. SIR JAMES FORREST, Bart., AND OTHERS. No. 50.

Bill-Chamber—Suspension and Interdict.—Note of Suspension and Interdict refused where the interdict was craved against the members of an acting committee of an association, on the allegation by complainant, that he had been illegally excluded from the meetings of the committee, by being refused notice of such meetings.

This was a reclaiming note against an interlocutor pronounced Nov. 29. 1851. by Lord Colonsay, Ordinary on the bills, refusing a note of sus- ^{Cargill v. For-}
 pension and interdict at the instance of Robert Cargill, writer to rest, &c.
 the Signet, against Sir James Forrest Bart., and others, in the
 following circumstances:—

Nov. 29. 1851. About the beginning of the year 1845, an association was formed
for the establishment of a colony at Otago in New Zealand, in
connection with the Free Church. At a meeting of the asso-
ciation held at Glasgow, on 10th August 1847, a committee
was appointed, of which Cargill, and the respondeuts were
members. In the course of their proceedings, Cargill brought
certain charges against the secretary, which, being referred to a
sub-committee to investigate, were declared (5th June 1848), to
be unsubstantiated; and the minutes of the committee bear, that
the secretary *discontinue* inviting Cargill to attend. Cargill re-
newed his complaints against the secretary, and preferred a claim
to be summoned to the meetings of the committee. Accord-
ingly, at a meeting of the committee, 22d November 1850, it
was declared that the charges made by Cargill had been carefully
and fully investigated; that it had been expressly understood, by
the meeting at which the sub-committee were appointed, that to
whichever party, the accuser or accused, the result of the investi-
gation should prove unfavourable, said party should cease to be
connected with the committee; that Cargill, not having withdrawn,
the committee of 5th June had directed the secretary to discon-
tinue inviting him to attend their meetings, and for these and
other reasons, they therefore now refused farther investigation as
impolitic and unjust.

Cargill, still continuing to assert his rights as a member of the
committee by protest and otherwise, the other members of com-
mittee resigned; and at a special general meeting of the Otago
Association held at Glasgow on 14th May 1851, their resignation
was accepted, their previous proceedings confirmed, and a new
Edinburgh committee, of which the respondents were members,
and from which Cargill was excluded, was appointed. Cargill
now presented this note of suspension and interdict to prohibit
the respondents acting as members of the committee, at any
meeting to which he has not been duly summoned to attend as a
constituent member thereof, or in any way carrying out the re-
solutions of the various meetings of the association.

The Dean of Faculty and Solicitor-General for reclaimer. The
whole proceedings of the Edinburgh Committee were illegal, in
respect they did not send Cargill notice of their meetings, which
they were bound to do. Nor could their resignation deprive him
of office, as resignation is an individual act requiring the consent of
each individual member. Counsel also contended that the meet-

ings of 14th and 19th May did not properly represent the association, inasmuch as notices thereof had not been sent to all the members, and at least did not contain intimation of the objects of the meeting. On the whole, therefore, the circumstances set forth entitled them to have the note passed to try the question.

Crawfurd for the respondents argued, that it was not usual to interdict those engaged in duties of more or less importance, when the Court was not able to substitute any one in their place.

THE COURT were of opinion that there was here no *prima facie* case for interdict. This association had been recognized by government, which circumstance gave it a certain status. It was entitled to appoint a sub-committee from which Mr Cargill was excluded, and the Court would not, by suspension, throw doubts upon the powers of these parties by such vague allegations as were before them. The Court would not interfere in the quarrels of the sub-committee when the body, from which its powers flowed, had not been called in question.

THE COURT therefore refused the prayer of the reclaiming note, and adhered to the interlocutor of the Lord Ordinary, but found no additional expenses due.

D. M. and H. Black, W.S., Complainor's Agents.
John Auld, W.S., Respondents' Agent.

SECOND DIVISION.

HUNTER v. MAXWELL.

No. 51.

Process—Divorce—Mode of Proof where date of decree of adherence wanting.

This was a point of practice occurring in an action of divorce on the ground of wilful desertion. The Lord Ordinary (Rutherford) now reported the matter with the view of receiving the instructions of the Court for his guidance in the case.

LORD RUTHERFURD.—In the extract-decree of adherence produced in this process, the date of desertion has been omitted. I therefore have no evidence before me that the defender has deserted the society of the pursuer for the statutory period of four years, which is the foundation of the pursuer's case of divorce. I propose to allow the pursuer to lead a proof of that point in the action of divorce.

*Nov. 29. 1851.
Hunter v.
Maxwell.*

Nov. 29. 1851. *Shand*, for pursuer.—The extract-decree of adherence in this case is in the usual form; at least it is strictly in accordance with the schedule of the A. S. 25th Feb. 1824, regulating the form of extracts in Consistorial cases. We have offered, agreeably to what I believe is the usual practice, where the date of desertion does not appear in the decree of adherence, to lodge in process a certified copy of the evidence led in the action of adherence; or, under the warrant of the Court, we are ready to get that process itself transmitted. To lead a proof of new in this case would cause considerable delay and expense, as the witnesses must be brought to Edinburgh, to depone before one of the Sheriffs-Commissionaries.

LORD MEDWYN.—The proof will not be an extensive one. There is only one point to be proved, and on the proof of it the whole case hinges.

LORD JUSTICE-CLERK.—I think the course contemplated by the Lord Ordinary is a most reasonable one, and entails no hardship on the pursuer. He must prove his case, and the course proposed to be followed is clearly the right one.

J. A. Robertson, S.S.C., Agent.

SECOND DIVISION.

No. 52.

M'INTOSH v. FLOWERDEW.

Jury Trial—Slander—Judicial—Privilege.—In an action of reduction of a Small Debt decree, on the ground of malice and oppression on the part of the Judges (Justices of Peace), certain statements were made by the pursuer regarding a witness in the Small Debt action, whom, he alleged, the Justices had not allowed him to cross-examine, and which would have disqualified him: *Held*, in an action of damages at the instance of the witness, that these statements were not pertinent to the cause in the action of reduction, and therefore not privileged, because in the summons of reduction it was not alleged that the facts regarding the witness had been made known to the Justices at the hearing in the Small Debt action.

Nov. 29. 1851. THIS case came before the Court on a bill of exceptions taken at a trial in an action of damages. The action was raised on account of certain statements made by the defender, Flowerdew, concerning the pursuer, in a summons of reduction at Flowerdew's instance,

*M'Intosh v.
Flowerdew.*

for setting aside a decree which a person named Bathie had obtained against him in the Justice of Peace Small Debt Court of Forfar.

Nov. 29. 1851
M'Intosh v.
Flowerdew.

It seems that in the Small Debt Court, Bathie, in support of his claim, which was for the price of hay, alleged to have been furnished to Flowerdew, examined as a witness the present pursuer who had been formerly a groom in Flowerdew's service.

In the reduction the grounds of action were, *inter alia*, malice and oppression on the part of the Justices in not having allowed Flowerdew to cross-examine the pursuer; and in setting forth this ground of reduction, he made the statements concerning the pursuer complained of, and which gave rise to the present action. The summons libels that the decree was pronounced "with the clearest malice and oppression on the part of the Justices, as will at once be seen from the following statement of the circumstances:—" "the pursuer lately found it necessary to dismiss a groom from his service on account of certain improprieties of conduct, and within a day or two afterwards this person began to stir and trump up claims in the names of third parties against the pursuer, which had no existence in reality, and with which he had no concern," and, amongst others, the claim by Bathie, under reduction. The summons further bears "that the said William Bathie, on being asked by the presiding Justice of the Peace, on the occasion of the trial of the said Small Debt Court action, if his claim was correct, which he, of course, said it was, and immediately put in the pursuer's discarded groom, the fraudulent instigator of the action, as a witness for him, though against the pursuer's protest and remonstrances. The pursuer insisted on his right to cross-examine that person, but the Justices, on the pretence that it was consuming too much time, would not allow him to do so, or, at least, to put beyond one or two unimportant initial questions." The issue which went to the jury was, "whether the said statements, or part thereof, are of and concerning the pursuer, and falsely, and calumniously, and maliciously represent him as a person trumping up claims against the defender, and as a fraudulent instigator of the said action, and as coming forward to swear in an action fraudulently instigated in support of claims trumped up by him to the injury and damage of the pursuer?"

It was not stated by Flowerdew in his summons of reduction that he had made these statements in regard to M'Intosh to the Justices, at the hearing of the small debt claim, or that they otherwise knew of them.

Nov. 29. 1851. Before this issue was approved of, it was the subject of discussion in the Inner House, the defender there contending that the statements complained of being judicial, and relevant to his case in the action of reduction, were privileged, and, therefore, that the Issue should put the question not only whether he made the statements maliciously, but also whether he made them, knowing or believing them not to be true; or, at least, that the Court ought to find that, under the issue as framed, it would be incumbent on the pursuers to prove that the defender made the statements complained of without believing them to be true, so that the Judge at the trial might be prepared to direct the jury to that effect. On the other hand, the pursuer contended that the word "*maliciously*" should be left out of the Issue, as it was sufficient for him to shew that the statements complained of were false and calumnious. The Court, by a majority of eleven to two (all the Judges being consulted), held that the Issue should be as given above; that what evidence was required to establish malice in the case would be left open for the Judge at the trial to determine; and they refused to give such a finding in law as that which the defender contended for, being of opinion that the parties were sufficiently protected against misdirection by the remedy of a bill of exceptions.

At the trial, accordingly, the question arose as to what it was necessary the pursuer should prove. He proposed to enter on an inquiry as to whether the case against the Justices of malice and oppression was not wholly groundless, which, he alleged, was competent under the word "*maliciously*," and that it was not enough for the defender that the allegations might be pertinent. This the Lord Justice-Clerk refused to allow, holding that the proper question in this cause was "whether the statements against the pursuer were stated relevantly on the face of the summons, in support of the cause therein contained," and he proposed that the question of pertinency or relevancy should "be then argued, as it would simplify the case for the jury, if it should be held that the statements were not pertinent to the summons; and would, on the other view, shew what the pursuer had to prove and what the defender had to meet." The question was, accordingly, argued; and the Lord Justice-Clerk decided "that the statements in the summons complained of were not relevantly stated, so as to shew malice and oppression on the part of the Justices, for which purpose they were said to be introduced, and with a view to which purpose alone they could be pertinent to the

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Flowerdew.

cause of reduction stated in the summons. The second reason of Nov. 29, 1851. reduction says, that the malice and oppression would be seen from "the following statement." Now, unless the facts set forth in the summons as to the pursuer were stated to the Justices, they did not tend to shew that the Justices were actuated by malice and oppression in their proceedings in the Small Debt action, by refusing to allow, or by stopping the cross-examination of the pursuer. That the statements are so introduced as not to support that reason of reduction, and, therefore, were not pertinent." The defender excepted to this ruling, and required "his Lordship to direct the Jury that, to entitle the pursuer to a verdict, it was necessary, in point of law under the issue, for the pursuer to prove that the statements complained of were maliciously inserted" in the summons therein referred to, which his Lordship "declined to do."

During the trial also, it was proposed by the defender to ask a witness what was the cause of M'Intosh's dismissal from his service. But this the Lord Justice-Clerk refused to allow, no issue in justification having been taken. To this ruling also, the defender excepted.

At the hearing on the Bill of Exceptions,

Penney and the *Solicitor-General*, in support of them, argued, that the statement was pertinent to the matter set forth in the summons; and, therefore, before the defender was made liable for them the pursuer must prove they were maliciously made. *Davidson v. Megget*, 1st May 1821; *Ewing against Cullen*.

Ingoldsby and *Patton* for pursuers argued against the pertinency.

The case was to-day advised.

LORD COCKBURN. The first exception is not well-founded. It is said the statements complained of being made in a judicial pleading were privileged; and, no doubt, statements made by a party in a cause, which are necessary to it, are privileged, and the maker of them cannot be called to account unless they were maliciously made. But the pursuer says the statements he complains of were not pertinent to the cause in which they were made, because it is not set forth in the summons of reduction that the faults imputed to him were known or stated to the Justices before pronouncing their judgment. It was, therefore, impertinent to make these statements in the summons of reduction as a ground of reduction. On the grounds set forth in the Lord Justice-Clerk's judgment, therefore, this exception should be disallowed.

Nov. 29. 1861. The other question is as to the admissibility of a question put to a witness. This exception also must be disallowed. There is no issue of justification taken, and the Lord Justice-Clerk was correct in rejecting that evidence.
M'Intosh v. Flowerdew.

LORD MURRAY.—This question is very important for its bearing on the undoubted privilege which all litigants have, to state anything whatever that is pertinent to the cause. In this case the pursuer first of all, in the former discussion, contended that the word *maliciously* should not have been in the issue at all, on the ground that the statements in the summons of reduction were not pertinent. The defender maintained that the issue ought not only to have the word *maliciously*, but that the pursuer was bound to prove the statements were made without reasonable cause. The case came before the Court to settle that very point before. The Court held they could not, beforehand, settle it. They approved of the word *malicious* being in the issue, according to practice, but thought it should be left for the Judge trying the cause to say whether the statement complained of was pertinent to the summons of reduction or not. There has been no argument to satisfy me that these were pertinent or relevant. If the idea that anything that has any connection whatever with the cause is pertinent were true, a man might raise any sort of slander whatever in a judicial pleading. But just as the privilege is great, it ought to be carefully guarded against abuse.

As to the other exception,—it was no part of the cause why M'Intosh was dismissed, and therefore the question was rightly disallowed.

LORD MEDWYN concurred.

LORD JUSTICE-CLERK.—The privilege allowed to litigants to make statements regarding third parties necessary for their cause, is a most important one; but its nature and extent must vary according to the nature of the case, and the period of the litigation when it is exercised. No privilege is higher than that belonging to expressions in a summons, when they are pertinent to the object for which the writ is taken out, but it must not be abused. As to the second exception, no issue of justification was taken, and therefore the proof attempted of the cause of M'Intosh's dismissal was inadmissible.

The COURT disallowed the exceptions.

*L. M. Macara, W.S., Pursuer's Agent.
 Wotherspoon & Mack, Defender's Agents.*

FIRST DIVISION.

SEQUESTRATION, CHARLES WALKER, DECEASED.

No. 53.

Sequestration—Meeting of Creditors.—Where the statutory notice of 14 days previous to meeting of the creditors on a bankrupt estate cannot be given, so as to admit of such meeting being held within the 21 days after confirmation of the trustee, the proper course is for the trustee to apply by petition to the Court, who will grant authority for fixing a day for such meeting.

The estate of the deceased Charles Walker having been sequestrated, a trustee was confirmed on 17th November 1851. The bankrupt act, § 65, provides, that the trustee shall fix a day for holding a meeting of the creditors not sooner than fourteen days, nor later than twenty-one days from the date of the trustee's confirmation; § 75 provides, that notice of meetings of creditors shall be advertised in the Edinburgh Gazette fourteen days before the day of meeting. A day for holding this meeting was fixed, but in consequence of a change of agency in the country, the statutory notice for the Gazette did not arrive in Edinburgh till after the publication of the Gazette of 21st November; consequently, the trustee having been confirmed on the 17th, the notice of fourteen days required by § 75, could not be given before the expiry of the twenty-one days provided for under the § 65.

The trustee on the sequestered estate now presented an application to the Lord Ordinary on the Bills, craving his Lordship to fix a day for holding the meeting of the creditors, and to appoint information thereof to be made in the Gazette, in order that the requirements of the statute might be complied with.

The Lord Ordinary (Cowan) reported the point to the Inner-House, as he was doubtful whether, as Lord Ordinary on the Bills, he had power to appoint such meeting. He referred to the case of Fyffe, 17th February 1844, 6 D. 686, where a similar difficulty having occurred, the Court interfered to rectify it. This, however, had been done on a petition presented to the Court. The present application had been made to the Lord Ordinary, and not to the Inner-House, with a view of saving expense.

Crichton appeared for the petitioner.

On consideration, the Court determined that the proper course was to present a short MS. petition to the Inner-House, praying

Dec. 2. 1851. for the necessary authority to fix a new day for the meeting. This was accordingly done, and the Court appointed a day for the Sequestration meeting of the creditors, and granted authority for intimation Walker. thereof in the Edinburgh Gazette.

SECOND DIVISION.

FORBES v. MORRISON AND STUART.

No. 54.

Right of Way—Minutes of Road Trustees—Shutting up of Road.—In an action of a right of way, circumstances in which held, that there was no sufficient evidence of the road having been regularly shut up by the Road Trustees, as alleged by defendant. An opinion indicated by one Judge against the authenticity of unsigned minutes of Road Trustees.

Dec. 2. 1851. This was an action to have it found and declared, that a road passing through lands of which Morrison was proprietor and Stuart tenant, was a public road, or at least that the pursuer had a right of servitude over it. The following issue went to a jury:—"It being admitted that the defendant, Mr Morrison, is proprietor of the lands of Muirton, and other lands in the parish of Forgue: Whether, for forty years, or for time immemorial, preceding the 4th day of November 1850, there existed a public road through the said lands, running in an easterly direction, on or near to the north side of the burn of Forgue from a public road near the church of Forgue to a public road which leads to the ford on said burn at mill of Forgue?"

Forbes v.
Morrison, &c.

At the trial, after the pursuer's case was closed, the defenders admitted that the road in question had been a public road before 1813, and had been under the management of the road trustees, but they averred that it had been shut up by the trustees in 1813, and remained shut up since. And, in support of this plea, they led evidence. They, *inter alia*, put in a minute, which they alleged to be a minute of the road trustees, taken from what they alleged to be their minute-book. It bore these words, "and the above-named gentlemen are hereby authorized, as soon as possible, to take the necessary steps for shutting up of the present road, from," &c., naming, amongst others, the road in question.

To this minute the pursuer objected as inadmissible in evidence, being unsigned, and otherwise unauthenticated. The minute was

received under reservation of the question of its admissibility. Dec. 2. 1851.
 The jury returned the following verdict:—"They, in respect of ^{the} ~~Forbes v.~~ ^{Morrison, &c.} the matters proved before them, find for the pursuer, but subject to the reservations on questions of law stated in the Lord Justice-Clerk's notes." The questions here referred to, and on which the verdict was to depend, were—

1. Whether any competent or adequate evidence is produced of any proceedings by the road trustees in regard to the shutting up of the road in question?
2. Whether the evidence produced, if admissible, is sufficient to prove that the road was shut up by the trustees in terms and in compliance with the Aberdeenshire Road Act then in force—or only prove that certain steps were authorized with a view to further and more regular procedure and resolutions as to the said road?
3. Whether, if the road was not actually shut up by the alleged procedure of the trustees, on which the defenders rely, the facts in evidence subsequent to the year 1813, establish a legal presumption that the road had been duly and regularly shut up, so as to entitle the defenders to a direction to the jury, that the road had been shut up from 1813, and no longer remained a public road?

The Lord Justice-Clerk had directed the jury on these points in favour of the pursuer, and it was agreed, that if the Court held this direction was wrong, judgment was to be entered for the defenders—if right, that it should stand for the pursuer.

The case now came before the Court—

Cook and Dean of Faculty (with them the *Solicitor-General*), for defenders.

Morar, (with whom *E. S. Gordon* and *Inglis*), for pursuer, argued—That the minute not being signed, &c., and no evidence being produced of its authenticity, could not be received in evidence. Next, the Turnpike and Commutation Act for Aberdeen requires, section 71, that it shall be lawful for the road trustees to shut up roads, "Provided always, that notice of the resolution to shut up any such road be given by advertisement at the churches of the parishes through which the said road passes for two consecutive Sundays," before it is shut up. Of this notice no evidence is produced. Lastly, the evidence shews, that although attempts have been made to shut up the road since 1813, they have not been acquiesced in.

LORD COCKBURN.—On the first point, he did not wish to give

Dec. 2. 1851. any countenance to the authenticity of unsigned minutes of road trustees; and were he giving judgment on that question, his opinion would rather be that signature was necessary. But waiving that point, he was of opinion that the minute was sufficient evidence of a resolution on the part of the road trustees to shut up the road. But then, notice was necessary, and we must have proof that it was given. Here, however, there is no direct proof of this notice. It is said there is indirect proof,—in the circumstance of the road having ceased to be used since that time, and that the evidence of this furnishes a legal presumption that the road was duly and regularly shut up. But the evidence goes rather the other way, and shews that notwithstanding attempts made to shut up the road, the people have obstinately adhered to their right to use it. I think, therefore, the verdict must stand for the pursuer.

The other Judges, without expressing any opinion on the first point, were of the same opinion as to the others.

Verdict stands for pursuers.

Webster and Renny, W.S. Pursuer's Agents.

Robert Irvine and Burnett & Anderson, W.S., Defenders' Agents.

SECOND DIVISION.

No. 55.

M'INTOSH v. FLOWERDEW.

Jury Trial—Expenses—Damages—Slander.—In an action of damages for defamation, the Jury found for the pursuer with only one farthing of damages. Expenses allowed to him.

Dec. 8. 1851. In this case (see *ante* p. 94), the jury had found for the pursuer with one farthing of damages. It now came before the Court on a motion by the pursuer to apply the verdict, and for expenses.

Penney and the *Solicitor-General* objected to the claim for expenses. The recent case of *Mason v. Tait*, 26th June 1851, has settled that there is no invariable rule by which the pursuer obtaining the smallest sum of damages in an action for defamation shall get his expenses. Each case must depend on its own circumstances. The circumstances of the present case are unfavourable to the pursuer. The statements complained of were never made public, and no damage has been instructed by him. The action should never have been brought into this Court.

Patton, for the pursuer. The circumstances of the case of *Dec. 3 1851.* *Mason* were peculiar. There, an issue in justification was taken, and the jury, by finding for the pursuer, with only one farthing of *McIntosh v. Flowerdew.* damages, virtually decided against her. The general rule is, that expenses shall follow a verdict for damages, however low. *Gardiner v. M'Kenzie*, 24th June 1846, 8 D. 859; *Laing v. Mathieson*, 23d June 1841, 3 D. 434. The pursuer here did not seek to prove substantial damages, but only to vindicate his character, which he has done.

LORD JUSTICE-CLERK. This case differs essentially from the case of *Mason v. Tait*. In this case a party—a professional man—having dismissed his servant, chooses to abuse his privileges as a litigant to slander him in the Supreme Court. No doubt the slander was not sufficiently known in Dundee (where the pursuer resides) to produce injury to his character; nor has he proved such injury; but he has vindicated his character. The defender gets well off with only nominal damages. In the case of *Mason*, I not only thought the character of the pursuer had not been vindicated, but that the jury intended to leave the woman under a stigma. Indeed, as Judge, I thought justification had been proved.

LORD COCKBURN. I follow the same principle here which guided my opinion in *Mason's* case, where I was of opinion expenses ought to have been given to the pursuer.

LORD MURRAY. As in *Mason's* case I thought expenses should not be given, because the Judge who tried it was of that opinion, so here, I am, for the same reason, of opinion they ought to be given. The opinion of the Judge trying the cause must always be most satisfactory.

LORD MEDWYN. I concur in thinking expenses must be given to the pursuer. In the ordinary case undoubtedly that is the rule, however small the damages.

The COURT accordingly found expenses due.

L. M. Macara, W.S., Pursuer's Agent.

Wotherspoon and Mack, W.S., Defender's Agents.

OUTER HOUSE—JURY COURT.

BEFORE LORD RUTHERFURD AND A JURY.

No. 56.

ROBERTSON v. CONOLLY.

Process—Jury Trial—Opening.—13 and 14 Vict. c. 36.—Opinion of the Judge in favour of a brief opening of the facts on both sides, to the exclusion of observations anticipating the evidence.

Evidence—Consequential Damage.—Circumstances in which held not incumbent on the pursuer to lead direct and positive evidence of the defender's knowledge of wrongful conduct causing damage, but the fact of the knowledge to be derived from a view of the whole case.

Dec. 3. 1851.

Robertson v.
Conolly.

By this action, the pursuer, a coach-hirer in Northumberland Street, Edinburgh, sought to recover damages for the loss of a chesnut gelding, and two other horses, which, it was alleged, had been destroyed in the following circumstances:—The pursuer had hired from the defender grazing for a chesnut gelding, in a park at Greenhill, near Bruntsfield Links, and which he was in the habit of letting out to parties in need of pasture for grazing horses or cattle. Into this park the chesnut gelding, valued at £21, sound and in good health, was accordingly put; and there it remained for five or six weeks. While in the park, it was averred that the defender by himself, or his servants, had also put into it a grey poney in a state of disease from farcey or glanders, with which the pursuer's chesnut gelding was in consequence infected, and became unwell. The pursuer not knowing the cause of disease took home the gelding and put him into his stable, when he soon broke out with farcey or glanders, and died, infecting at the same time two others of the pursuer's horses, a grey horse and another chesnut horse, respectively valued at the sum of L.24, both of which became so diseased that they had to be destroyed.

For these losses the pursuer claimed damages, and consequential damages.

The defender denied the libel, and the case this day went to trial, on an issue embracing the facts above narrated, and the consequent liability of the defender.

Damages laid at L.69 for value of the horses, and L.50 for loss of services and expenses.

Wood and Pattison, junior counsel on either side, opened their respective cases with a simple statement of the grounds of action and defence. And

LORD RUTHERFURD, addressing the jury, explained that by Dec. 8. 1851. the recent statute a change had been made in the form of pro-
cedure at these trials; and now there were two speeches on the Conolly.
evidence after it was all led. The case had been correctly opened
for the parties, the junior counsel having left all comments on the
evidence to their seniors.

The Lord Advocate, senior counsel for the pursuer, addressed the jury on the whole case, and was followed by *G. Bell*, the de-
fender's senior.

LORD RUTHERFURD charged the jury. The question came to be merely a weighing of the evidence. The pursuer was bound to prove that the defender put the grey poney into the field "wrongfully," and "in the knowledge" of its being diseased. It was not incumbent on the pursuer to bring direct and positive evidence of such knowledge on the part of the defender. It was for the jury to determine as to that knowledge, and the defender's "wrongful" conduct from a view of all the evidence led on both sides.

Verdict for the pursuer. Damages in full, L.40.

Junner & Stuart, S.S.C., Pursuer's Agents.
William Hunt, W.S., Defender's Agent.

FIRST DIVISION.

WILLIAMSON v. SHARPE.

No. 57.

Act 1685—Publication of Entail.—In a reduction of a disposition of lands entailed, but where the deed of entail had not been registered previous to the date of the disposition, held that the judicial production of the deed of entail previous to registration was not publication in the sense of the statute, so as to invalidate the disposition.

This was a reduction of a disposition of the entailed lands of Dec. 8. 1851. Kilmahew, and of deeds following thereon, raised by Thomas Williamson v. Williamson, surgeon in Leith, as a substitute under the entail. Sharpe. The entail was executed on 19th July 1687, but was not recorded until the 11th March 1820. The last heir of entail, William Brydie Napier, resided in the State of Virginia, in North America, and, on his succession, opened a negotiation with the defender's father, the late Alexander Sharpe, Esq., for a sale of the estate, to Mr Sharpe. The parties came to terms in the month of Feb-

Dec. 3. 1851. ^{Williamson v.} February 1820, and on 6th March thereafter a disposition was granted by the seller "in consideration of the sum of £5,616 instantly advanced and paid ;" and upon this Mr Sharpe was infest conform to instrument of sasine, dated and recorded at Edinburgh on the 7th and 11th March 1820. In the meanwhile a substitute under the entail had been endeavouring to prevent the completion of this arrangement by procuring a registration of the entail. A petition with this view was presented to the Court on 28th February, an order for registration was pronounced on the 11th March, and on same day the entail was duly recorded in the Register of Tailzies, thus corresponding in date with the sasine in favour of Sharpe.

In 1822 the pursuer's aunt, Mrs Brydie, instituted an action of declarator, irritancy, and reduction-improbation for setting aside the deeds above mentioned in favour of Sharpe, which action, however, was eventually discharged in 1824. The present action was brought to have the same deeds reduced, and also a bond and disposition in security by Sharpe, in favour of Joseph Bain of Morriston, and deeds following thereon ; and also a disposition and assignation of said bond and disposition in security, in favour of the deceased James M'Arthur, and instrument of sasine thereon. M'Arthur's trustees were thus parties to this action, which was also directed against Sharpe, the son of the original donee. The pursuer concluded for reduction, on the ground that the disposition in favour of Sharpe was granted in contravention of, and with the fraudulent purpose of defeating the entail ; and that the said disposition and sasine following thereon were executed after a proper application had been made to the Court, to have the entail recorded ; and further in the 4th reason of reduction, the pursuer concluded that the bond granted by Sharpe to Bain was void and null, as proceeding from a party *non habens potestatem*.

The Lord Ordinary (Ivory) held, that in the question with M'Arthur's trustees, even although the title of the other defender, Sharpe, should eventually be set aside for fraudulent conspiracy between his ancestor and the former heir of entail, it could not affect them representing an onerous third party, who *bona fide* relied on the faith of the public records, and was entitled to do so. No *vitium reale* attached to the title so made up.

His Lordship, therefore, so far as regards the question with M'Arthur's trustees, repelled the reasons of reduction, assoilzied and decerned, finding expenses due : and, as regards the defender Sharpe, remitted the case to the Issue Clerks.

Dec. 3. 1851.

Williamson and Sharpe reclaimed.

Pattison and Inglis for reclaimers.—This interlocutor is premature, and ill-founded in point of law. The act 1685 does not say that such tailzies only as are inserted in the register shall be effectual. The register is to be evidence merely that the deed has been judicially produced. The judicial production of the deed of entail, along with the petition for registration, is equivalent to publication to all the lieges, and renders the deed effectual from the date of such publication. In this way, publication of this entail, being prior to the date of Sharpe's sasine, was, therefore, a blot on his title. M'Arthur was bound to make inquiry and satisfy himself that his aauthor's title was good.

P. Shaw and Dean of Faculty, for respondents.—According to a sound construction of the Act 1685, an entail is not effectual against third parties until registered in the Register of Entails. Judicial production is not publication. An entail not registered has not the authority of this Court interponed to it. *Grahame v. Grahame*, 6th Oct. 1831, 5 W. and S., 759; *Smollet v. Smollet's Creditors*, 14th May 1807, Ap. to Dictionary, *voce* Tailzie, No. 12; *Drummond v. Munro*, 30th August 1831, 5 W. and S. 359; *Ross v. Drummond*, 9th Feb. 1836, Fac. Decisions, xi. 374. Erskine, B. 3, T. 5, § 10.

THE LORD PRESIDENT.—There are no solid grounds for sustaining the reduction now before us. Whatever appears on the summons as to a conspiracy in 1820 to defeat this entail is foreign to this discussion, for there are no special allegations to connect the heir in possession with any of these proceedings. But what is maintained is, that the security is not available in respect of the peculiar circumstances that took place in regard to the recording of the entail. This ground of reduction rests solely on the allegation that the security was obtained in violation of the deed of entail, and was executed after the proper application to the Court to have the tailzie recorded. I know of no case in which it has been found that when the question comes to be, was there a recorded entail at the time a particular transaction took place, that the preliminary steps necessary to the recording an entail have cut down any instrument whatever. Production of the deed to the Court is not publication in the sense of the Act of Parliament. The interponing of the authority of the Court is worth nothing, unless accompanied with a warrant to the Lord Clerk-Register to record. All these measures are merely precedent to the recording. That

Dec. 3. 1851. was not a deed of entail in point of form till the final fiat of the Court ordering registration was given effect to. Therefore there are no legal grounds on which I can think of overturning this judgment.

LORD FULLERTON was of the same opinion. After the passing of the statute 1685, publication was necessary to the efficacy of every entail against third parties; and no point in our practice is better settled in law than is the necessity of registration to the efficacy of an entail. The case of *Drummond* makes that very clear. This part of the case is quite untenable.

LORD CUNINGHAME also concurred. The doctrine laid down by Erskine in the passage before referred to is confirmed by Lord Stair, B. III., T. 9, § 16, and the various cases reported in the Dictionary, *voce Fraud*, 4886, &c.

LORD IVORY remained of the opinion expressed in his interlocutor. To allow the reading of the statute contended for by the pursuer would be to upset the construction put upon it for centuries. Production of the deed in Court, not registration, would henceforth be the rule for giving efficacy to entails.

The COURT, therefore, adhered to the interlocutor reclaimed against as in the question with Sharpe, and remitted to the Lord Ordinary, reserving all questions of expenses, and also refused Williamson's reclaiming note, with additional expenses.

Patrick Graham, W.S., Agent for Pursuer.

Alexander Nairne, W.S., Agent for M'Arthur's Trustees.

James Newton W.S., Agent for the Defender, Mr Sharpe.

TEIND COURT.

No. 58.

BELL AND OTHERS v. THE OFFICERS OF STATE.

Erection of Saint Columba's Gaelic Church, Glasgow, into a separate Parish, 7 and 8 Vict. c. 44, s. 12.

Dec. 3. 1851. This was a summons, by which the pursuers, Robert Bell, Esq. advocate, procurator for the Church of Scotland; the very Rev. John Lee, D.D., and others, trustees of the Gaelic Church, situated within the barony parish of Glasgow, known as the Gaelic Church of St. Columba, concluded under the authority of the 7 and 8 Vict. c. 44, sec. 12, and with reference to the constitution of the said Church, to have it found and declared, that, the said

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Church of St. Columba should, with the congregation thereof, though the members of said congregation be scattered over several parishes, be erected into a separate parish, without any territorial district being assigned to such parish exclusively, to be called in all time coming the parish of St Columba, Glasgow, under the provision and declaration, that religious instruction and the ordinances of religion should be in the Gaelic language, to the extent and in the manner provided by the constitution of the church—the patronage of the same to be vested in the male communicants belonging to the congregation, twenty-one years of age and upwards, in full communion with the congregation at the time of any vacancy, with the usual alternative condition respecting the *jus devolutum* of the Presbytery of Glasgow.

And this day, having heard *Baillie* for the pursuers, the Lords found, decerned, and declared, in terms of the conclusions of the libel in all respects.

William Young, W.S., Agent.

TEIND COURT.

PETITION, MEYRICK BANKES.

No. 59.

Parish of Poolewe—Erection into a separate Parish.—Circumstances in which *held* that intimation to all concerned was sufficient evidence that the limits of the parish were properly settled.

This was a petition by an heritor duly qualified under 7 and 8 Dec. 3. 1851.
Vict. c. 44, praying for the disjoining and erection of the parish Petition,
of Poolewe in the county of Ross, setting forth that, under the
authority and provisions of the 4 Geo. IV. c. 79, and 5 Geo. IV.
c. 90, an additional place of worship in the parish of Gairloch and
Presbytery of Lochcarron had been built and provided, and a
district defined and set apart for the same, conform to minutes of
Presbytery set forth, and therefore praying the Court to erect the
same into a parish *quoad sacra*, by the name of the parish of Pool-
ewe. The church had existed as a Parliamentary church for
about thirty years.

E. Gordon appeared in support of the petition.

The Solicitor-General, for the Crown, submitted that there was no evidence that the heritors had settled and agreed with the Presbytery as to the limits and bounds of the district.

- Dec. 8. 1851. The Court held, that this church having now existed for thirty years as a Parliamentary church, it was now too late to take this objection. Intimation of the petition had been made to all concerned;—they therefore decerned and declared in terms of the petition.

Petition,
Bankes.

John Macrae, W.S., Agent.

FIRST DIVISION.

No. 60.

SOUTAR v. SOUTAR.

Bill—Onerosity—Reference to Oath.—Circumstances in which *held* that the onerosity of a bill which had been granted as per agreement was established by the holder's deposition on a reference to oath.

- Dec. 5. 1851. This was an action at the instance of Christian Soutar against her brother for payment of £200 on a promissory note granted by him, in the following circumstances:—John Soutar, tenant in Ballinshoe, brother of the pursuer and defender, died in 1832. The defender, Peter Soutar, on the allegation that the executors named in his brother's testament, had declined to act, expedite a decree-tative, with a view to administering his brother's personal estate. Against that estate the pursuer, Christian Soutar, preferred a claim *qua* creditor on account of a legacy said to be due to her under her late father's deed of settlement. She and the defender, at the date of their brother's death, lived in family together, and so continued till 1841. The defender having then married, the pursuer left his house; and in April 1841, the defender granted the promissory note libelled on:—

“ £200.

Ballinshoe, April 1841.

Twelve months after date I promise to pay my sister, Miss Christian Soutar, tow hunder pounds, as per agreeament hereby refferred too.”

(Signed) “ PETER SOUTAR.”

When this note fell due it was not paid; and Christian Soutar thereupon raised an ordinary action in the Sheriff-Court to enforce payment. The defence was, that the accounts of the defender's intromissions with John Soutar's succession not having been settled, it was arranged between the pursuer and defender that he should grant her a bill in the meantime, payable at a distant date, but under the special condition and agreement that her right to claim the contents of the bill was to depend upon its being found that there was a reversion of John Soutar's succession when the affairs were wound up, and the defender's accounts, as executor,

Soutar v.
Soutar.

finally settled ; and he pleaded that as John Soutar's funds ultimately proved inadequate for payment of his debts, the pursuer could not make any claim upon the promissory note. The defender professed himself perfectly willing to account for his whole intromissions *qua* executor. The whole matter was referred to the pursuer's oath, upon the construction of which the case now hinged.

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Inter alia she deponed, " I did not give the defender money for the bill in question. I depone that he granted to me the promissory note, No. 2 of process, for L.200, as my share of John's property and effects. I wished L.400 as that share," &c. " I did not receive said note as for my full share of John's said effects. I still look for a farther sum to complete my share." She also deponed that, supposing John's effects not to have been sufficient to pay his debt in full, and that no money would thus be paid to the defender, " I certainly do not consider that I was or am entitled to anything either." " There was no valuation of John's effects made at the time of his death, but one for the inventory duty. No calculation was made at the time of the amount of his debts, or the value of his effects, so as to enable me to say that the value of the stocking was sufficient to pay the debt." Being asked whether the amount of her claim depends entirely upon the value of her late brother John's effects ? Depones, " There are plenty of funds, and plenty to pay every body." " I can give no explanation whatever" of the meaning of the words " as per agreeament hereby refferred to," in said promissory note. " I depone distinctly that the defender, at the time of granting said promissory note, agreed unconditionally to pay me said L.200 as my share of John's estate. There was nothing agreed on between the defender and me as to the time of payment of said note, farther than what the said note bears."

The Sheriff-substitute held the oath negative of the reference, which finding the Sheriff adhered to.

The defender advocated.

The LORD ORDINARY (IVORY) found the oath negative of the reference, but that the question as to the onerosity of the said bill, and the extent of such onerosity substantially resolved into a question of accounting as to how far the pursuer's claim, with interest as at the date of the bill, really amounted to £200.

Christian Soutar reclaimed.

P. Fraser and Inglis for reclamer. The reclamer has deponed "there is plenty to pay everybody." No matter what her *causa*

Dec. 5. 1851. *scientiae*, the matter was distinctly referred to her oath, and other considerations are now excluded. The oath at this stage of the proceedings must embrace the whole cause. *White v. Murdoch*, 9th June 1802, F. C. Both as to funds and liability her answers are distinctly negative of the reference.

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Soutar.*

Solicitor-General for respondent. There is nothing in the oath to shew that this was a donation unconditionally, that she was entitled to payment should there be no surplus on accounting. It is said the whole cause is referred, and that proof of the existence of funds is now barred. If a party depones to things *extrinsic*, as in regard to funds requiring an accounting, the oath can never bar further inquiry.

THE LORD PRESIDENT came to the same conclusion as the Sheriff-substitute. The defender referred all the facts and grounds of action on record, and on the whole the pursuer's oath was decidedly affirmative of her case, and negative of the reference.

LORD FULLERTON. If the question turned on the amount of John's succession, I should have great doubt as to the effect of the pursuer's depositions, as she pretends to have no *caus scientiae*. But it is unnecessary to go into that point, for the sole question is agreement or no agreement, and on this point the oath is negative beyond the possibility of a doubt.

LORD CUNNINGHAME concurred in thinking the oath negative. This was a compromise or agreement respecting this succession which the parties deliberately made for themselves, after having had a tract of years for inquiry and consideration.

LORD IVORY adhered to his former opinion.

The COURT, therefore, by a majority, altered the interlocutor of the Lord Ordinary, remitted to the Sheriff *simpliciter*, and found the advocator liable in additional expenses.

Graham Binny, W.S., Respondent's and Reclaimer's Agent.
John homeon, S.S.C., Advocator's Agent.

FIRST DIVISION.

No. 61. *Process—Judicial Factor, &c.—Form of Petition for Appointment of.*

Dec. 5. 1851. In the Single Bills to-day the Lord President announced that, in future, petitions for the appointment of judicial factors, curators, &c., must explicitly state the age of the pupil, &c., and the

value of the estate, and in the case of an insane person, the duration of his insanity, and the length of time his funds have been intrusted with by his friends: Also, whether the party craved to be appointed has been acting as agent for the pupil or insane person. This regulation had been approved of by both Divisions of the Court, and was in like manner announced by the Lord Justice-Clerk in the Second Division.

FIRST DIVISION.

CLARK'S TRUSTEES v. MRS MARY PATERSON OR HARDIE. No. 62.

Testament—Share of Child—Vesting.—A testator directed that on his youngest child attaining the age of eighteen his trustees should convert the residue of his estate into cash, and divide the same among his children, share and share alike: *Held* that such share vested *a morte testatoris*. *Observed*, that "vesting means the power of assigning or of testing."

The question raised in this process, which was a count, reckoning, and payment, was, whether the shares of the residue of the estate of the deceased John Harvey provided to his children vested *a morte testatoris*, or did not vest till the youngest child attained the age of eighteen years complete. The deed, among other provisions, which will be found alluded to in the subjoined argument of counsel, provides, "that as soon after my said youngest child have attained the age of eighteen years complete, my said trustees shall convert the remainder of my means and estate, heritable and moveable, into cash, and pay and apply the same equally amongst my sons and daughters, their heirs or assignees, share and share alike."

The testator had ten children. One of them, Catharine, married, and survived her father, but predeceased the date of the youngest child reaching the age of eighteen. Her husband, John Clark, also died. His representatives now claim Catharine's share of the residue of Harvey's trust-estate, along with the other beneficiaries, on the ground that a share vested in Catharine by surviving her father, and passed to her husband by marriage, and therefore now belongs to them as his representatives. This action was directed against the widow of the testator as his sole surviving trustee.

The Lord Ordinary (Wood) found in favour of the claim, and Hardie reclaimed.

Dec. 5. 1851. *Penney and Dean of Faculty* for claimer. The construction of the will must depend on the apparent intention of the testator. *Clark's Trustees v. Pater-son or Hardie.* The deed declares, that in the event of any of the children dying intestate, or without issue of their bodies before receiving payment, the share of the child so dying shall be divided equally among the surviving children. The case so contemplated has now occurred. The deed also provides that the rents, interests, and profits of the estate shall be bestowed in upbringing, clothing, and educating his children, until the youngest of them shall attain the age of eighteen years complete. There is no allocation here to each particular child. It was thus clearly the intention of the testator, that, until the specified event, the beneficiaries should not have the power of testing, and, therefore, that their shares should not vest. The power of testing is not necessarily implied by the phrase, "heirs and assignees." *Bell v. Cheap, 21st May 1845, 7, D. 614.*

P. Fraser and Marshall for respondents, argued that the intention of the testator must be held to have been that the shares should vest at his death. It could not have been his intention that in so large a family the eldest should not be able to avail themselves of their share, even as a fund of credit. The deed provides, that on the youngest child attaining the age of eighteen years complete, the trustees shall pay to the testator's spouse the sum of £1000, declaring that she shall have full power to test on the said sum. The deed also allows the trustees to advance a sum not exceeding £100 to any one of the children, such payment to be imputed to part payment of their share of the residue, and the residue is to be paid to their heirs and assignees. The share must have first vested before it could be assigned; accretion to the surviving children takes place only in the event of intestacy, or where there are no heirs; but the share in question was assigned by marriage before this destination took place. *Kennedy v. Thom, 20th July 1841, 3 D. 1266; Robertson v. Davidson, 24th November 1846.*

The LORD PRESIDENT thought that there was sufficient indication that the intention of the testator was that the shares should vest at his death. That intention was to be gathered from a consideration of the whole deed; but he laid great stress on the proviso that the residue was to be paid to the children, their heirs, or assignees. That indicated what was in the mind of the testator at the time—that they should have the power of assignation.

There is here a legal assignation by marriage ; and the representatives of Catherine's husband were therefore in right to claim her share.

LORD FULLERTON was of the same opinion. The mere circumstance of payment being postponed was as consistent with the notion of vesting as of non-vesting. Vesting means the power of assigning or of testing. Here there is only a postponed payment ; but when made, it is to the children, their heirs or assignees. That authorises the power of assignation on the part of the children.

LORDS CUNNINGHAME and IVORY concurred.

The COURT, therefore, adhered to the Lord Ordinary's interlocutor reclaimed against, and remitted to his Lordship as to expenses.

Archibald Melville, W.S., Agent for Defender and Reclaimer.

Andrew Howden, W.S., Agent for Pursuers.

Dec. 5. 1851.

Clark's Trustees v. Father-
son or Hardie.

SECOND DIVISION.

MEIKLAM v. GLASSFORDS.

No. 63.

Process—Adjudication—Parliamentary Trust—Pleas in Law.—Held that an Act of Parliament vesting portion of an entailed estate in trustees for the purpose of sale, to discharge debts on the estate, did not bar adjudication at the instance of a prior creditor, there being no special clause in the Act excluding such adjudication ; also, Held that in such adjudication it was not necessary to call the parliamentary trustees as defenders, nor the heir of an alleged purchaser under the Act, who refused to implement the sale—Observed, that defences to the adjudication founded on the existence of the Act as rendering the adjudication incompetent, were preliminary, and not dilatory pleas.

This was an action of adjudication at the instance of a creditor on an entailed estate having right to attach the fee of the entailed estate for his debt. In defence it was stated that an Act of Parliament had been passed for a sale of part of the entailed estate, in satisfaction, among others, of the debts founded on, by which statute part of the lands sought to be adjudged was vested in the Parliamentary trustees therein named. It was farther stated, that in consequence of the powers conferred on the trustees, they had sold a portion of the lands ; that the purchaser (who was now dead) had failed to pay the price or implement the sale, and that an action had been raised against his heir for implement of the sale, and damages. And it was pleaded that the summons should be dismissed, because, 1, The trustees who were vested by the

Dec. 5. 1851.

Meiklam v.
Glassfords.

Dec. 5. 1851. *Meiklam v. Glassfords.* statute in the lands mentioned had not been called as parties ; 2, Because the heir of the purchaser had not been called. It was also pleaded, 3. that "as a Parliamentary trust was created for payment of the debts in question, the attempt to adjudge the lands is incompetent," and, 4. that, "as part of the lands sought to be adjudged is not vested in the defender, but is vested in the parliamentary trustees, the adjudication as to them is incompetent."

The Lord Ordinary (Cowan), by his interlocutor, "Repels the objections stated to the competency of the action, and the whole other defences in so far as preliminary : Sustains the competency of the action as libelled ; and appoints the record to be prepared on the merits."

The defenders reclaimed.

P. Shaw for reclaimers—The parliamentary trustees should be called. *Bell v. Willison*, 8th July 1822, 1 S. App. C. p. 220. *Brown v. Wemyss*, 25th May 1827, 5. S. 703; *Bennet v. Reid's Trustees*, 27th May 1828, 6. S. 854. The Lord Ordinary deals with the objections to the competency of the action founded on the existence of the parliamentary trust, as being dilatory pleas, and dismisses them without allowing a record. He calls them preliminary, but that term is inaccurately used for dilatory. He is wrong in so doing. They are pleas on the merits, because, if sound, they exhaust the cause, and leave the pursuer no case on which to go to any other Court. They bar action altogether. The defender was therefore entitled to be allowed to make up a record for establishing them. If they are dilatory, the defender has nothing to state on record as to the merits; *Geils v. Geils*, 8th May 1851, Scot. Jur. 23, 435; Lord Chancellor's speech. The Act of Parliament declares that adjudication shall not be competent at the instance of any creditor.

Dean of Faculty, (with whom *Mure*) for respondents. The Act of Parliament was made applicable only to part of the entailed estates, while the adjudication extends to the whole. It only gives a power to sell and no power to intromit with the rents, and the trustees have never done so. Next, it provides that until a sale takes place, "the heir of entail in possession, for the time being, shall be entitled to use and exercise all the powers and privileges competent by law to any heir of entail," so that until estate is sold there is no divestiture of the heir. Accordingly, after the Parliamentary trust, he granted bond of annual-rent over the lands for £4000, and the First Division sustained it as a good bond; *Glassford's Executors against Scott and Others*, 9th March 1850, 12. D. 902. Can it now be said the heir has not the fee of the

estate? Campbell against Campbell, 11th July 1828. (Counsel Dec. 5. 1851.
was stopped by the Court in his argument.)

LORD JUSTICE-CLERK.—There is no difficulty in this case. In Glassfords. *Meiklam v.* the first place, nothing but an express clause in the Act of Parliament can make it a ground for stopping diligence for debts anterior to the Act; but there is none such here; therefore the pursuer was not bound to call the trustees, because not bound to recognise their right. As to calling the purchaser's heir it would be preposterous to require an entaller's creditor to call, in an adjudication for his debt some one liable in damages for failure to implement an authoritative sale. The two defences founded on those parties not being called are dilatory. Perhaps all the defences are so; but assuming the others, from the mode in which they are worded, to be preliminary, (and a dilatory and preliminary defence are quite different things)—a preliminary defence does not necessarily require probation, but may be dismissed as incompetent. Now, as I hold the adjudication competent, and must be sustained as such, I am for repelling these pleas, which are proper objections to the diligence of adjudication proceeding.

LORD MEDWYN took the same view. The parliamentary trustees, the statute says, are to be vested, but to what effect? not that they are to have the management of the estate, because there is a clause in the act saying the heir is to exercise the powers of management. There is no clause excluding adjudication. There was, indeed, a clause saying it was not to be necessary, but none to prevent creditors bringing adjudication.

LORD COCKBURN concurred. In regard to the form of the interlocutor, I see the first two defences are not preliminary, but dilatory, a term often incorrectly used. The other two defences are bad defences, but I have some doubt whether the defender should not have had a record.

LORD MURRAY concurred.

The Court pronounced an interlocutor, by which they "recal so far, and vary the interlocutor, as to repel the first two defences which are dilatory, and repel the other objections to the competency of the summons of adjudication, which are proper objections to the diligence of adjudication proceeding: sustain the cause as competent; and the whole defences stated being thus repelled, remit to the Lord Ordinary to proceed with the adjudication, with due regard to the whole defences being disposed of."

William Muir, S.S.C., Reclaimer's Agent.

Patrick, MacEwan and Carment, W.S., Pursuer's Agent.

FIRST DIVISION.

No. 64.

JOHN THOMSON and OTHERS, Petitioners.

Process—Summary Application—Curator Bonis—Intimation.

Dec. 6. 1851. ^{Thomson, &c., Petitioners.} Last session a petition was presented, in name of the petitioners, for the appointment of a *curator bonis* to Thomson's father, who had fallen into a state of mental imbecility. The petition craved the appointment of A, whom failing of B. The Court, after intimation, appointed A. A failed to accept the office.

Shand, for the petitioners, at the last calling, resumed the case, stating that A had refused to accept, and craving that B should be appointed in his place.

LORD PRESIDENT. This cannot be done at once. Full intimation must be made *de novo* to all concerned, and to the party himself who is said to be insane, just as if this were the original application.

Intimation having accordingly been made in terms of the order of Court, B was, of this date, nominated curator.

John Gardiner, S.S.C., Agent.

FIRST DIVISION.

No. 65.

Petition, JAMES MATTHEW.

Process—Pupils' Protection Act—Factor loco Tutoris—Special cause must be shewn for a petition for appointment of factor loco tutoris to minores puberes.

Dec. 6. 1851. ^{Pet. Mathew.} This petition prayed for the appointment of a factor *loco tutoris* to five children, all of whom were above pupillarity, excepting the youngest, who was about ten years of age.

LORD IVORY. By the Act of Sederunt of 17th February 1730, factors are to be appointed on the estates of pupils not having tutors, and of persons absent that have not sufficiently empowered persons to act for them, or who are under some incapacity for the time to manage their own estates. The Pupils' Protection Act does not extend the rule, but narrates the Act of Sederunt 1730. These minors, therefore, cannot have a factor *loco tutoris*. There is no obstacle to their choosing curators for themselves. The

Court, therefore, will require special cause to be shewn for appointing a judicial factor for them.

Dec. 6. 1851.
Matthew,
Petitioner.

THE LORD PRESIDENT. The ages of the pupils should be distinctly stated, and the nature and extent of the property to be under the power of the tutor, in accordance with the rule lately laid down by the Court.—(See *ante*, p. 112.)

Marshall, for petitioner, asked leave to put in an amended petition.

Leave granted.

John Gardiner, S.S.C., Petitioner's Agent.

FIRST DIVISION.

NISBET'S TRUSTEES v. NISBET and OTHERS.

No. 66.

Deed of Settlement—Forfeited Share—Next of Kin.—Where one of the beneficiaries under a deed of settlement had incurred the forfeiture of his share: *Held* in a competition between the other beneficiaries adhering to the settlement and the next of kin, that the forfeited share accrued to the beneficiaries who so adhered, and could not be claimed as a lapsed legacy by the next of kin.

This was a competition between certain of the beneficiaries under a trust-disposition and settlement of the late Thomas Nisbet, Esq. *Dec. 6. 1851.* *Nisbet's Trustees v. Nisbet,* of Tweedbank and Mainhouse, and his next of kin, as to the right to part of his succession, forfeited under the said settlement. The case came before the Court in the form of a multiplepoinding, at the instance of Mr Nisbet's trustees, as the holders of the fund *in medio*. Mr Nisbet died on 10th February 1848. He left no family, and never was married. By deed of settlement he directed that after his estate shall have been realised, his trustees should divide the residue into three equal parts, and assign one share to the children of his brother, Robert Nisbet, another share to the children of his brother, Ralph, and the remaining third he directed to be invested in good security, “taking the deeds or writings constituting the securities or investments to and in favour of the said Martin Bladen Edward Hawke, (his sister's son), in liferent, for his liferent use allenarly; and if he shall predecease his mother, to and in favour of the said Mrs Hannah Nisbet or Hawke (the testator's sister), in liferent, for her liferent use allenarly; and to and in favour of the children of my said brother, Robert, other than his said eldest daughter, to the extent of one half of the said third

Dec. 6. 1851. share, and the children of my brother, Ralph, to the extent of the other half of the said third share, in fee," &c. The deed of settlement also contains a special provision that if either of the testator's brothers or sisters, or any other of the beneficiaries, shall impugn the validity of the settlement, they shall forfeit for themselves and children all right to any benefit under it.

Nisbet's Trustees v. Nisbet, &c.

After the trustor's death, his brother, Ralph, as heir-at-law, successfully challenged the trust-settlement, on the ground of deathbed, and obtained decree of reduction, in so far as concerned the whole heritable estates belonging to the deceased. Ralph thus forfeited the share of the succession which would otherwise have been assigned to his children, and the question now arose, to whom does this forfeited share belong? The original value of the trust estate was about £21,850. It was now reduced to about £8,500. The children of Robert Nisbet, as beneficiaries, contended that they were entitled to one half of this sum immediately, and to the fee of the other half on the expiry of the life-rents in favour of Martin Bladen Edward Hawke, and his mother: on the other hand Mrs Hawke claimed to be preferred to one half of the fund *in media*, as of a lapsed legacy, and so accruing to her as one of the next of kin of the deceased trustor.

The Lord Ordinary (Cunningham) held that it was presumable, on a sound construction of the settlement, and on a reasonable interpretation of the trustor's meaning and intention in that deed, that the forfeiture of the third share should accrue to the beneficiaries who adhere to the settlement, so as to compensate and indemnify them in part for the loss sustained by the repudiation of the father of the other beneficiaries. His Lordship was of opinion that the trustor only intended the division to be tripartite if the heir did not challenge the settlements; but if he did, he meant the children of that heir to be excluded, and thus declared in effect that the division should be bipartite. In corroboration of this view, his Lordship referred to Lord Eldon's judgment in *Kerr against Wauchope* in 1819, 1 Bligh, p. 1, and to the judgment of Sir Thomas Plumer, Master of the Rolls in *Gretton*, against Haward, 1 Swanston, p. 409.

He therefore repelled the claim of Mrs Hawke, who now re-claimed.

Baillie, with whom *Dean of Faculty* for reclamer. Repudiation by the heir-at-law was contemplated by the testator; and he provides against it accordingly. Whoever challenges the deed forfeits his share under it. But he does not go on to say, that in

that case the residue shall be divided between the other two parties; Dec. 6. 1851.
the words are express that each party shall take a third merely.

With regard to this forfeited third, therefore, there is intestacy; Nisbet's Trustees v. Nisbet, and as one of the next of kin, the half of it falls to Mrs Hawke, &c.

The doctrine of compensation is not known in the law of Scotland.

Macfarlane, with whom *Marshall*. The two points to be considered are, 1st, what was the intention of the testator? and, 2d, are there funds to carry it out? The Court has always proceeded on the principle, that so far as possible, the intention of the testator shall be carried out. *Macalister*, June 29. 1827, 5 S., p. 562; *Peat v. Peat*, February 14. 1839, 1 *Dunlop*, p. 508; *Breadalbane*, January 15. 1841, 3 *Dunlop*, p. 357.

The intention of the testator was, that the fee of the whole residue should vest in the beneficiaries. This is not an intestate succession, but is carried by the settlement, and goes *pro tanto* to make up what was the intention of the testator. The respondents' claim is supported by the analogous doctrine in the English law of equity of compensation.

THE LORD PRESIDENT was of opinion that the interlocutor of the Lord Ordinary ought to be adhered to. The testament provides that whoever shall impugn the deed shall forfeit his share. Looking to this provision, he could entertain no doubt that this attempt of Mrs Hawke so to betake herself to her claim as one of the next of kin to the deceased, was just as much an attempt to defeat and impugn the settlement of the deceased as the act of the brother who claimed as heir-at-law. She rejects her definite right of liferent altogether,—her son, also a beneficiary, concurring with her, and claims right to all that has been disengaged by the act of her brother. It is not disputed that Mrs Hawke and her son, as liferenters, participate in this sum which is cut off. The other beneficiaries admit that they are to get the same benefit as themselves, in the proportion of the interest therein created by the deed. The Lord Ordinary had done justice to the parties by his interlocutor now under review.

LOD FULLERTON was of same opinion. The argument for the respondents was rested on the English doctrine of compensation; but that doctrine, so far as known to his Lordship, led to much the same conclusion as that to which he arrived by reasoning in our own law. These beneficiaries claim the whole of the remaining fund, which, even if they get it, will leave them losers to a

Dec. 6. 1851. considerable extent, and Mrs Hawke, who is altogether excluded from the testament, claims her share as next of kin. The whole *Nisbet's Trustees v. Nisbet*, fallacy of the argument for the next of kin lies in supposing that &c. one-third of the residue contemplated by the testator is equal to one-third of the residue as it now stands. There were no grounds in law or equity, for supporting this claim.

LORD CUNNINGHAME disclaimed every notion that the law of Scotland, in questions analogous to the present has been derived from English precedents or practice. The maxim *Qui reprobatur non approbat* has been recognized in our practice for centuries, being adopted, like many of our rules, from the Roman law, the chief fountain of our jurisprudence. See the case of *Lady Essex Kerr*, and many prior decisions. But here there is a special declaration forfeiting the share of a repudiating donee. The question, therefore, is, whether this share is to be held as a lapsed provision left intestate, or as a portion meant by him to accrue and go into the general residue. His Lordship held that the former alternative was out of the question. The law generally is most adverse to the conclusion of intestacy, and adopts any reasonable construction of the will to avoid it. He adhered to his former opinion as Lord Ordinary.

LORD IVORY also adhered to the interlocutor, adopting the principles laid down by the Lord Ordinary.

THE COURT, therefore, refused the reclaiming note, and adhered to the interlocutor of the Lord Ordinary, with expenses.

A. and C. Douglas, W.S., Agents for Reclaimers.

Lockhart, Morton, Whitehead, and Greig, W.S., Agents for Respondents.

HIGH COURT OF JUSTICIARY.

No. 67. BEFORE the LORD JUSTICE-CLERK, LORDS WOOD, IVORY,
COLONSAY, and COWAN.

H. M. ADVOCATE *v.* JOSEPH KILGOUR, Pannel.

Indictment—Theft, Fraud, &c.—Husband and Wife.—A husband appropriated a sum of money, which, by antenuptial contract, was expressly reserved to the wife,—the husband's *jus mariti* being declared to be excluded: Held that an indictment charging the husband with the crime of theft, as also fraud, was relevantly laid.

The major proposition of the indictment in this case charged Dec. 8. 1851. the pannel with "theft; as also fraud; as also breach of trust and ~~embezzlement~~^{H. M. Advocate v. Kil-}, in so far as he did steal and theftuously away-take, from his wife, the sum of L.200; or otherwise, he did fraudulently and feloniously, and in breach of the trust reposed in him, embezzle and appropriate to his own use the said sum of L.200—the same being the exclusive property of his wife.

The indictment narrated that by antenuptial contract of marriage, the sum of L.200, contained in a bond and disposition in security, was expressly declared to remain the property of the wife, Kilgour renouncing all right in the same, in virtue of the *jus mariti*, courtesy, or otherwise; and that full power was reserved to the wife to uplift the bond and grant discharges therefor, without the consent of her husband. The indictment then libels, that it having become necessary to uplift theforesaid sum of L.200, the same was entrusted to Kilgour by his wife, to be deposited in bank in her name, or that he, having fraudulently obtained possession of the notes, upon the pretence of carrying them to the bank, did wickedly and feloniously steal, and theftuously away-take, the bank-notes to the above amount; or otherwise, did fraudulently and feloniously, and in breach of the trust reposed in him, embezzle and appropriate to his own uses and purposes the said bank-notes, the exclusive property or in the lawful possession, of the said Margaret Kilgour, his wife.

Craufurd, for the pannel, objected to the relevancy of the indictment. Although, according to the rules of our civil law, the property might still be considered as belonging to the wife, yet the *species facti* of the libel here did not constitute a crime as against the husband. By the law of Scotland husband and wife are recognised as one person, and the husband, therefore, cannot be said to steal what is his own. The wife cannot be convicted of stealing from the husband goods falling under the *communio bonorum*, much less can the husband, who is the *dominus*. By renouncing the *jus mariti*, he cannot confer on the wife a higher right in the *communio bonorum* than his own.

There are only two instances on record of such a charge being brought before the Court; and in both instances the charge was abandoned.—*Jane Becket*, 26th April 1831; *Donald Macleod*, Oct. 14. 1838, Swinton's Reports, ii. 190. The institutional writers are silent on the subject.

In the law of England it is clearly laid down that it is not theft

Dec. 8. 1851. for a wife to take her husband's goods ; Roscoe's Digest, 3d ed., pp. 593-4 ; 1 Russell on Crimes, p. 22.

H. M. Advocate v. Kilgour.

This was therefore a new case in criminal law ; and the Court would be slow to constitute that act as a crime which might have been committed under the belief that it was not so, and which would expose the husband to sentence of transportation for doing what a wife might do in England with impunity.

He also objected that the three charges in the indictment are so laid, that the prisoner is said to be guilty of one or more of them, so that there was a cumulative minor proposition.

The *Solicitor-General* and *Young, A.D.*, were for the Crown.

LORD WOOD. In this case the property belonged to the wife by express stipulation in the contract, and in respect thereto the husband had renounced his *jus mariti*. Therefore, the husband could not uplift or appropriate it to himself without his wife's consent, and it was relevant to charge him with feloniously stealing it. The mode in which the theft was said to have been committed was also relevantly laid. He could not detain the money without committing theft. He was also of opinion that it was quite possible for the wife to steal from the husband, and competent in certain circumstances to try her for it. If, as was argued, the husband could not be found guilty of any such offence against his wife, in consequence of their being *una persona*, as little could he be found guilty of assaulting her. He therefore held that the charge was relevantly libelled. As to the charge of fraud, it has been established by many decisions that the minor proposition may be so set forth.

LORD IVORY said the case decided itself as soon as it was admitted that the property in question was the exclusive property of the wife. The husband here was bound to respect the property of his wife, and more eminently bound to protect it than any other person, and his being the offender might rather be considered as an aggravation of the charge. His Lordship, however, would rather withhold any opinion in regard to theft on the part of the wife till such a case came up, and certainly such a case had never been decided yet.

LORDS COLONSAY and COWAN concurred that the charge was relevantly libelled.

THE LORD JUSTICE-CLERK concurred. He laid aside the consideration of any charge that might be brought against a wife for stealing from her husband, because the particular specification of facts might raise a different question from that before the Court,

and the relevancy of the charge might depend on the kind of ap- Dec. 8. 1851.
propriation. In this case it was admitted that the money was the ^{H. M. Adv-}
separate property of the wife, by deeds which the law considers ^{cate v. Kil-}
the most sacred for constituting a separate right of property, and ^{gour.}
these funds were assuredly under the ordinary protection of the
law against crime.

He regretted that for some years the Court had allowed one minor to stand for the separate charges in the major proposition. But such being the case, he concurred that the charge was relevantly laid.

THE COURT, therefore, repelled the objections, and sustained the relevancy of the libel.

HIGH COURT OF JUSTICIARY.

BEFORE THE SAME LEARNED JUDGES.

Suspension and Liberation.—WATT v. HOME.

No. 68.

Indictment—Relevancy—Theft—Expenses in Inferior Court.—Held that a party who had received yarn for the purpose of being woven into a web, and appropriated the yarn, was properly charged with theft.

This was a suspension and liberation at the instance of Alexander Dec. 8. 1851.
Watt, weaver in Forfar, convicted of the crime of theft, and sen- ^{Watt v.}
tenced to six months' imprisonment, against Andrew Home, Fiscal ^{Home.}
of the burgh of Forfar; and it proceeded on the ground of the irrele-
vancy of the libel, under which the complainant was convicted. The
libel charged him with the crime of theft, in so far as on 26th May
1851, "the said Alexander Watt having received from James
Moffat, residing in Victoria Road of Forfar, and warehouseman
to Charles Lucas and Company, manufacturers in North Loan of
Forfar, from their premises, a certain quantity of yarn and tow,
for waist and weft, to be woven into a web, as therein mentioned,
did wickedly and feloniously, &c., steal and away take," the said
quantity of flax-yarn and tow, "the property, or in the possession,
of the said Charles Lucas and Company, or the said James Moffat,
their warehouseman, or one or other of them."

Logan, for complainant, argued that the libel preferred against the complainant was, *ex facie*, wholly irrelevant, the major proposition contradicting the minor, and the whole statement in it

†

Dec. 8. 1851. proving that the crime of theft never existed. If the complainer did not return the wrought web, or the materials, he might be guilty of embezzlement, breach of trust, or fraud, but not theft. Counsel referred to the series of cases quoted in Bell's Notes to Hume, p. 9, and particularly to the case of *Brown*, 3d July 1839, 2 Swinton's Reports, 394; also to *Bradley*, 6th February 1850, Shaw's Reports, 301.

Watt v.
Home.

Craufurd, (with whom *Millar*) for respondent. On the authority of the decided cases, particularly that of *Brown* before referred to, the averments constitute the crime of theft, and not merely breach of trust or embezzlement.

LORD WOOD.—There is no sound distinction between this case and the case of *Brown*, where the possession of watches given for the purpose of being cleaned was held to be a limited possession merely for a specific purpose. The same principle applies here. It is the same thing that is to be returned; the same yarn, only in the condition of a web instead of yarn. Many other cases involving a similar principle have been decided, and between them and the present there is no distinction whatever.

LORD IVORY was of same opinion. This person gets delivery of the yarn for a special purpose, and whilst this purpose has not been fulfilled, the party appropriates the yarn to his own use. It was unnecessary to say more than this. It was clearly theft. In the case of *Bradley*, a pawnbroker was held to have a certain *proprium jus* in the articles pledged with him, which distinguishes it from such a case as the present.

LORD COLONSAY concurred. There is no part of our criminal law in which our constitutional writers have greater difficulty than in distinguishing between theft and breach of trust. He thought this was one of the cases which clearly fell under the denomination of theft. This yarn was given to this party to be returned by him; he appropriated it, and that involves all the essence of the crime of theft.

LORD COWAN was of same opinion.

The LORD JUSTICE-CLERK also concurred. Where one party gives certain articles to another, acting under his instructions for his interest, to be used in a particular way, the party so receiving the goods has no separate possession, for he gets them under these particular instructions, and if he appropriates them, that is theft.

The COURT, therefore, refused the note of suspension.

The respondent's counsel asked expenses; but the Lord Justice-Clerk observed, that in an ordinary case of crime or theft, prosecuted as a proper matter of dittay, he was not prepared to give expenses against the criminal who had appealed, as in cases prosecuted for fine or imprisonment, in which expenses could by statute be concluded for, and that as the prosecutor in this, (the Justiciary) Court did not get expenses, he saw no reason, in a case of theft, why the Procurator Fiscal should get expenses against a man sentenced to six months' imprisonment for theft. The claim for expenses was therefore waived.

Wotherspoon and Mack, S.S.C., Complainant's Agents.
Sang and Adam, S.S.C., Respondent's Agents.

HIGH COURT OF JUSTICIARY

BEFORE THE SAME LEARNED JUDGES.

HER MAJESTY'S ADVOCATE *v.* JOHN MOONEY.

No. 69.

Act 2 Will. IV. c. 34—Uttering.—A counterfeit coin was substituted for a genuine shilling received in change, and another genuine one demanded for it: *Held* that this was "uttering" in the sense of the statute, 2 Will. IV., c. 34; *held* also that in an indictment under the statute, it was not necessary to libel "uttering *as genuine*."

This case was certified from the Glasgow Autumn Circuit Court Dec. 8, 1851. by Lord Colonsay. Mooney was indicted under 2 Will. IV. c. 34, § 7, with the crime of uttering base coin, as also with falsehood, H. M. Advocate v. fraud, and wilful imposition. The statute enacts, that "If any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, &c." The *species facti* were thus set forth:—This you did, by "representing, or pretending to the said Margaret Turnbull or Dunn that she had then and there delivered to you the said false or counterfeit coin instead of a genuine shilling piece, as part of the change which you were entitled to receive from her out of a half-crown piece," the counterfeit coin having been substituted by Mooney for a genuine shilling received by him.

Maconochie for the pannel, objected that the crime, as specified, did not amount to the statutory offence, which presumes intention on the part of the utterer of the coin to injure the currency of the realm. This intention was here wanting; for the coin was uttered

Dec. 8. 1851. as false, not as genuine. In the crime of forgery, it was essential that the subject of the crime should be uttered as genuine ; Hume, i., 150. To this rule there was only one exception, viz., where coin or notes were transferred as false from one accomplice to another. But this exception had no analogy to the present case, as in that crime there was the deliberate intention to defraud the revenue, which was wanting here, where the party to whom the coin was issued was warned by the act of issuing, and was bound to destroy the coin.

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Mooney.

THE LORD JUSTICE-CLERK had no doubt that this crime fell under the statute. In the first place, it is not necessary that the coin should be issued as genuine ; and, in the second place, this coin was issued for the purpose of getting value for it, viz., a genuine coin substituted in its place. Whatever does resemble the coin of the realm, in whatever way it is put off, amounts, when put off, to uttering in the sense of the statute. The act of putting off, is for the purpose of getting value for it.

LORD WOOD was of the same opinion. It is of importance that this statute does not say "tendering as genuine." That shews that it was not considered necessary in order to make a relevant indictment under the statute, so to word it. This person contrived to substitute for a good coin a bad shilling, and in this way got value in the shape of a good coin for a bad one. Unquestionably he uttered it as false ; therefore the charge was relevantly laid ; for it was not necessary under the statute to libel that he uttered the coin as genuine.

LORD IVORY—The Act is a consolidating statute, and the decisions under it are applicable to the whole kingdom. The case of *Frank*, Russell on Crimes, i. 78, 3d ed., shews that in England the word "uttering" has the extended signification given to it in this indictment, and being a decision under the statute, was therefore, in his opinion, conclusive on the subject.

LORD COWAN also expressed his opinion, that the indictment was relevant.

LORD COLONSAY concurred. This party is in possession of the false coin, and confessedly intended to pass it instead of a genuine coin. By reason of its resemblance he substitutes it for a coin of the realm, and by so substituting it he brings it into circulation. This is a fraudulent dealing with the coin, which clearly brings it within the meaning of the statute.

The Court, therefore, repelled the objection, and found the indictment relevant.

HIGH COURT OF JUSTICIARY.

BEFORE THE SAME LEARNED JUDGES.

No. 70.

Suspension and Liberation, M'DONALD v. LYON and MAIN.

County Constable—Arrestment—Undue Detention by Constable without Warrant of Commitial.

About one o'clock on the morning of Monday the 11th August, Dec. 8. 1851. the suspender was arrested by James Main, county constable of Dumbartonshire, with the assistance of William Lyon, officer of police for the burgh of Kirkintilloch. The arrest was made within the burgh, and without any warrant, in consequence of a serious charge of assault preferred against the complainant by a party in whose house he was apprehended by the officers. After his apprehension the suspender was lodged in a building used as a lock-up-house by the burgh police, and there detained until the morning of Wednesday the 13th, when he was conveyed to Dumbarton for examination before the Sheriff, and liberated in the course of the same day. The present bill was brought in order to have the apprehension and imprisonment suspended, as illegal and *ultra vires* of the officers.

Mure, (with whom *Watson*,) for the respondents. The suspender was the prisoner of Main, the county constable, who acted under statute 1617, c. 8, and not under the General Police Act (3 and 4 Will. IV. c. 46). He was not, therefore, strictly bound either to carry the person in his custody before a magistrate within twenty-four hours, or to liberate him *de plano*, but might detain him longer at his discretion, on shewing a reasonable and sufficient cause for so doing. On Monday the 11th, he was compelled to be present in a criminal court at Stirling as a witness, and on Tuesday the 12th attended the Sheriff at a Small-Debt Court held in Kirkintilloch, when he informed the Sheriff that the suspender would be conveyed to Dumbarton for examination by him on the following day. Owing to the distance between Kirkintilloch and Dumbarton, the respondents, in these circumstances, were justified in detaining the suspender.

Craufurd, for the suspender,—It was the duty of every officer, especially when acting without a warrant, immediately to convey the party apprehended before the nearest magistrate.—*Hume*, II., p. 75. In this case the suspender should have been taken before the magistrate of the burgh, who, if the charge, upon

Dec. 8. 1851. *M'Donald v. Lyon, &c.* inquiry, had proved a serious one, could have granted warrant of committal for trial before the Sheriff. At all events, the suspender should, on the 12th August, have been brought up for examination before the Sheriff when he was officially present in Kirkintilloch. The Sheriff was made aware of the long period of the suspender's detention, and no verbal report made to any magistrate could justify such detention without a warrant.

LORD JUSTICE-CLERK held, that in this case, the powers of a constable had been far exceeded. Main must have been duly cited to appear at Stirling as a witness on the Monday, and could not, therefore, have been called away unexpectedly. He might then have directed his fellow-officer, Lyon, to carry the party in custody to Dumbarton, or before one of the burgh magistrates, who had certainly full power to investigate and commit. Besides, the prisoner's person and residence were both well known, so a safe alternative would have been, to release him then, and afterwards to obtain a warrant against him. But with our improved facilities for conveyance, he (the Lord Justice-Clerk) really could not, in any circumstances almost, pronounce a judgment finding a constable entitled to detain a party, without bringing him before a magistrate, for sixty-five hours, as was the case here, and consequently he must pass the bill with expenses.

The other Judges concurred.

*Alex. Hamilton, W.S. Suspender's Agent.
John Forrester, W.S. Respondents' Agent.*

COURT OF EXCHEQUER.

Before LORD RUTHERFURD and a JURY.

No. 71.

H. M. ADVOCATE-GENERAL *v.* RENNIE.

Solicitors and Law-Agents—Admission Duty—Contravention of 55 Geo. III. c. 184.

Dec. 8. 1851. *H. M. Advocate v. Rennie.* This was a prosecution to recover from the defendant the admission duties payable under the Stamp Act, 55 Geo. III. c. 184, by a solicitor, procurator, or law-agent, practising before an Inferior Court.

Donaldson (with whom the *Lord Advocate* and *Solicitor-General*) stated the case for the Crown. The defendant in this suit, Alexander Rennie, was a solicitor, and had for many years practised

as such in Inverness, without having qualified himself in the manner required by the 55 Geo. III. c. 184, Schedule, part I. Pre-
vious to his admission by the Sheriff of Inverness, he had not served the usual clerkship or apprenticeship, and therefore, besides the ordinary admission duty of £25, he had incurred the further duty of £30, required by the statute in the case of a party in that position. These sums, amounting together to £55, he had failed to pay, although he had continued to practise, and therefore the present suit had been rendered necessary. The Jury would have no difficulty in the case, as, besides other evidence, a letter would be produced from the defendant, addressed to the Solicitor of Inland Revenue, admitting that he had practised as a solicitor since April 1836, and that he was in law liable in the demand made by the plaintiff.

Evidence having been led to the above effect, and no appearance made for the defendant,—

LOD RUTHERFURD charged the Jury, who then gave a verdict for the Queen for £55.

The Solicitor of Inland Revenue for the Crown.

COURT OF EXCHEQUER.

Before the same Learned Judge and a Jury.

**H. M. ADVOCATE-GENERAL v. HENRY BROWN and
GEORGE BROWN.**

No. 72.

Excise—Malt—Contravention of the 7 and 8 Geo. IV., c. 52, secs. 1 and 40.

This suit was instituted against the defendants for making malt in an unentered place, and for concealing and conveying away malt to evade the duty.

The first count of the information stated that, on the 27th day of January 1851, the defendants, being maltsters and makers of malt, did use a certain place for making forty bushels of malt without having made an entry thereof, as required by the 7 and 8 Geo. IV. c. 52, sec. 1, whereby they had forfeited and lost the sum of £.100.

The second count set forth that, on the same day, the defendants fraudulently deposited, concealed, and conveyed away, from the sight of the officers of Excise, forty bushels of corn and grain making into malt, in contravention of the 40th section of the above

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&c.

Dec. 8. 1851. H. M. Advocate v. Brown, &c. statute, whereby they had forfeited and lost the farther sum of L.200.

The defendants pleaded the general issue.

Donaldson (with whom *the Lord Advocate* and *the Solicitor-General*) stated the case for the prosecution, and led evidence.

Millar, for the defendant George Brown, argued that the evidence did not shew that the premises into which the malt was put were his, and that the Crown had put the charge in the first count upon the ground that the premises were those of Henry Brown, who was the only party bound to enter the premises; and that they could not be therefore held to be unentered premises used by George Brown.

No defence was offered for Henry Brown.

LORD RUTHERFURD charged the Jury.

Verdict for the Queen on both counts; penalties L.600.

The Solicitor of Inland Revenue for the Crown.

SECOND DIVISION.

No. 73. M.P. POLLOCK, (Macdonald's Trustee,) v. MUIR and OTHERS.

Trust Deed—Powers of Trustee—Investment for Beneficiary. Where a trust deed empowered the trustees on the trustee's daughter "attaining majority, or, on her previous marriage, to lay out in heritable bonds" or otherwise a sum of money, "and take same payable to herself; or, should" they "deem it advisable," authorised them to take the bonds "payable to herself in liferent," and her children in fee; *Held* that the primary obligation on the trustees was the obligation to invest; that the ways of doing so were equally within their choice; and that the power of choice was not lost, although not exercised at majority—the event which first occurred.

Dec. 9. 1851. Pollock v. Muir, &c. By trust-disposition and settlement, dated 31st March 1823, Macdonald conveyed his whole estate, heritable and moveable, to certain trustees, "and the survivors or survivor of them who should accept." One of the purposes of the trust was expressed as follows:—"And also, that my said trustees shall be bound and obliged, on my lawful daughter, Clarissa Margaret Macdonald, attaining majority, or on her previous marriage, to lay out in heritable bonds, or other proper securities, the sum of L.1500 sterling, and take same payable to herself; or should my said trustees deem it advisable, they are hereby specially authorised and empowered to take the bond or bonds payable to herself in

liferent, for her liferent use allenarly, and to the children to be Dec. 9. 1851.
procreated of her body in fee, whom failing, to the others of my Pollock v.
lawful children or their heirs equally in fee, and debarring and ex- Muir, &c.
cluding the *jus mariti* of any husband of my said lawful daughter
in the event of her marriage," "or to take the said bond or bonds
in any other terms which my said trustees may deem requisite."

Macdonald died in April 1823, and three of those named as trustees accepted, among whom was Pollock.

Macdonald left only one daughter, who came of age on 21st March 1837 ; but the trustees did not then think proper to exercise their discretion, to the effect of paying over her provision to her, to be held by her in fee and at her uncontrolled disposal, the reason being, as averred on record, that her habits, in respect of improvidence and otherwise, were such, that the trustees did not think that it would consist with their duty to do so. At the same time, they were unwilling to put it beyond their power ever to pay over to her the money, which would have been the case had they at once taken an investment payable to her in liferent, and to her children in fee. They accordingly retained the money without making any investment. In the meantime, two of the trustees died, leaving only Pollock ; and on 27th September 1849, Miss Macdonald was married to Robert Muir. Previously to her marriage, Pollock paid out of the sum provided for her, L.300 to discharge some debts she had incurred, and on her marriage, he paid a further sum of about L.200 ; a balance of L.1000 of the sum provided to her thus still remained in his hands. This he proposed now to invest payable to her in liferent. No desire had ever been expressed by Mrs Muir at her majority, or since, or at her marriage, to have the sum invested. She had, on the contrary, acquiesced in the arrangement by which it remained in the hands of the trustee. But she and her husband now demanded payment of the balance, contending that, from the terms of the trust-deed, the discretionary power given to the trustees to invest the provision, payable to her only in liferent, was one which they could exercise only at the dates named in the deed, namely her majority or marriage, whichever occurred first ; and that if not exercised then, they lost right to exercise it at all ; or at any rate, that in the altered circumstances arising from the death of the other trustees, and the payment of part of the sum provided, the single survivor was not entitled to exercise that discretion in regard to the balance. To determine the question the present multiplepoinding was raised by Mr and Mrs Muir in name .i the trustee.

Dec. 9. 1851. The Lord Ordinary (Rutherford) sustained the claim of Mr and Mrs Muir; and Pollock reclaimed.

Pollock v. *E. Fraser and Inglis* were for the claimer.

Monro and the *Dean of Faculty* for the respondents, referred to *Moir*, folio Dict. 2, p. 387, and *Stein v. Stein*, 8th December 1826.

The case was to-day advised.

The LORD JUSTICE-CLERK. This case is not without difficulty, and is unsolved by any precedent. The two cases quoted are clearly inapplicable. The case may be considered in two different points of view.

1. On the strict construction of the clause in the deed apart from all the facts of the case.

The clause is an obligation to provide the daughter in a certain sum of money, at certain dates, and in one or other of two ways. It cannot be read, as contended for by the Muirs, stopping at the end of the first alternative, and disjoining it from the other. The primary matter is the direction to provide the sum, which is a most peremptory and positive obligation; the ways of doing so follow, and each is connected with the primary and leading direction as much as the other, and is equally within the trustee's choice. It is a fallacy to connect the words of obligation exclusively with the first-mentioned mode of giving. But this is the foundation of the argument of the real raisers, that at majority or marriage alone could the discretionary power be exercised. This reading is unsound.

The specification as to time has relation to the main and leading provision of a sum of money, so that at majority or marriage it should be ready. But that specification cannot be read so as to make the discretionary power contingent on its exercise exactly at these events or moments of time. The whole argument that it does so obtain its plausibility from leaving out of view, that there was no demand by the party interested for the provision being given to her in one form or another at the time mentioned.

It seemed to be considered, that a minute of declaration of the trustees, as to their intentions, made at majority, would have preserved their discretionary power, although not actually exercised for long thereafter. This is an abandonment of the claimant's construction of the clause; for the power, in their view of the words, attaches only to the *act* and *mode* of investment.

Further, in construing such a trust as this, we must not view it with jealousy, as a power permitted, but really opposed to some

adverse and paramount interest actually and separately given. Dec. 9. 1851.
It is, in truth, a duty devolved on the trustees for the best interests
of the daughter. At majority, if she makes no demand, there is ^{Pollock v.} Muir, &c.
no reason for doing anything; on the contrary, to decide at ma-
jority might have been disadvantageous to her.

Nor does the subsequent marriage give a distinct and separate interest in the sum to the husband, as now his, in respect it was not invested. Law will never favour any construction of a parent's deed which is contended for in order to give to the husband the distinct right to money which the father intended his trustee should have power to give to the daughter exclusive of the *jus mariti*. The daughter made no demand till after her marriage; and it seems an additional ground for the trustee not investing at majority but delaying, that it might enable him yet to fulfil one important object of this trust, if there seemed ground for guarding the daughter's interest at marriage.

2. The *second* view of the case is the effect which the long delay, and the death of two of the trustees, and the altered state of matters have had on the surviving trustee's power. The claimants' plea on that ground cannot be sustained. This view admits that the exercise of the discretionary power was originally not confined to the exact day of majority. If so, the question comes to be, Has the delay been wrongous on the part of the trustee? It has not. Nor do the advances to the daughter strengthen her claim. They make the intentions of the trustee only the more reasonable.

LORD MEDWYN.—The claim of the Muirs cannot be sustained. By the deed the trustees were in a certain event bound to do a certain thing, but it was in their discretion to do it in one or other of two specified ways, or "in any other terms they thought requisite." And the question is, as they did not, on the occurrence of the event, do this thing, nor were called on to exercise the discretionary power, have they lost the power and discretion, the delay being expected, no doubt, to give an opportunity for a more beneficial arrangement at some future time? This is not the case of a trust to be executed in one way only. That will be held to be exercised whenever the obligation is prestable. But where a discretion is given as to the mode of making an investment, the terms of the investment will often be decided by circumstances not necessarily occurring before the dates named, and both parties may see fit to postpone it. The object in the present case was not so much to fix a date for the investment, as the condition and provisions of the investment. A date had to be fixed before which it

Dec. 9. 1851. could not be done, but it is not said, if not exercised then, the discretion is renounced. On the contrary, since the trustees did not exercise it, and Miss Macdonald did not call on them to do it, it must be supposed she concurred in postponing the settlement till a period when it might be more beneficially exercised. For if once exercised by investment, their power was at an end. The discretion remained for exercise till the money was invested; and if so there is nothing in the changes which have occurred to take away the power from the survivor. That power is expressly given by the deed. Nor does the circumstance that the whole £1500 no longer remains, furnish a good plea to Mrs Muir. The money advanced was advanced at her request, and to relieve her from debt.

LORD COCKBURN concurred. The question here is entirely as to the power of the trustees under this trust-deed. To the survivor is given all the power of the others. Now the trust-deed imposed on the trustees an obligation to provide a sum for Miss Macdonald, with power to do it in one of two ways, at a particular time. The time is indeed gone at which they might have been called on to do so. But they have not lost the power though not exercised at the moment specified.

LORD MURRAY differed. It appears as clearly expressed in this deed as it can be in any deed, that the duration of this trust was the majority or marriage of Miss Macdonald. Reading the first part of the clause, down to the words, "L.1500 sterling," the ultimate period is here clearly the majority; nor are there any words in the deed giving means of prolonging the period. Take the subsequent part of the clause—"and to take the same payable," &c. That is all one continuous explanation applicable to the terms of the bond, and nothing else. It does not extend the duration of the trust. The interlocutor, therefore, should stand.

The COURT by a majority recalled the interlocutor.

A. Pearson Scotland, S.S.C., Agent for Mr and Mrs Muir, the Real Raisers.

Pollock & Stewart, W.S., Agents for Nominal Raiser, Pollock.

FIRST DIVISION.

No. 74.

NASH v. COCHRANE AND MANDATORY.

Foreign Decree—Costs—Court of Chancery—Court of Session.—The Court of Session will enforce payment of costs of suit in the Court of Chancery.

The question involved in this case regarded the jurisdiction of Dec. 10. 1851. the Court to enforce payment of costs found due in a suit before the Court of Chancery for England. In 1840, an action was brought against the defender for the execution of a certain lease, conform to a decree of the High Court of Chancery, proceeding on the allegation that he had "withdrawn himself from the ordinary jurisdiction of the High Court of Chancery, and had recently been discovered to be residing at the Ross, near Hamilton," and concluding against him for £287, 10s. of unpaid rents, and for the sum of £100, less or more, being the amount of costs found due in the said Court of Chancery, and which stood on a remit to the Master in the said Court to tax the same, and also for expenses of process. In March 1841, the matter was compromised ; it being agreed that costs should be paid by the defender. Nothing further was done till June 1847, when the process was wakened. There then remained nothing to be settled under the same, except the expenses thereof, and also the question as to the costs found due in the Court of Chancery.

The defender pleaded that that formed a subject matter to which the jurisdiction of this Court did not extend. A record was accordingly made up on that point, and the Lord Ordinary (Robertson) having repelled the objection, Cochrane, the defender, reclaimed.

Penney, for claimer. The only point alleged to remain between the parties being that of costs found due in a Chancery suit, that is peculiarly a point which can only be determined in Chancery ; and, if not there, nowhere else. There was no relevant statement in the summons to warrant interference in this suit. The defender is subject and willing to subject himself to the jurisdiction of the Court of Chancery. He has lost his Scotch domicile, having removed from Scotland with his family some years ago. At the time the suit in Chancery was instituted against him, he was possessed of valuable property in England, which he still retains. Therefore the jurisdiction of the Court of Chancery over the defender and his property was never in abeyance.

Moir, for pursuer and respondent. The original action raised in this Court was competently brought, because the defender having rendered the decree of the Court of Chancery inoperative, by going beyond its jurisdiction, it was competent for this Court to pronounce a decree conform, so that execution might be obtained against the defender within the domicile which he had chosen. Al-

Dec. 10. 1851. though a partial settlement of the case took place, it was on the express condition that the costs should be paid, which condition Nash v. Cochrane, &c. has not yet been implemented. It is denied that the defender had lost his Scotch domicile; but supposing the action originally competent, it could not become incompetent on the ground that the defender had, during the course of the proceedings, left Scotland and gone to England.

The LORD PRESIDENT was of opinion that the original action having been competently brought, the present proceedings, which have reference to it, are competent also.

The other Judges concurred.

The COURT, therefore, refused the note, reserving all questions of expenses, and remitted to the Lord Ordinary with power to dispose thereof, and to proceed in the cause as may be just.

Alexander Hamilton, W.S., Reclaimers' Agent.

Wotherspoon and Mack, S.S.C., Pursuer and Respondents' Agents.

BILL CHAMBER.

M'INNES v. WILLIAM AND GEORGE FAIRLEY.

No. 75. *Suspension and Liberation — Diligence — Officer's District — Consent of Debtor, by which objection waived.*

Dec. 11. 1851. The complainer in this case had been charged on an extract-decree of the Sheriff-substitute of the Fort-William District, Inverness, and afterwards, in virtue of a *fiat*, incarcerated in the prison of Inverness. He now applied for suspension and liberation, for these reasons:—1st, The decree was in absence; 2d, The action was at the instance of “William and George Fairley,” whereas the charge is to make payment to “the said George and William Fairley;” 3d, The execution of charge bears, that a copy was delivered to the complainer in presence of “James Campbell,” while the witness who signs the execution signs “James D. Campbell;” 4th, The officer who apprehended the complainer did so out of his district. Although only an officer for the Fort-William district, he carried the complainer from Fort-William, out of Inverness-shire, into Argyleshire, and forced him two miles into the latter county without obtaining concurrence from the Sheriff of Argyleshire.

The respondents by their answers denied the statements of the

M'Innes v.
Fairley, &c.

complainant, as to the inaccuracy and identity of the parties referred to in the note. The whole procedure was regular and legal, and the warrants had been executed in the way and manner such as Fairley, &c. ^{Dec. 11. 1851.} ^{M'Innes v.} Warrants are daily executed in the district, where no concurrence is ever required. Besides the complainant had not objected to the officer's proceedings at the time, but all had been done with his consent.

LORD COWAN refused the note of suspension and liberation with expenses. His Lordship said, in the note to his interlocutor, that the objections taken on the ground of the inaccuracy of the names of Campbell the officer, and of the Fairleys, were immaterial. There could, on the face of the proceedings, be no doubt of the identity of the parties. As to the objection that the officer had acted on the warrant out of his district, it appeared that the portion of Argyleshire alluded to required to be traversed in order to reach Inverness, and it was material to observe that the complainant had accompanied the officer all the way without any objection on his part. If the complainant could have shewn that he had resisted the authority of the officer while within Argyleshire, he might have been entitled to liberation. But he made no resistance, nor did he dispute the illegality of the officer's proceedings at all. In these circumstances, the objection could not be taken as a ground of suspension. As to the reason of suspension that the decree was in absence, it is important to keep in view that the note had been presented without caution or consignation, and the suspender had not adopted the proper means for opening up the decree.

John Walls, S.S.C., Agent for Complainant.

John Leishman, W.S., Agent for Respondents.

FIRST DIVISION.

In re A. B., dismissed Judicial Factor.

No. 76.

Pupils' Protection Act—Factor loco Tutoris—Malversation of Office—Remit to Her Majesty's Advocate.

This was a report by the Accountant-General to the Court of Session on the conduct of A., who had been lately dismissed from the office of judicial factor. In January 1826, A., accountant in Glasgow, was appointed factor *loco tutoris* to John Newlands, a cognosced idiot. The Accountant-General found an inventory ^{Dec. 11. 1851.} ^{In re A. B.}

Dec. 11. 1851. lodged of the estate committed to the factor's management, but
In re A. B. no accounts of his intromissions or vouchers. In March 1850, the Accountant addressed a printed circular to the factor, and subsequently, in April 1851, a requisition, along with a copy of the Act of Sederunt of 11th March 1851, (as directed by the Court,) calling on him to lodge accounts of his intromissions from the date of his appointment to 31st March, and the vouchers. The factor having failed to comply with this requisition, the Accountant, on 12th June, notified to the factor, under sec. 19 of the Act, that, unless the same was complied with in forty-eight hours, his disobedience would be reported to the Court. The factor neither complied nor lodged objections; and accordingly the Accountant transmitted a report to the Lord Ordinary on the Bills, (Cowan), who, on 5th July 1851, ordained the factor to lodge accounts of his intromissions, and the vouchers, within eight days after service; and, failing compliance with that order, his Lordship notified that he would report the matter to the Inner-House, that it might be dealt with in terms of the 20th section of the statute, (Pupils' Protection Act.)

The Accountant reported that the factor had failed to satisfy this order; in consequence of which, on the report of the Lord Ordinary on the Bills, the Lords removed him from his office, and remitted to his Lordship, with power to appoint a new factor *ad interim*, whose duty it would be to call A. to account for his intromissions. His Lordship, accordingly, appointed Mr Guild to be *curator bonis ad interim*.

The Accountant-General now reported that he had received a report from Mr Guild, to the effect that A. had been for many years, and now was, in occupation of the heritable estate which belonged to the idiot; that he had realised upwards of L.1200 of funds; and that he craved further delay until the Christmas recess, for reasons which were vague and unsatisfactory. The Accountant further reported that he could not avoid coming to the conclusion that gross injustice had been practised by A. under his judicial appointment, and by an abuse of the powers committed to him by the Court. He directed the attention of the Court to secs. 6, 20, and 21, as applicable to the mode of dealing with such a case as this.

This report the Lord Ordinary appointed to be printed, with a view to his now reporting it to the Court.

The LORD PRESIDENT. We must take steps to bring this factor to an accounting for his intromissions with an estate for

now upwards of quarter of a century. It was necessary, not only as doing substantial justice between man and man, but as a warning to others in a like situation, that the Court should avail themselves of the power conferred by the late Act, sec. 21, and remit to Her Majesty's Advocate to consider the case.

Dec. 11. 1851.
In re A. B.

Logan, for the factor, submitted that his removal from office was a sufficient punishment for his delay in rendering the accounts, which were in course of preparation, and explained that for the occupation of the idiot's heritable property (a house and garden), he credited the estate with the full rent; whilst, of the sum of £1200, which had been had for the compromise of various law-suits, the greater part had gone to defray the costs of the litigation. These averments he offered instantly to instruct by the production of the accounts. There had therefore not been such malversation as would justify this remit to the Lord Advocate.

The LORD PRESIDENT was of opinion, that, looking to the whole circumstances of the case, the Court would be wanting in its duty to the public should it follow any other course than that suggested by sec. 21. The Court would not delegate to the Accountant the disagreeable duty of originating this procedure, but would itself determine the course to be adopted.

LORD FULLERTON was of the same opinion.

LORD IVORY thought it impossible to come to any other conclusion if this were a subsisting factory; but the appointment substantially fell in 1847 by the death of Newlands, although, no doubt, this did not relieve A. of responsibility. The interim appointment of factor has also fallen, and therefore things were in this anomalous situation, that although B.'s representatives are *sui juris*, they are not here. Therefore this inquiry takes place in their absence, and there is no one to represent the estate. The Act is divided into two portions—up to sec. 21, it refers to existing factories, then sec. 22 begins with reference to factories that no longer exist. He had difficulty, therefore, whether the Act was applicable to this case.

The LORD PRESIDENT considered that the Court were not called on to decide on that point. It was for the Lord Advocate to consider what was the proper course to be taken.

LORD CUNNINGHAME concurred. The Court could not hesitate in adopting the course suggested by the Lord President, as that which their duty to the country imperatively points out.

Dec. 11. 1851. The COURT accordingly nominated and appointed James Wylie
In re A. B. Guild to be *curator bonis* on the estate for behoof of the representatives, with the usual powers,—the said James Wylie Guild always finding caution before extract, and decern *ad interim*; farther, direct the Accountant's report, together with the whole proceedings, to be laid before Her Majesty's Advocate, to inquire into the same, and to take such steps in reference to the same as to his Lordship shall seem proper.

Lothians and Finlay, S.S.C., Factor's Agents.

FIRST DIVISION.

PETITION, ABERDEEN RAILWAY COMPANY.

No. 77.

Process—Appeal—Competency—In an action against a Railway Company for implement of an alleged contract, it was, *inter alia*, pleaded in defence, that the contract was illegal under the Companies Clauses Act. The Court repelled the defence as not supported by the statute, and approved of an issue. *Held* competent to appeal against the decision before trial.

Dec. 11. 1851. THIS petition was presented by the Aberdeen Railway Company for leave to appeal against a judgment pronounced by the Pet. Aberdeen Court, on 18th November last, in an action raised at the instance Railway Co. of the Messrs Blaikie Brothers of Aberdeen against them.—See *ante*, p. 26.

G. Young and Inglis for the respondents, objected that the appeal was inexpedient at this stage of the proceedings. The case is for trial at the Christmas sittings, and the object of this petition is to put the trial off. At the trial questions of law may be raised, and, if so, the whole case will then go to the House of Lords, with this advantage, that it will go on a bill of exceptions, which will entitle it to precedence; otherwise, if appealed now, it may stand over for two or three years on the rolls of the House of Lords. This being a question of relevancy, it ought not to be appealed until the facts of the case have been ascertained. Counsel referred to the opinions of the Lord Justice-Clerk and Lord Cockburn, in petition *The Dundee Banking Company, &c.*, for leave to appeal, as given in these Reports, *ante*, p. 54, and to the opinion of Lord Mackenzie, in *Dundee Harbour Trustees v. Dougall*, 5th Dec. 1848, 11 D. 181.

Neaves, (with whom E. S. Gordon,) for petitioners argued that as this was a final interlocutor, appeal was competent. In *Dougall's*

case there was no finding in law, while in this case a pure point Dec. 11. 1851.
of law was decided, which could not be affected by the facts of
the case.

*Pet. Aberdeen
Railway Co.*

The LORD PRESIDENT.—It was understood by all of us, in giving judgment, that the Railway Company should have an opportunity of appealing to a Court of higher resort, in order to satisfy themselves whether we had decided the point of law correctly. The same thing was done in the case of *Campbell of Blythswood*, where a point raised on an Act of Parliament was decided before the trial, and appeal held competent. In the special circumstances of this case, the general doctrine laid down by the Lord Justice-Clerk does not apply.

LORDS FULLERTON and CUNINGHAME concurred.

LORD IVORY.—The Court is shut up to the conclusion to which it has now come. If it shall come to be that there is no question between the parties as to the alleged contract of 6th February, but that the date of the contract shall be restricted to 4th June, this appeal falls to the ground, because it would not be applicable. But it was the purpose of the Court, in giving judgment, that there should be leave to appeal granted, if desired. As to the point of law in question, a bill of exceptions cannot be taken at the trial.

The COURT granted the prayer of the petition, and discharged the order for trial.

Webster and Renny, W.S., Petitioners' Agents.

Lockhart, Morton, Whitehead and Greig, W.S., Respondents' Agents.

FIRST DIVISION.

M'KINLAYS v. M'KINLAYS.

No. 78.

Prescription—Mercantile transactions—Held that triennial prescription does not apply to transactions between merchants in an extended course of trade.

The only point in this case to which the attention of the Court Dec. 11. 1851. was called, was whether the plea of triennial prescription applied to certain transactions which formed the subject-matter of the *M'Kinlays v. M'Kinlays*. action. The pursuers, John M'Kinlay and Company, in the course of their business as bleachers, employed the defenders, William M'Kinlay and Company, commission-agents, to make

Dec. 11. 1851. *certain purchases on their account of goods to be bleached ; which goods, when bleached, the defenders afterwards, as commission-agents, sold.* The pursuers allege, that in order to enable the defenders to make the purchases for them, they advanced certain sums of money, and that they received from the defenders sundry partial payments on account of the proceeds of goods disposed of by the defenders. Both partnerships have been dissolved, and the present action was brought by the surviving partner of John M'Kinlay and Company against the individual partners of William M'Kinlay and Company, for payment of L.408 : 8 : 5, the balance alleged to be due by the defenders in the transactions between the two companies. The pursuers, *inter alia*, founded on an account holograph of William M'Kinlay, one of the defenders, in which William M'Kinlay and Company debit themselves—1, With the amount of cash advances made to them ; 2, with the proceeds of the goods sold by them on commission ; and, 3, with the amount of a bleaching account between them and the pursuers ; and, on the other hand, they take credit to themselves—1, for an alleged cash payment to the pursuers, which the pursuers disputed ; 2, for the prices of raw or unbleached goods purchased by them ; 3, for partial payments made by them on account of the proceeds of goods sold ; and, 4, for their charges of commission, &c. The result of these debit and credit entries is, that, as at 27th January 1837, a balance of L.408 : 8 : 5 is brought out as due by the defenders, William M'Kinlay and Company, to the pursuers, including interest to that date.

The defenders denied that this was an account-current, but merely a jotting or hypothetical vidimus. And they pleaded that the alleged accounts, or balances of accounts, are prescribed, and that resting-owing can only be proved by the defenders' writ or oath.

The Lord Ordinary (Wood) held that neither the triennial nor quinquennial prescription applied to this case, and referred to the cases of *Hamilton*, 24th January 1795, M. 11,120 ; *Anderson and Child*, 18th January 1809, Hume's Decisions, 469 ; *Brunton*, 3d December 1822, 2 Shaw, 54 ; *Freer*, 2d January 1826, 4 Shaw, 339 ; *Macfarlane*, 17th January 1827, 5 Shaw, 189 ; *Boyes' Trustees*, 30th June 1829, 7 Shaw, 815.

The defenders reclaimed.

Patton and Solicitor-General for reclaimers. The account sued for was incurred in the course of mercantile transactions, and did not proceed upon any writing. It is an open account, and is of

the nature of merchant's accounts, to which the triennial prescription is applicable. The cases cited by the Lord Ordinary have chiefly reference to transactions with foreign merchants. The case of *Ord*, Feb. 15. 1630, M. 11,083, is applicable to this case, and the principles there laid down have not been affected by subsequent decisions.

T. Mackenzie, for respondent. This claim arises out of a commission agency to which the triennial prescription does not apply; More's Notes to Stair, vol. i. p. 275, and cases therein referred to.

The LORD PRESIDENT was clearly of opinion that prescription did not here apply. The cases of *Freer* and *Macfarlane* were decisive.

LORD FULLERTON was of the same opinion. This is truly a question of accounting,—the account is not a merchant's account in the sense of the statute. If the statute were applicable here, it would be equally so to bankers' accounts, and others of a like nature.

LORD CUNINGHAME. Triennial prescription does not apply to protracted transactions between merchant and merchant in an extended course of trade. Although the cases of *Hamilton* and *Anderson* and *Child* arose from transactions between home and foreign merchants, the law laid down for them applies equally to transactions between home merchants. The present case falls clearly within the rules assigned as the grounds of decision in the cases of *Freer* and *Macfarlane*.

LORD IVORY concurred. The account libelled on was libelled, not as between buyer and seller, but as a general mutual accounting as between principal and agent. The plea of prescription was clearly not applicable.

The COURT repelled the plea of prescription, remitted to the Lord Ordinary to proceed farther in the cause, and found the reclaimer liable in expenses since the date of the interlocutor.

Robert Oliphant, S.S.C., Agent for Reclaimers.
W. A. G. & R. Ellis, W.S., Agents for Respondents.

SECOND DIVISION.

No. 79. MARSHALLS v. THE OMOA AND CLELAND IRON AND COAL COMPANY.

Assytement and damages—Issue to be tried.—Terms of an issue approved of in an action of Assytment and damages against the proprietor of a colliery and of iron works for the death of one of his workmen, where the defender pleaded he was not liable, in respect that the works were under the management of other workmen, and a contractor of competence and skill.

Dec. 11. 1851. This action of assytment and damages was moved in to-day, with the view of closing the record and adjusting the issue. The pursuers were the widow and the three surviving children of the deceased James Marshall, miner at Bellside, in the parish of Shotts and county of Lanark, who claimed from the defender, Robert Stewart, as the only known partner of the company, or as the proprietor of the works, the sum of L.400 in name of reparation and *solutium* to the widow, and L.100 for each of the three children.

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The Omoa and
Cleland Iron
and Coal Co.

The condescendence for the pursuers, in substance, averred, that on the morning of the 11th January 1849, while engaged as a miner in the Bellside pit, and while ascending the shank in the cage, James Marshall was struck on the head by a lump of coal, iron-stone, or other hard substance, in consequence of which he fell to the bottom of the pit, and died shortly afterwards; that the cage was not provided with a cover so as to protect the miners; and that the shaft of the said pit was in an unsafe and insufficient state. The pursuers, therefore, maintained by their plea in law that the death of Marshall was occasioned by the insufficiency of the cage, or by the fault, negligence, or unskilfulness of the defender, or of those for whom he is responsible; and that they were therefore entitled to reparation.

The defender denied the pursuers' averments as to the nature and condition of the pit, stating that, at the date of the death of Marshall, it was under the charge and management of persons of sufficient skill and experience, and in all respects fit and competent for their business; and that at the time referred to, as well as for a considerable time previous, the defender had contracted with John Craig, a person of sufficient skill and capacity, to maintain the pit in question. The defender, therefore, *inter alia*, pleaded, that he is not answerable for injuries sustained by a

workman, owing to the wrongous conduct, fault, or negligence Dec. 11. 1851. of other workmen employed along with him in the same common ^{service;} and that he is not responsible for the fault or negligence ^{Marshalls v.} The Omaha and of the contractor, Craig, supposing that the accident in question ^{Cleland Iron} and Coal Co. were attributable to Craig.

The Lord Ordinary, (Cowan,) "in respect questions of relevancy have been raised by the defender, under the decision of the Second Division of the Court, in the case of *Paterson v. Maitland Iron Company*, (1st July 1851), and that though the summons were now held as relevant, the parties do not agree as to the terms of the issue proposed for the trial of the case, reports the cause to the Lords of the Second Division of the Court, in terms of the 38th section of the Act 13 and 14 Vict. c. 36."

Wood and the *Dean of Faculty* were for the pursuer.

Macfarlane and *Inglis* for the defenders.

The COURT approved of the following issue—"Whether the death of the said James Marshall was occasioned while he was working in a coal-pit belonging to, and in the occupation of, the defender, by injuries arising from the shaft of the said pit being in an unsafe and insufficient state, from causes for which the defender or the employer of the said James Marshall is responsible?" They therefore held the record as finally closed, and found that such should be the issue to be tried in the cause.

Scott and Gillespie, W.S., Pursuers' Agents.

Gibson-Craigs, Dalziel, and Brodie, W.S., Defenders' Agents.

FIRST DIVISION.

DONALDSON *v.* DONALDSON'S TRUSTEES.

No. 80.

Trust-estate—Life-rentrix—Shares—Dividend.—Where certain shares in a shipping company, and the right to the dividends thereon, had been sold between terms by the trustees on a trust-estate:—*Held* that the price received therefor was not capital to the exclusion of the rights of the life-rentrix; but that she was entitled to a sum out of the price equal to the proportion accruing up to the date of the sale, of the dividend for the current year, and thereafter to interest on the price.

This was an action at the instance of Mrs Donaldson, as life-rentrix of her deceased husband's estate, against her husband's trustees, for payment of part of the price received by the trustees ^{Dec. 12. 1851.} ^{Donaldson *v.*} ^{Donaldson's} ^{Trustees.}

Dec 12. 1851. for certain shares in two several Shipping Companies held by the deceased. The testator died in March 1844. In his trust-deed and settlement he directs the trustees to pay to Mrs Donaldson, during her life, the "whole rents, interests, dividends and annual profits whatsoever of the free residue of my said property, means, and estate, heritable and moveable."

*Donaldson v.
Donaldson's
Trustees.*

The testator was possessed of 481 shares in the Clyde Steam Navigation Company, and also of $25\frac{1}{2}$ shares in the Glasgow and Londonderry Steam Packet Company. Upon the shares in the former company the liferentrix received the proportion of the dividend for the period from the date of her husband's death till October 1844. In June 1845 then next, the shares and right to draw all the profits and dividends thereon were sold to the company at the price of L.26,455. Subsequently, the yearly dividend was declared in October. The pursuer maintained that the price received by the trustees must be held to have included the value of the accruing profits or dividends thereon of the then current year, to the extent of the proportion thereof that would have fallen to the pursuer as liferentrix, if the said sales had been made under the reservation of the sellers' right to a proportion of such dividend up to the date of receiving payment of the price thereof; and she therefore claimed a proportion of the realised price to be set apart for her, or an allowance out of the same made to her, in virtue of her legal rights and interest as liferentrix. With regard to the shares in the Glasgow and Londonderry Steam Packet Company, the trustees, in November 1844, accepted an offer made by the Steam Packet Company, for the stock, on the understanding, that, over and above the price, the trustees were to be allowed an equivalent for the dividend which would have been in course of payment at the end of that year, had the Company not resolved to expend their divisible funds in the purchase of an additional vessel. The pursuer received no part of the payment obtained by the trustees in lieu of dividend, nor any return whatever on this part of the trust-estate, from the time that her liferent commenced. She therefore claimed an allowance or compensation for the loss she had thereby sustained.

The defenders maintained that the sums received by them for the shares in both companies were to be dealt with as part of the fee of the trust-estate, to the interest or annual proceeds of which the pursuer had right, but only from and after the date of said amount being paid to them; and she could only be entitled to the interest of said sum, the same being capital and not income.

The Lord Ordinary (Wood) assailed the defenders from the conclusions of the action, in so far as regards the price obtained for the sale of the shares of the stock of the Clyde Steam Navigation Company; and *quoad ultra*, decreed for payment to the pursuer of the sum of L.203, 3s. 6d., as the proportion of the dividend received from the Glasgow and Londonderry Steam Packet Company relating to the period subsequent to the death of the testator.

Against this interlocutor the pursuer claimed. The defenders also reclaimed, but against the latter finding merely.

Logan and *Solicitor-General* for pursuer, argued, that although the trustees were invested with the power to sell, they were not entitled so to exercise that power as to defeat the pursuer's life-rent interest to the extent of one shilling. She has a vested interest which they cannot deprive her of. The Lord Ordinary had rested his judgment, first, on the uncertainty whether there would be a dividend; and, secondly, on the difficulty of ascertaining how much was paid in respect of anticipated dividend. As to the uncertainty of the dividend, it was not more precarious than that of other companies; and as the company were the purchasers, they must be taken to have been fully conversant with the exact situation of the concern, and as a dividend was eventually declared for the year, are to be held as having known that that would be the case, and to have paid a part of the agreed on price on that account. As to the second point there might be difficulty in ascertaining the amount, but that was no reason for giving the life-renter nothing from October 1844 till July 1845, when the price of the stock sold was paid to the trustees.

Penney and *Marshall* for the trustees. At the date of the sale in June there might be no profits, and yet a dividend be declared in October on profits subsequently arising. In the case of *Rollo v. Irvine*, 1801, Dict. 8282; App. *voce* Liferenter No. 1, an extraordinary *boxus* was declared not to belong to a liferenter. Unless where a dividend is declared the trust-estate could derive no benefit from it. What is received for selling between terms, is not income but capital.

THE LORD PRESIDENT. There is no allegation of misconduct on the part of the trustees. The only question, therefore, is whether this claim is well-founded. With regard to the first sale mentioned in the Lord Ordinary's interlocutor, the trustees unquestionably sold the right to the dividends accruing on the shares;

Dec. 12. 1851. and supposing that the liferentrix had had nothing else to look to, it certainly would have been a very questionable proceeding. The only difficulty is how to ascertain how much of the profits accrued after the sale of the shares, and how much before, as in the fluctuation in the affairs of mercantile concerns, these may greatly vary at different periods.

Donaldson v.
Donaldson's
Trustees.

As to the other branch of the case, it was immaterial whether a dividend was declared. If the profits went to increase the capital for the farther security of the company, that was merely appropriating the dividend. He thought there was sufficient principle for holding that the right in the liferentrix was deserving of attention.

LORD FULLERTON thought there would be great hardship on the lady, if the Court sustained to the full extent the principle laid down by the Lord Ordinary. Under the trust-deed, she is entitled to the liferent of all profits, &c. The specific sum received by the trustees should have been considered as the value of the shares, with their profits, from the date of the last payment to the liferentrix; and, had the trustees proposed to pay interest on the price for the whole year, there would have been great plausibility in this proposal. But they have chosen to interfere with the rights of this lady, and have sold not merely the shares, but the right to the next dividend. They thus sell what she was entitled to. In equity her claim was strong indeed.

LORD IVORY thought the case addressed itself particularly to equity. What the trustees in both cases sold, was not only the stock, but the profits. The question was, what was the fair and equitable duty of the trustees in regard to these transactions. The interest of the widow in the sale is said to depend on the contingency of a dividend being declared; but still this contingency was her property, which they were not entitled to deprive her of. He was prepared to find that it was impossible to exclude the widow altogether from participating in the price obtained by the trustees.

LORD CUNINGHAME was not present at the debate, which was on 12th November last.

The COURT, therefore, refused the reclaiming note for Donaldson's trustees; and *quoad* the reclaiming note for the liferentrix, appointed parties to be heard as to the proper manner in which the reclamer's proportional right, as liferentrix of the fund, ought

to be adjusted, and allowed the said claimer in the meantime to Dec. 12. 1851.
lodge a minute stating what she claims.

The liferentrix lodged a minute, offering to accept of a certain sum, being the proportion of the dividend declared in October 1845, referring to the period between September 1844, when the former dividend was payable, and 19th June 1845, the date of the sale of the shares by the defenders. *Donaldson v. Donaldson's Trustees.*

On considering this minute, the demand appeared to the Court to be fair and reasonable, and they therefore sustained the claim of the liferentrix, as set forth in the minute, and allowed the expenses of both parties to be paid out of the trust-estate.

Dalmahoy and Wood, W.S., Pursuers' Agents.

Gibson-Craigs, Dalziel and Brodie, W.S., Defenders' Agents.

FIRST DIVISION.

BABINGTON v. M'CULLOCH.

No. 81.

Action of Damages.—Petition and Complaint—Circumstances in which Held that the consideration of a petition and complaint, proceeding on the averment that the defender had been tampering with the pursuer's witnesses, should precede the trial.

In an action of damages at the instance of M'Culloch against Babington, issues were adjusted, and the case stood for trial in July last. On the case being called, Babington's counsel moved to have the trial postponed on account of the pursuer Dr M'Culloch's improper interference with the defender's witnesses; and the presiding Judge (the Lord President), in respect of the affidavit by the defender's agents then read in Court, and the motion of the defender's counsel, postponed the trial, reserving all questions of expenses. The matter was now brought before the Court on petition and complaint at Babington's instance, setting forth the facts complained of, and craving a proof thereof. *Babington v. M'Culloch.*

Inglis (with whom *Solicitor-General* and *Sandford*) for respondent submitted that, as the trial was fixed to take place during the Christmas recess, the natural course was to let the trial go on in the first place, and see what use is made of the witnesses at the trial.

Macfarlane and Neaves were for the complainer.

The LORD PRESIDENT. The whole gist of the case is, whether at the time of the alleged interference, the pursuer was in the

Dec. 12. 1851. Babington v. M'Culloch. knowledge that these parties were cited as witnesses for the defendants. This is a charge of attempting to tamper with the ends of justice, and it must be investigated.

LORD IVORY. This was deemed so serious a matter when the case was on for trial in July, that the trial was stopped. It was now before the Court on a petition and complaint, the relevancy of which is not disputed ; and if it is a mere question of expediency which should go first, the petition and complaint should take precedence.

The other Judges concurred.

THE COURT, therefore, sustained the relevancy of the petition and complaint, and allowed a proof of the facts therein set forth before a commissioner.

Thomas Ranken, S.S.C., Petitioner's Agent.

Inglis & Burns, W.S., Respondent's Agents.

FIRST DIVISION.

No. 82.

M'CULLOCH v. BABINGTON.

Jury Trial—Protection to Witness beyond the jurisdiction of the Court, and Bankrupt—Commission to take Deposition.

Dec. 12. 1851. M'Culloch v. Babington. This case being fixed for trial at the Christmas sittings, an application by the pursuer was now made to the Court to grant protection to one of the principal witnesses, who had been constrained to go to France to escape diligence at the instance of his creditors, or to grant commission to examine him.

The *Solicitor - General* (with whom *Sandford*) for pursuer. There can be no objection to grant protection to this witness to enable him to attend the trial. In the recent case of *Share v. Earl of Fife's Trustees*, where a picture formed the subject of dispute, protection was granted to have it produced in Court.

LORD FULLERTON. But in that case the trial could not go on without the picture, while this case may go on without the witness's personal appearance in Court. It was not indispensable for the ends of justice that the Court should grant protection here.

LORD IVORY. The protection of the Court may be good against parties' agents ; but when third parties come against him, it may be a serious question how far the protection would avail him.

The LORD PRESIDENT. If he is so essential a witness, let a regular commission be issued.

The COURT therefore granted commission to the British Consul Dec. 12. 1851.
at Boulogne-sur-Mer to take the evidence of the witness upon *M'Culloch v.*
interrogatories to be adjusted in common form, to be reported Babington.
quam primum, and appointed the case to be tried on Monday the
29th instant.

Inglis and Burns, W.S. Pursuer's Agents.

Thomas Ranken, S.S.C. Defender's Agent.

SECOND DIVISION.

BRIGGS and OTHERS (Trustees of the deceased Dr Robert Briggs) No. 83.
v. DALYELL.

Teinds—Crown Charter—Warrandice—Relief.—A. granted to B. a disposition of the lands and the teinds thereof; and the clause of warrandice covered both lands and teinds. But in the title of A.'s father, there is a clause binding him to pay to the Crown the price of the teinds from a certain date, which clause goes into B.'s charter from the Crown. The Crown recovers from B. Held that B. has relief against A. under the clause of warrandice.

This was an action for relief of certain sums paid by the deceased Dr Briggs to the Crown, as the price of the teinds (and interest) of the lands of Gordonshall. These lands had been purchased by him from the father of the defender, along with the teinds, in November 1825. The disposition contains an express conveyance of the teinds as well as the lands, and was granted in consideration of a sum of L.11,550, as the agreed-on price of the lands and teinds. The clause of warrandice warrants the "lands, teinds, and others, with the pertinents above dispossed, to be free, safe, and sure from all incumbrances and grounds of eviction whatever, at all hands, and against all mortals, as law will," with certain exceptions specially mentioned.

It appears that, as far back as 1752, the predecessors of the defender pursued a valuation and sale of the teinds of the lands of Gordonshall, the price of which was then fixed at L.93 : 10 : 6. The teinds were at that time under tack to the Marquis of Tweeddale, which expired in 1780. The decree of sale was in terms usual in such circumstances, viz., fixing the price, and decerning the purchasers to pay the annual rent of the price to the tacksman, till the expiry of the tack, and thereafter to the receiver general, until the purchaser should receive a valid right to the teinds.

Dec. 12. 1851. It does not appear that any further title to the teinds was obtained till 1807, when the defender's father's title was made up by adjudication in implement on a trust-bond. The Crown charter of adjudication, then granted, comprehends the teinds, and contains in, or adected to the clause of *reddendo*, the following words:—" *Ac porro prestan. unicam et singulam solutionem nobis vel nostro conductori aliisque jus præstantissimum haben., particularium summarum in dicto decreto venditionis mentionat., tanquam pretionem decimarum rectoriarum dict. terrarum, ad novem annorum redditus earundem, cum debitis et legitimis usuris dict. principaliū summarum, a termino Pentecostis in anno 1752, atque omni tempore futuro, deinde quatenus debitibus supersit.*"

Briggs, &c. v.
Dalyell.

After the sale to Dr Briggs, he expedie a Crown charter of resignation, in which there is introduced the same clause or condition as in the charter of adjudication of 1807. In 1840, the Crown made a demand upon Dr Briggs for payment of the price of the teinds, (L.93 : 10 : 6,) and for interest from 1780, being the expiry of the Marquis of Tweeddale's tack. The demand was notified to the defenders, and relief claimed. The Crown succeeded in recovering from the pursuers (as trustees of Dr Briggs) the price, with interest from 1811. It does not appear whether the interest, from 1780 to 1811, was abandoned by the Crown, or was held to have been settled. The pursuers now claimed relief of the sums they have been compelled to pay, and of the cost to which they were put in the proceedings with the Crown ; and they rest their claim on the warrandice in the disposition granted by the predecessors of the defender to the late Dr Briggs.

The defenders maintained that it was not, and could not be the intention of parties, that the warrandice should cover such a demand on the part of the Crown. They say, that the obligation to pay the price of the teinds, and the interest from 1752, was introduced into the charter of adjudication in 1807, as a condition of the right, and so stood, in 1825, on the face of the title of the seller, communicated to the purchaser, and not objected to ; that it was again introduced, and admitted into the charter of resignation, taken by the purchaser himself ; and that no remonstrance or demand of any kind was made till the Crown advanced its pretensions in 1840 ; that the right to the teinds is good, and has not been evicted, and that what the pursuers are seeking is, to get rid of the conditions of that right, after having all along recognised and admitted those conditions. They also aver that the defender was served heir to his father *cum beneficio inventarii*, and

is not universally liable for his debts and obligations, but only *Dec. 12. 1851.*
secundum vires inventarii.

By his interlocutor, the Lord Ordinary (Colonsay) "finds that, *Briggs, &c. v.
 Dalyell.*" under the warrandice in the disposition" to Dr Briggs, "the pursuers were entitled to be relieved of the claim which was made upon them by the Crown for the price of the teinds of the lands of Gordounshall, and interest thereof, and are entitled to repayment" of the sums paid by them, with interest, "from the respective dates of payment so libelled:" "Therefore, repels the defences as regards these sums, and decerns. But before further answer as to the claim for law expenses said to have been incurred in the suit with the Crown, appoints the case to be put to the roll." He gives no finding as to the plea founded on the defendant's limited representation of his father.

In the note appended to this interlocutor, (and from which the statement of the case here given is mainly taken,) the Lord Ordinary says, in support of the view, that the absolute warrandice of the disposition cannot be got the better of on the ground set forth by the defendant;—"the sum in question was the price of the teinds, and interest thereof, which the heritor owed to the Crown, and which might have been at any time exacted by the Crown, or voluntarily paid off by the heritor, but was allowed to remain substantially as a burden. It is presumed that, in the meantime, the heritor got the benefit of his purchase, and drew the teinds, and although he had not paid up the price, he ought at least to have paid the interest annually. The terms of the charter of adjudication, in 1807, did not necessarily imply that no interest had been paid prior to that date; still less did they imply that neither interest nor principal had been paid betwixt that date and the sale, in 1825. No doubt, the clause introduced into the charter of resignation taken by Dr Briggs in 1825, should have warned him that the seller had not cleared off that burden, or, at all events, should have led him to make inquiry. But his silence for fifteen years—from 1825 till 1840, when the demand was made by the Crown—does not prove that the warrandice was understood by the parties not to extend to the price of the teinds, or the interest of the price. Still less does it infer an abandonment or forfeiture of any right which he would otherwise have had under the warrandice."

The defender reclaimed, and craved the Court to recal the interlocutor, "or otherwise; and in the event of the conclusions of the action being sustained, to find that the defender is only liable *secundum vires inventarii*, and to limit the decree accordingly," &c.

Dec. 12. 1851. *Patton* (with whom the *Dean of Faculty*) addressed the Court in support of the reclaiming note.
Briggs, &c. v. Dalyell.

Inglis and G. G. Bell were for the respondents.

But the COURT, without hearing counsel for the respondents, pronounced an interlocutor, by which they, "in respect of the plea of representation, recal the decerniture *in hoc statu*; remit to the Lord Ordinary to hear parties therein, and again to decern, if he see cause; *quoad ultra*, adhere, and refuse the desire of the reclaiming note; find the reclaimers liable in expenses since the date of the Lord Ordinary's interlocutor," &c.

Walker and Melville, W.S., Agents for Defenders.

Jardine, Stodart, and Fraser, W.S., Agents for Pursuers.

No. 84.

FIRST DIVISION.

A. v. B.

Professional contract—Obligation to secrecy—Action of damages—Circumstances in which held that the violation of secrecy, on the part of a medical man, was relevant to sustain an action of damages against him.

Dec. 13. 1851. This case came before the Court to adjust issues. The ground of action was an alleged violation of professional confidence on the part of the defendant, who is a medical practitioner, and was employed by the pursuer under the following circumstances:—The pursuer who was an elder of the Established Church, was married on the 30th March 1849. On the 13th September thereafter, being two days less than six lunar months after his marriage, his wife gave birth to a child. Some days after the birth of the child, the pursuer mentioned the circumstance to one of the clergymen of the parish, (which is a collegiate charge,) who, under the impression that this had been done with the view of asking baptism for the child, brought the matter under the notice of a meeting of the kirk-session, on 1st October 1849. The meeting, before taking up the question, required to be furnished by the pursuer with the dates of his marriage, and of the birth of his child. These dates having been furnished, the kirk-session at a meeting held on 10th October, considered further enquiry unnecessary, and "they therefore adjourn until Saturday at ten o'clock, A.M., for the purpose of the present proceedings being communicated to A., and for the purpose of citing him to appear at the adjourned meeting, to afford such explanations and respectable medical evidence as he thinks fit, for the satisfaction of the

A. v. B.

"session." The pursuer alleges that being apprehensive lest Dec. 13. 1851.
doubts should be entertained as to the child's being conceived
after marriage, he resigned his eldership, and for his own satisfaction
he applied through his agent for the confidential opinion of
the defender, and of another regular practitioner in the town.
These gentlemen inspected the pursuer's child, and being of opinion that it was conceived before marriage, they embodied their joint opinion to that effect, in a written report drawn up by the defender in duplicate; one copy of which was given to the pursuer himself, and the other was left by the defender at the house of the first minister of the parish.

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The kirk-session assembled pursuant to adjournment on 13th October 1844. The pursuer did not appear, but his letter of resignation as a member of session was produced, and, at same time, the copy-report left with the minister of the parish: but instead of accepting his letter of resignation, the session declared him to be no longer a member of session. Subsequently, the defender concurred with the other medical man in a joint letter to the kirk-session, requesting that body to return the copy of opinion, and expunge it from their minutes, as it was a document of a private and confidential nature, furnished by them to A., at his own desire, and it was only through a mistake laid before the session. With this request, however, the session refused to comply.

Under these circumstances, the pursuer brought this action of damages against B., who pleaded in defence, that although not the regular medical attendant of the pursuer's family, he had been called in to see the pursuer's wife, after her confinement; that he had been previously informed by the minister, that the pursuer had referred to the defender for an explanation of the appearances presented by the pursuer's child at its birth, and being then unable to give the requisite explanation, he understood the object of the pursuer's request was partly to obtain a medical opinion for his own satisfaction, upon the question whether his child had been conceived before marriage, and partly that the defender might qualify himself to give the explanations for which the pursuer had referred the minister to him.

The pursuer proposed to put in issue, 1st, whether the defender was employed to "report confidentially" his opinion as to the birth of the pursuer's child being premature, and "whether in breach of the duty undertaken by him, in respect of such employment, and to which he was bound, the defender delivered a copy of the said report" to the first minister of the parish, "to the loss, injury and damage of the pursuer:" and, 2d, whether

Dec. 18. 1851. the defender published and circulated, &c., "the libellous and calumnious statement, that the pursuer's child had been born of ante-nuptial fornication, to the loss, injury and damage of the pursuer."

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Cook and Dean of Faculty for the defender, argued that there was no issuable matter set forth in the summons and record, and that, at all events, whatever ground there might be for an issue embracing the subject of the first issue proposed by the pursuer, there was none for allowing the second of the proposed issues. Secrecy is no part of the stipulation on which a medical man is employed. He cannot plead professional privilege as a ground of refusal to divulge the truth; 2 Starkie, 220, 322; *King v. Duchess of Kingston*, report of trial published by order of House of Lords, 1776, p. 119. It is only where secrecy is the essence of the contract that an action of damages will be sustained; *Kerr v. Duke of Roxburgh*, 3 Murray. There is no allegation that there was any false statement by the defender, or that it was made maliciously.

Inglis (with whom *Donaldson*). The defender was employed on the express understanding that the report was to be the property of his employer. His making a copy of such report, and putting it in the hands of the minister, was not merely a breach of professional honour, but of professional contract.

The LORD PRESIDENT thought there was here a relevant averment to be the subject of issues. The result of the confidential employment of these gentlemen was a joint report, which, it is clear neither of them could deal with as he pleased. He did not look to what this person might be compelled, as a professional man, to disclose. He had committed a violation of his confidential employment, and therefore he was of opinion that they could not exclude this investigation.

LORD FULLERTON was of the same opinion. The question of privilege as to giving evidence in a Court of Justice was different from a question between the parties themselves. The points are totally distinct. A medical man is bound to keep secret, disclosures made to him which it may be of the utmost importance to the parties to keep secret.

LORD CUNINGHAME was also of opinion that there was here an obligation to secrecy. If it be proved, however, as averred by the defender, that he was consulted by the minister, it may reduce his fault or mistake to a venial error.

LORD IVORY concurred. It would be most serious to adopt the argument of the defender: for disclosures may be made to a

medical man which it was of the utmost importance for a whole Dec. 13. 1851.
 family to keep secret.

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The COURT approved of the first issue as being the proper issue for the trial of the cause ; and the second issue was withdrawn by the pursuer's counsel.

D. M. Adamson, S.S.C., Pursuer's Agent.

W. and J. Cook, W.S., Defender's Agents.

FIRST DIVISION.

Orr's Trustees v. Orr and Others.

No. 85.

Trust-estate—Factor—Insolvency—Personal Liability of Trustees.—Circumstances in which, held that trustees were not personally liable for certain sums lost to a trust-estate through the insolvency of a factor appointed by them.

This case came before the Court on a reclaiming note for John Auld, the common agent in the conjoined processes of multiple-pointing and exoneration, &c., the trustees of Robert Orr, against Orr and others, his legatees, and the question now to be considered, was, whether the trustees were personally liable for certain sums due to the trust estate by the person appointed by them to manage it, and now lost through his insolvency. By the trust deed, the trustees were empowered to appoint a factor for whose acts and intromissions they were declared not to be responsible, if habit "and repute responsible at the time of entering on his office." It was not denied that the factor was habit and repute responsible at the time of his appointment. But it was maintained that they were liable for various sums :—*inter alia* L.120 of factor's fee, a sum paid by the factor to the former agents of the trust, and disallowed by the accountant, &c.

Dec. 13. 1851.
 Orr's Trustees
 v. Orr, &c.

The ground on which the common agent held the trustees liable for the same, was, that the payment of any factor fee was illegal, in respect the factor was one of the trustees themselves, and the trust deed gives no power to the trustees to appoint one of their own number factor ; that the payments were made *in mala fide*, and after judicial intimation had been made, in a multiplepointing to which the trustees were parties, that they intended to bring the whole funds into Court, in an action of multiple-pointing and exoneration ; and that the payments were not the acts of the factor, but of the trustees themselves, the same having been sanctioned by their minutes, and for which, therefore, they were liable.

Dec. 13. 1851. *The trustees pleaded, that not having intromitted with the money, they were not liable under the protective clause of the trust-deed for the factor's non-accounting.*

*Orr's Trustees
v. Orr, &c.*

The common agent having lodged in process a minute to the above effect, moving to having the trustees found conjunctly and severally liable for the above amount, the Lord Ordinary (Cowan) in respect that the trustees had no personal intromissions with the sums specified in the minute, and that it is not denied that their authorising the factor to take credit for the same in his accounts had no other effect than to diminish *pro tanto* the balance due by him thereon, refused the motion contained in said minute, and found no expenses due.

The common agent reclaimed.

E. S. Gordon appeared for the claimer.

Patton for the trustees.

The LORD PRESIDENT could see no grounds for overturning the Lord Ordinary's interlocutor. It had not been made out that the trustees had intromitted with these sums for which the factor is liable to account. To the last moment he had their entire confidence; and because he happened to die insolvent, it is impossible to make him liable for his intromissions.

The other Judges concurring,

The COURT refused the reclaiming note, without prejudice to any claim against the factor, and remitted to the Lord Ordinary to proceed further in the cause as shall be just, finding the trustees entitled to the expenses incurred by them.

John Auld, W.S., Reclaimer's Agent.

James A. Robertson, S.S.C., Agent for Trustees.

FIRST DIVISION.

No. 86.

AINSLIE v. SUTTON and MANDATORY.

Jury Trial—Bill of Exceptions—Deposition on Commission—Judge's Charge.—Where the depositions of foreign witnesses taken on commission were proposed to be put in evidence:—*Held* that it was not necessary first to prove that the witnesses were not in Scotland; also *held* that the presiding Judge properly refused to tell the jury that the charger on a bond alleged to have been granted for a gambling debt, was not bound to prove for what consideration the bond was granted.

Dec. 13. 1851. *THIS was a suspension at the instance of Mr Ainslie against Mrs Sutton, relict and administratrix of the original charger, Henry Stephen Sutton, of the county of Hants, England, and manda-*

*Ainslie v.
Sutton, &c.*

tory. The case went to trial in March 1851, on the issue, whether Dec. 13. 1851.
two bonds had been granted, the one on consideration of money won at play, and the other in security of a gambling debt. At ^{Ainslie v.} Sutton, &c.
the trial, the suspender's counsel proposed to put in evidence the report of a commission containing the deposition of a witness resident in London. To this, the counsel for the chargers objected, on the ground that such report could not be read to the jury, unless the suspender proved that the witness could not attend the trial on account of absence, or that the suspender could not bring the witness to the trial. The presiding Judge (Lord Murray) having repelled such objection, the counsel for the charger thereupon excepted. Two other exceptions proceeded on the same ground. A fourth exception referred to the Judge's charge to the jury, in respect that his Lordship "refused to tell the jury that the charger was not bound to prove the consideration given for the bond, and that the presumption was that it was given for value until the contrary were established by the suspender.

The Jury found for the suspender.

The bill of exceptions now fell to be disposed of.

An addition was made by Lord Murray to the bill of exceptions, with reference to the Act of Sederunt, 16th February 1841, § 37, to the effect that he recommended the jury to find for the defenders, unless it had been proved by the pursuer that the bond had been granted in consideration of money won at play, or due in respect of losses at play.

P. Fraser and *Macfarlane* in support of the exceptions. The deposition of a witness taken on commission cannot be received unless the Judge be satisfied by affidavit, or by oath in open Court, that such witness is dead, or cannot attend, owing to absence, age or permanent infirmity; *Act of Sederunt*, 16th Feb. 1841, § 17. The principles according to which this branch of the practice of the Court is regulated, is, that the witnesses must be produced in Court, in order that it may be seen, what amount of credit is to be given to them. The previous Acts of Sederunt having reference to this point, are, first, *Act of Sederunt*, 9th Dec. 1815, §§ 22, 25; *Act of Sederunt*, 29th Nov. 1825, §§ 28, 59. With reference to persons absent, the decisions are *Wight v. Liddell*, 4. Murray, 328; *Wight v. Liddell*, on motion for new trial, 5. Murray, 47; *Armstrong v. Leith Banking Company*, 12. S. 443. As to permanent illness, *Scott v. Gray*, 4 Murray, 61; *Setton v. Setton's trustees*, 1. Murray, 10. *Aitchison v. Patrick*, 28th Dec. 1836, 15. S. and D. 360. See also as to the rigid

Dec. 13. 1851. practice of the Court, *Gray v. Sutherland*, 31st December 1849, *Ainslie v. Sutton, &c.* 12. D. 438; *Maberly and Company*, 8th July 1834, 12. Shaw, 902. In the case of *Mackay v. Macleod*, 12th July 1827, 4. Murray, 278, there was certainly no evidence of the causes of the absence of witnesses; but it was there admitted that they were in Ireland, therefore, this decision is not adverse.

In this case it does not appear in the deposition or elsewhere, that these witnesses were foreigners, or could appear; and therefore both the words of the Acts of Sederunt, and of the decisions of the Court, were against such depositions being received.

As to the last exception, the presiding Judge left the Jury in the dark, and gave them a discretion to find for whom they should think fit, which, under the circumstances, he was not entitled to do. Also the addition made by Lord Murray was not authorised by the Act of Sederunt to be made to bills of exception, but only to notes of evidence on a motion for a new trial.

Young and Inglis for suspender. There is a distinction between foreigners and persons labouring under severe illness. In the latter case, unless there be permanent infirmity, the deposition would not be allowed; the commission is granted merely lest the witness should die. But in the case of a foreigner, the *onus* of proving him to be present lies on the other party. He is beyond the process of the Court; and his deposition raises the presumption that he is still abroad. It is impossible to prove that the witness is out of the country; the other party must prove that he is present. The case of *Whyte* clearly proves this.

The last exception is not a positive but a negative exception. Lord Murray does charge the Jury that the pursuer was bound to prove that it was a gambling debt, and no exception is taken to this. The exception was, that the Judge did not tell the Jury that the defender was not bound to prove the consideration given for the bond. This might be good law, but it had no reference to the case.

The addition made by his Lordship, whether added regularly or not, is not be taken as part of the bill of exceptions.

The LORD PRESIDENT.—The bill of exceptions has reference to an alleged departure from the practice authorised by the Act of Sederunt; but on considering the Act, he was of opinion that the bill of exceptions should not be allowed. In the various Acts of Sederunt, applicable to the exception now under consideration, the words were all but identical; and it was of importance that, in the very first case in which a question arose as to the procedure

in regard to a person beyond the jurisdiction of the Court, it was Dec. 18. 1851. ruled by the Chief Commissioner in the case of *Macleod*, that it was not necessary to proceed with proof of absence from the country, before reading the deposition taken on commission. The *onus* of proof is shifted to the other party. The commission is not given *de plano*, without the other party being aware of it. The interrogatories are made up under the eye of the clerk of Court, and when the depositions here came to be read, not a word was stated about the parties not being in London.

Now, according to the practice of the Court, the usage is, where depositions have been taken, as in this case, at once to proceed to read them; and no case has occurred in which the reading of the depositions was preceded by putting a witness in the box to say that he has reason to believe that the party was in foreign parts. The case of *Mackay v. Macleod* was almost identical in point of principle with that now before the Court. He concurred with the view of the Commissioner, that there being no insinuation that the witnesses were in this country, the *onus* of proving that they were so lies on the other party.

He also thought that the exception to Lord Murray's charge could not be allowed. It was not relevant to the case.

LORD FULLERTON had some doubts on the Act of Sederunt; but the important matter here was the undoubted practice of the Court; and, confirmed as the alleged practice had been by the experience of the Lord President, and by a Judge in the other Division, whose practice in the Jury Court has been very great, he was not disposed to give effect to the first exception now before the Court.

With regard to the last exception, it was untenable. It comes to this: there was a demand to the Judge to lay down a certain proposition in law, which was irrelevant to the case. He declined to do so, and what he did put to the Jury is given in his note. He could see no objection to this, and therefore could not allow the exception.

LORD IVORY was of same opinion. If the question had turned upon the construction of the Act of Sederunt, he would have had some hesitation what construction to put on it; but that difficulty was removed by the construction which had already been put on it by the Lord President and the Lord Justice-Clerk.

As to the other exception, Lord Murray was not bound to give directions as asked by the defender, for it was unnecessary to the matter put in issue. As to the form in which Lord Murray had

Dec. 18. 1851. put it, perhaps a better form might have been adopted, but there was nothing in it essentially wrong.

Ainslie v. Sutton, &c. LORD CUNINGHAME was not present.

The COURT therefore disallowed the bill of exceptions, and found the suspender entitled to the expense of this discussion.

Thomson Paul, W.S., Charger's Agent.

Gibson-Craige, Dalziel and Brodie, W.S., Suspenders' Agents.

SECOND DIVISION.

No. 87.

PETITION, JOHN M'NAB.

Sequestration—Petition for Recal—Concurring Creditor — Where the concurring creditor and trustee was himself an undischarged bankrupt, the Court refused to recal the sequestration, but appointed a meeting of the creditors to be held.

Dec. 13. 1851. This was a petition at the instance of John M'Nab, distiller, Glenmavis, near Bathgate, for recal of the sequestration of the estates of Walter Hunter, grocer and spirit-dealer, sometime at Bonnyrig, in the county of Edinburgh. The petition stated that M'Nab was a creditor of Hunter to the amount of L.43 : 5 : 7, the contents of a promissory-note on which he had used arrestments, and incarcerated Hunter; and the ground of the application was, that the concurring creditor and trustee in the sequestration, James Geddes, the alleged holder of another promissory-note by Hunter for L.130, 15s., was himself an undischarged bankrupt, and not a true creditor to the amount required by law, and that the whole proceeding was a fraudulent scheme for disappointing the just rights of the petitioner and other creditors.

Hunter and Geddes, by their answers, denied the bankruptcy of the latter, pleading in law, *inter alia*, that the sequestration now sought to be recalled was strictly in terms of the Bankrupt Act, 2 and 3 Vict. c. 41, and that M'Nab's only object was to obtain an undue preference over the other creditors.

The Lord Ordinary on the Bills (Murray,) remitted to the Sheriff of Edinburgh to inquire into the proceedings under the sequestration of the concurring creditor, Geddes, and also into the proceedings connected with Hunter's sequestration, and to report on the facts set forth in the petition and answers. The Sheriff accordingly made a report, from which it appeared that sequestration against Geddes' estate had been awarded on the 31st December 1849, and that he was still an undischarged bankrupt. As

to Hunter's sequestration, the Sheriff reported that Geddes, the ^{Dec. 13. 1851.} concurring creditor, had been elected interim factor, and subsequently confirmed trustee.

Petition,
M'Nab.

On advising this report, with the petition and answers, the Lord Ordinary on the Bills (Fullerton) pronounced an interlocutor, refusing the petition for recal, and finding the petitioner liable in expenses; "but appoints the respondent Geddes to call a meeting of the creditors without delay, and to lay before them the report of the Sheriff of Edinburgh, in order to receive their orders thereon." In a note to this interlocutor, his Lordship says, "he cannot hold that there was any such incompetency in the step taken by him, in concurring in the application for the sequestration of Hunter, as to demand the recal of the last sequestration, after it had been adopted by the general body of the creditors. It was clearly a step taken for the benefit of Hunter's creditors as well as of his own; and accordingly, the petitioner does not dispute that his only interest in applying for the recal is, to secure a preference in virtue of an arrestment which he has used in the hands of a creditor of the bankrupt. The Lord Ordinary has therefore refused to recal the sequestration; but he thinks it indispensable that the body of the creditors should be apprised without delay of the true situation of the respondent Geddes, whom they have chosen trustee."

M'Nab reclaimed.

Patton for the claimer, proceeded to argue on the Sheriff's report.

LORD JUSTICE-CLERK. Do you know any case where the debt being vouched, and an affidavit produced along with it, the Court have interposed?

Patton. The debt must be a true debt, 2 Bell's Commentaries, p. 332. *Wood v. Thomson*, 29th January 1851. *Hunter and Company v. Mitchell and Robertson*, 12. S. 10. July 1834. It is a fatal objection to a sequestration, that it proceeds without the concurrence of a true creditor.

LORD MEDWYN. The adoption of the sequestration by the other creditors favours the proceeding.

Moidment was for the respondents.

THE LORD JUSTICE-CLERK. The ground of recal pressed is not to be sustained in the abstract. Here the sequestration has gone on, and a trustee appointed. Along with the petition, there was produced a vouched debt, and an affidavit. This claim

Dec. 13. 1851. ^{Petition,} ~~v.~~ may be found bad, but this would not be a ground for annulling the sequestration. If there is a clear case of collusion, as in the case of Thomson, the sequestration would have been recalled without inquiry into the verity of the debt. He adhered to the interlocutor of the Lord Ordinary.

The other judges concurred, and it having been stated that Geddes had applied for another sequestration of his own estates, the COURT pronounced an interlocutor refusing the reclaiming note with additional expenses, "but in respect that it has been stated and not disputed, that the respondent, Geddes, has now applied for another sequestration, appoint the respondent to call a meeting of the creditors."

William Traquair, W.S., Petitioners' Agent.

William Wallace, W.S., Respondents' Agent.

FIRST DIVISION.

No. 88.

MACKINTOSH v. PITCAIRN.

Heritable Loan—Malversation of Agent—Loss—Liability.—A. negotiated through B. a loan on heritable security with C. A. had previously given the money to B, to be paid to C, the borrower, who, however, only received a part of the sum from B, on the pretence of objections to the titles. Pending negotiations B. suddenly died bankrupt, without accounting for the balance of the money he had so received from A.:—*Held* in a question between A. and C., the borrower, that the loss must fall on the latter.

Dec. 16. 1851. ^{Mackintosh v.} ~~v.~~ THIS was a conjoined process of suspension of a charge on a decree of the Sheriff of Forfarshire, to deliver up to the defender a bond and disposition in security, and of declarator, at the instance of the pursuer, to restrict the sum and security under the same.

The material facts of the case, as determined by the findings of a concerted interlocutor of the Lord Ordinary (Robertson), settled by the counsel on both sides, and now final, and as disclosed by other parts of the record, were these:—The defender employed the late David Smith, writer in Dundee, in a variety of money transactions, and with regard to the security to be obtained upon loans and the uplifting of interests. In the month of December 1844, Smith having advertised money to lend, Mackintosh, who was then a stranger to him, applied to him for a loan, and a correspondence ensued, in the course of which Mackintosh offered heritable security and agreed to dispense with the revision of the bond. Smith made inquiries into the responsibility of Mack-

intosh, and being satisfied on that subject, recommended to Pit-^{Dec. 16. 1851.}
 cairn to go into the arrangement for advancing the sum of £1400, ^{which} Mackintosh
 which Pitcairn accordingly agreed to do. Smith immediately *v.* Pitcairn.
 after wrote to Mackintosh that he was ready to send the bond for
 signature and to remit the money, but that the transmission of
 certain title-deeds connected with the subjects over which the
 security was to extend, was indispensably necessary. After fur-
 ther inquiries, the defender directed Smith to proceed to draw out
 the bond. Difficulties, however, arose in consequence of certain
 of the titles having gone amissing, and it was proposed that until
 the transaction could be completed, the bond should meanwhile
 be signed, and a part of the money remitted to Mackintosh, infest-
 ment being also taken on the bond in the meantime. To this
 proposal Smith agreed; and the bond having been signed by
 Mackintosh at Inverness on the 29th of March 1845, was forth-
 with transmitted to Smith, and after some further correspondence
 respecting certain inhibitions which, it appeared, affected the pro-
 perty over which the security extended, and an arrangement hav-
 ing been made for the discharging of these inhibitions, the sum of
 £700 was, on the 22d April 1845, remitted by Smith to Mack-
 intosh.

It was averred that the L.1400 had previously been paid by Pit-
 cairn to Smith, for the purpose of completing the loan to Mack-
 intosh. But the bond had, in the meantime, been kept in Smith's
 possession for the purpose of having the infestment completed; and
 on the 17th May 1845 infestment was accordingly taken, the instru-
 ment being recorded at Edinburgh on the 29th of the same month.
 Smith's letter to the notary who took the infestment shewed that
 the proceeding was of a secret nature, and gone about without
 communication with, or intimation to, Mackintosh. The bond,
 with the infestment and relative titles, having, in July thereafter,
 been obtained by the defender's father from Smith's office, was
 thereafter got back from that gentleman by Smith for the purpose,
 as it was pretended, of making out his account. Some of Mackin-
 tosh's titles being still amissing, a further correspondence ensued
 between him and Smith, who, in the course of his communication
 with Mackintosh, had urged various pretences for delay, and alleged
 reasons for difficulties and hindrances in the way of the transac-
 tion; and Mackintosh, finding that he could not obtain from Smith
 a final settlement of the matter, employed Mr Thomas Levell
 Hammond, writer in Dundee, as his agent there, who insisted
 either that the remaining L.700 should be paid, or that the herit-

Dec. 16. 1851. able security should be restricted. A farther sum of L.300 was afterwards consigned in the Bank of Scotland in the joint names of Smith and Hammond; and to Hammond, Smith delivered up the bond for behoof of the parties, until the case should be properly arranged. The L.300 was subsequently obtained by the pursuer from the bank; but it did not appear that any further remittance or payment was made to him by Smith on account of the bond. The sum thus actually received by the pursuer from Smith was L.1000, leaving unrecovered by him a sum of L.400.

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Almost immediately after these transactions, Smith suddenly died in bankrupt circumstances, when it appeared that the whole sum of L.1400 had previously been paid by Pitcairn, the defender, to Smith, who thus had retained and misapplied the balance of L.400.

Pitcairn thereupon presented a summary application to the Sheriff of Forfarshire, against Mackintosh, his agent Hammond, and also against Smith's representatives, praying for an order upon Hammond, to deliver up the bond to him, and for damages. In this proceeding, he was ultimately successful, and (the consideration of the conclusion for damages being superseded), decrets went out against Mackintosh, on which he received a charge which Mackintosh suspended. With the suspension there was conjoined a declarator by which Mackintosh concluded, that Pitcairn should be decerned and ordained to make payment to him of theforesaid sum of L.400, with interest; or otherwise, to have it found and declared, that, notwithstanding the terms of the bond, no more was paid to him than the sum of L.1000; and that the bond and infestment should be limited and restricted accordingly.

In this conjoined process, the question now came to be on which of the two parties, the pursuer or the defender, the loss arising from Smith's retention of the £400 should fall. In proof of the averment that the defender had paid the £1400 to Smith, there was produced a letter, dated the 1st April 1845, addressed by Smith to Pitcairn in these terms: "I acknowledge to have this day received from you the sum of one thousand four hundred pounds sterling, contained in bond and disposition in security by Æneas Mackintosh, Esquire, in your favour, and I bind myself to get infestment completed as speedily as possible. I am, Sir, your most obedient Servant;" to which was added the following: "1st April 1845, Mr Pitcairn owes me nothing preceding this date." The pursuer objected that this document, in respect of not being stamped, was not legal evidence of the payment. In

this state of the case, the Lord Ordinary appointed the parties ^{Dec. 16. 1849.} to lodge minutes of debate, arguing the questions of law between them, and specially, 1st, whether there was sufficient legal evidence, as against the pursuer, of the payment of L.1400, by the defender to Smith : and, 2d, whether, supposing this to be established, the loss of the L.400 not accounted for to Mackintosh should fall on him, or on the defender ?

In the minute of debate for the pursuer the authorities founded on, in arguing the first point, were the 55 Geo. III., c. 184, "Receipt," Schedule, part I.; *Tilley on the Stamp Laws*, p. 556; *Ross v. Mathieson*, 9 D., 1366, and 21 Scot. Jur., 376, 27th March 1849. And, on the second point, it was maintained that the loss must be borne by the defenders.

In the minute for the defenders the references were *Tomkins v. Ashby*, 6 Barn. and Cres. 541; *Pirrie v. Smith*, 28th February 1833, 11 Shaw, 473; *Allan v. Murray*, 13th June 1837, 15 Shaw, 1130; *Martin v. Brash*, 25th June 1833, 11 Shaw, 782; and *Tilley on the Stamp Act*, p. 558. As to the second point, the loss must fall on the pursuers.

The Lord Ordinary having considered these minutes of debate and whole process, pronounced an interlocutor, dated the 20th July 1849, by which, *inter alia*, he found that the writing of the 1st April 1845, "not being a receipt and discharge of a debt, but importing only an acknowledgment of the payment by a party to his law-agent of a sum to be paid over to a borrower from that party, and an obligation to get infestment completed, the said document is admissible in evidence, although unstamped as a receipt, and that the same, together with the entries in the books of David Smith, and whole correspondence, sufficiently establish that the whole amount of the loan, being £1400, was paid by the defender Pitcairn to David Smith." And with reference to the loss of the £400, and the other questions between the parties, his Lordship, "under the whole circumstances of the case in the action of declarator, sustains the defences, assizizes the defenders, and decerns; and, in the suspension, finds the letters orderly proceeded, and decerns : Finds the defender entitled to expenses," &c.

In a note to this interlocutor, the Lord Ordinary said that the difficulty of the case arose in a great measure from the employment of Smith as the agent of both parties. The case was one of great hardship ; and as both parties were contending to avoid the loss occasioned by the fraud of another, he thought that the loss must fall on him by whose confidence in the party perpetrating

Dec. 16. 1851. the fraud, and stepping out of the ordinary course of business for his own accommodation, the wrong-doer was enabled to commit that fraud.

Mackintosh reclaimed.

Inglis (with whom *Buchanan*) for the claimer, in support of the argument urged in the minute of debate for the pursuers, contended that there was here a plain fraud, and for which Pitcairn, as his principal, was responsible. Counsel referred to Hoverden on Fraud, p. 174, *Mair and Sons v. Thom*, 20th February 1850. From the reasoning of Lord Mackenzie the bond must here be held for the borrower. The infestment over the lands was taken, as the correspondence shews, for the full amount, in a clandestine manner, and so as to prevent Mackintosh knowing of it. The sasine, therefore, was the fraud as against Mackintosh—*Ross v. Mathieson, supra*.

The *Dean of Faculty* (with whom *N. C. Campbell*) for the respondent (defender), followed the argument maintained by their minute of debate, and—with reference to the case of *Mair, supra*, and the letter of the 1st April 1845, which, as an acknowledgment of payment, did not require a stamp—contended that Pitcairn could not be held as participant in the fraud, and that, therefore, the loss ought not to fall upon him.

This day the case was advised.

THE LORD PRESIDENT.—Looking to the whole correspondence and state of the transactions between the parties, I think it is established, that, though acting to a certain extent for the benefit of the defender, the great preponderance of that correspondence clearly shews that Smith was acting as agent for Mackintosh in effecting the heritable security for the loan of £1400, and that the pursuer chose to place his confidence in him and his representations to an unwarrantable extent; that he never resorted to the assistance of a regular agent till a very late period, when he employed Mr Hammond,—while, notwithstanding all the shuffling and evasive conduct of Smith, in delaying completion of the transaction, he never once addressed himself to the defender, which, if he had done, the whole evil would have been averted. There was therefore great negligence and *laches* on Mr Mackintosh's part, in having relied too much on Smith's honesty, which he was not justified in at all doing, and particularly in putting the executed bond into Smith's hands. Taking all these circumstances into view, he was of opinion that the loss which has arisen out of Smith's death, in

bankrupt circumstances, must fall on the pursuer, and not on the ^{Dec. 16. 1851.} defender.

As I am now satisfied that there is sufficient evidence that the ^{v.} ^{Mackintosh} ^{Pitcairn.} defender did put Smith in possession of the contents of the bond, I concur in the views of the Lord Ordinary, that the objection to the admissibility of the letter of acknowledgment of the 1st of April 1845, coupled with the facts of the case in evidence, is not well-founded. It is not a *receipt* for any debt or sum as previously due, being then paid. The want of a receipt stamp does not, therefore, appear of importance, as the bond, which specifically was granted as a security for that sum of money, undoubtedly was duly stamped.

Keeping this in view, and that the bond duly signed was entrusted to Smith by the pursuer, and that he had actually delivered it up to the father of the defender Mr Pitcairn, and only got it back on an improper pretext, when Hammond again got possession of it,—I can arrive at no other conclusion than that of the Lord Ordinary, that the loss of the £400, arising from Smith's death and bankruptcy, is attributable much more to the unusual proceedings of the pursuer, and his want of due vigilance and exertion—after having had the strongest grounds for mistrusting Smith—than to any proceeding whatever on the part of the defender. In short, I see no indication of any neglect or impropriety on the part of the defender, which ought to subject him in the loss which has arisen.

LORD FULLERTON. The parties here have had the misfortune to deal with a person most unworthy of their confidence. In the course of that dealing a fraud has certainly been committed from which loss has arisen, and the question is, which of the two shall be the sufferer?

The defender's averment that the whole £1400 was paid by him to Smith must be proved *alhunde* of the bond. And I think it is so proved by Smith's acknowledgment of 1st April 1845, confirmed as it is by a letter of Smith to Hammond on the 21st July.

The payment of the money by the defender to Smith being thus established, the question between the parties is reduced within very narrow limits. It really comes to this, which of the two can be held to have reposed in Smith that confidence which he has abused? I think it pretty clear that if the defender had placed the £1400 in the hands of Smith without seeing the bond completed in his hands and getting possession of it, and if Smith had retained the whole or any part of the money, the defender must have been the loser. He could have been the party by

Dec. 16. 1851. whom the confidence would have been reposed in Smith. But here the reverse took place. The pursuer placed the bond in the hands of Smith without getting the money, and that on an arrangement of which the defender knew nothing, and could not be supposed to know anything. The pursuer then was the party by whom the confidence was reposed, and he must suffer from the abuse of it. I am therefore of opinion that we ought to adhere to the interlocutor of the Lord Ordinary.

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LORD CUNINGHAME. I have great doubts of the soundness of the Lord Ordinary's interlocutor. I have a strong feeling that *in dubio* the responsibility ought to be laid on the defender, Mr Pitcairn, and looking to the whole position of Smith, I think he acted solely and exclusively as the defender's agent, and that the defender alone is answerable for his moral and professional breach of trust.

On the most anxious consideration of the correspondence, I really cannot find a single circumstance calculated to have led the most circumspect party in the pursuer's situation to suspect the honesty of Smith as an agent for Pitcairn. There was a hitch at first in the titles of the lands offered as a security. In the state of these titles the immediate advance of the whole loan might have been hazardous to the interest of the lender; but temporary retention of a part of it was therefore necessary for his security; and the pursuer could never suppose or dream that this could not be clearly explained by Smith to his client.

Another plea has been urged against the pursuer's claim which appears to me to be equally untenable. It was said that the pursuer misled the defender by sending his bond to Smith, acknowledging receipt of the full sum. With whom, however, could the pursuer transact except with the agent who was entrusted by the defender with his money? In short, the whole case of the defender seems to be founded on the assumption that there was some improper dealing, if not a conspiracy, between Smith and the pursuer to take some advantage of him. But I can find nothing to warrant the least suspicion of the *bona fides* and honourable dealing of the pursuer. For although there was a deliberate scheme on the part of Smith to deceive his own client and the pursuer, the latter did not, till a very advanced period, discern the various acts of deception practised by this agent. He was even ignorant of the infestation secretly ordered by Smith to be taken and registered on the bond.

In conclusion, I must advert to one view as affording to my

mind a strong illustration of the defender's liability for the bond, Dec. 16. 1851.
Let it be supposed that a catastrophe had befallen the pursuer, as sudden as that which overtook Smith, and that he had become insolvent and dropped down dead before the incumbrances were cleared, to whom would the balance in Smith's hands have belonged if Smith had survived in good credit? Would it have gone to Mackintosh's creditors in virtue of his bond, or been reclaimed by the defender as still in the hands of his agent? I could have as little doubt of the defender's right in the latter event, as of the pursuer's claim in this process.

I must add, however, that I concur with your Lordships and the Lord Ordinary in holding that the objection of want of stamp urged against Smith's acknowledgment to his client of the receipt of the money is not relevant in law.

LORD IVORY. I concur with the majority of your Lordships.

The first question that arises is, was the money paid over by Pitcairn to Smith as agent for Mackintosh or as his own agent? I am clearly of opinion that Pitcairn dealt with Smith exclusively in the latter character. And what seems conclusive on this head is, that if Smith had at this stage become bankrupt without delivering up this bond to Pitcairn on the one hand, or making payment to Mackintosh on the other, the loss must have fallen, not on Mackintosh but on Pitcairn. I conceive, independently of the acknowledgment of 1st April, the proof of the receipt of the money by Smith which was to constitute the loan as between Pitcairn and Mackintosh, stands otherwise substantially established against the latter on the face of the bond itself, followed as that bond was by complete delivery in favour of Pitcairn.

But with whom lies the blame in the result of that double confidence which was thus so unworthily reposed in Smith? On Pitcairn's part all is regular and correct according to the strict and familiar course of every-day practice. On the other hand Mackintosh, who alone had been the cause of matters getting out of the ordinary train, was the party to look after Smith that no advantage was taken. And, in so far as he did not do so, *sibi impudet* as alone answerable for Smith's deceiving Pitcairn into the confidence that all was right. There was no negligence or *laches* on the part of Pitcairn. There was decided rashness and want of caution on the part of Mackintosh. Who shall bear the loss? Holding both parties *in pari casu* in respect to *bona fides*, surely it must be he, without whose irregular and unbusiness-like, and

Dec. 16. 1851. out-of-the-way procedure, the deception that was successfully practised against the other party could not have occurred.

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The case of *Mair* would have more closely resembled the present had the delivery of the deeds, which was there a question, been made antecedent to the death of Smith and not after it, and as I read the opinions of the Court, such a difference in the *species facti* would have had a most important bearing on the judgment. Though even then there would have remained, in *Mair's* case, an important specialty in the borrower's favour, which has no place in the present question.

The COURT refused the reclaiming note with additional expenses.

Sang and Adam, S.S.C., Agents for Pursuer.

Andrew Murray, W.S., Agent for Defender.

FIRST DIVISION.

No. 89. **MONCRIEFF (TOD AND HILL'S TRUSTEE) v. UNION BANK OF SCOTLAND.**

Act 1696, c. 5, Bankruptcy—Further Security—Letter of Obligation.—Where a security had been granted on the eve of bankruptcy in implement of a letter of obligation granted prior to the date of constructive bankruptcy:—*Held* that such security was reducible under the Act 1696.

Dec. 16. 1851. This action was instituted by the trustee on the sequestered estate of Messrs Tod and Hill, W.S., for the purpose of reducing and setting aside the assignation of a bond and certain policies of insurance granted in favour of the defenders, by Messrs Tod and Hill, within sixty days preceding the bankruptcy of these parties. The grounds of reduction were: 1st, that the assignation was null under the Act 1696, c. 5, which declares “all and whatsoever voluntar dispositions, assignations or other deeds which shall be found to be made or granted directly or indirectly be the forsaide dyvor or Bankrupt either at or after his becomeing Bankrupt or in the space of Sixty dayes of befor in favors of any of his Creditors either for their satisfaction or farther Security in preference to other Creditors to be voyd and null.” And, 2d, that intimation had not been made of the assignation to the granter of the bond.

Moncrieff v. Union Bank.

The facts of the case were these: In 1847, an application was submitted to the defenders on behalf of Messrs Tod and Hill for an extension of their bank credit, and it was arranged that the

bank should advance L.3000, for which Messrs Tod and Hill Dec. 16. 1851.
should grant their promissory note, and a letter of obligation to
assign a certain bond, and policies of insurance. Accordingly, on Union Bank.
15th June 1847, Messrs Tod and Hill granted to the manager of
the Union Bank of Scotland, a promissory note for L.3000, pay-
able six months after date, which was discounted, and the pro-
ceeds placed to the credit of Messrs Tod and Hill. Of the same
date, Tod addressed the following letter to the manager of the
bank :—

"I hereby agree to convey to you, at any time required, a
bond for L.4000, by Samuel Laing, Esq. of Papdale, in my
favour, dated 31st January 1838, and two policies for L.2000
each, effected with the Standard Life Assurance Company, in
August 1844, upon Mr Laing's life, and that in security of
L.3000, in a promissory note of this date, by myself and Mr H.
D. Hill, to you as manager of the bank."

The bond and policies of insurance were, of same date, 15th June 1847, delivered to the defenders, and remained in their possession thereafter. On 17th December, a demand was made upon Messrs Tod and Hill by the bank, to grant an assignation of the bond and policies of insurance in terms of the aforesaid letter of obligation; and, on the same day, a formal assignation thereof was executed by Tod. On the following day, the assignation of the policies of insurance was duly intimated to the Standard Insurance Company, with whom the same had been effected. On the 23d of December, the estates of Messrs Tod and Hill were sequestered under the bankrupt statute.

In these circumstances, the trustee on the estate sought to reduce the assignation as a "farther security," prejudicial to the legal rights and interests of the other creditors. The defenders, on the other hand, maintained, that the assignation was not reducible under the Act 1696, in respect the same was granted in implement of an absolute and unqualified obligation for an instant advance, executed long prior to the sixty days preceding the bankruptcy of these parties.

Cases for both parties were prepared by order of the Lord Ordinary (Ivory) on the legal effects of the assignation; and thereafter his Lordship repelled the defences, and decreed in terms of the libel, with expenses.

In the note appended to his interlocutor, his Lordship remarked — "Even had the case here been, that it was from the first *par contractus*, that a specific security (to use the words of Lord Mon-

Dec. 16. 1851. *crieff*) ‘should be granted in due and sufficient form, UNICO CONTEXTU with the payment to be made,’ and that the creditor had advanced his money ‘only in the assured belief that he had obtained such a perfect security,’ both parties having ‘*bona fide* acted and transacted solely on the faith that such a security was actually granted,’ the Lord Ordinary could scarcely have felt himself at liberty, in face of the opinions delivered by the majority of the Court, in *Inglis v. Mansfield*, confirmed and adopted as they were by the learned Lord who disposed of that case in the last resort, to pronounce any other judgment than that which he has done. Indeed, though the question had been an open one—(distinguishing between those authorities which touch securities actually granted by the debtor after bankruptcy, and those which relate to securities granted before bankruptcy, but having their dates constructively brought down; *fictio juris*, to that of the *sasine*, &c., by which they have been completed after bankruptcy)—no act of the debtor being required, or being *de facto* interposed in such a step)—the Lord Ordinary would rather have been disposed to hold, that the result arrived at in *Inglis v. Mansfield* was really that which is most consonant with a just construction of the statute, as well as with sound legal principle, and a correct appreciation of the whole decisions.”

His Lordship was of opinion, that the writs handed over to the creditor to be eventually made available, in case the additional security contingently stipulated should, at some indefinite after-date, come to be called for, “neither constituted any present security for the debt, nor was it in any just sense contemplated or intended as one which should operate in that manner. It was, in truth, a mere device, and that of the most dangerous description,—looking to the interests of the general creditors—to evade the operation of the statute.” “What was intended was, not a present but a future, or, in the words of the statute, a ‘further security’ for the debt already otherwise settled, and which the creditor was to have it in his power to call for, should the necessities of the case, or the altered circumstances (it may be) of his debtor, eventually prompt such a demand. Accordingly, *so long as no demand was made*, there was no actual obligation incumbent upon the debtor even to give this security. Such an obligation was only to rise upon the creditor’s requisition, and could not exist without it.

The defenders (the Union Bank) reclaimed.

Dean of Faculty (with whom *Wood*) for reclaimers. As to the general rule of law applicable to such cases as the present, if a

disposition be granted before the sixty days, it cannot be cut down ^{Dec. 16. 1851.} by the Act 1696, if nothing be required to complete the title but ^{Moncrieff v.} intimation of an assignation or sasine on the bond, even if that ^{Union Bank.} take place within the sixty days; for that is not an act flowing from the bankrupt, but is the act of the creditor himself to complete his title. The opinion of the judge in *Inglis v. Mansfield* was not a conclusive decision, but a mere *obiter dictum*. The Lord Ordinary's opinion, however, is rested on the specialties of this case. There is here not merely a general obligation to give security; there is a specific obligation stipulated for by the Bank, and agreed to by Tod and Hill, to convey a specific bond and policies of insurance. The delivery of these documents did not of itself make a conveyance; but it was material as shewing the intention of parties, and that the bank could, when they thought necessary, prepare a deed of assignation, and present it for signature. Moreover, it prevented Tod and Hill going into the market with these documents in order to obtain additional money by their means. The promissory-note was just the voucher for the debt in respect of which the conveyance was to be granted. That conveyance was not a voluntary deed, but one which Tod and Hill could have been compelled to grant. It was therefore not reducible, although the actual execution was postponed until after the commencement of the sixty days. The case of *Cranstoun v. Bontine*, 6 W. & S. p. 79, applies *a fortiori* to the present case. There is not here a prior debt. This was a specific security stipulated for at the time.

Intimation was not necessary in order to divest the grantor, or to complete the security in the person of the defenders. At any rate, due intimation was made to the debtor in respect that, at the time the assignation was granted, Messrs Tod and Hill were the accredited factors and commissioners of Mr Laing, and in that capacity managed and transacted his business.

The *Lord Advocate* (with whom *Ross*) appeared on behalf of the respondent. The case of *Cranstoun* was rather as between seller and purchaser, than between debtor and creditor. Counsel referred to Sir Islay Campbell's notes on the session papers, by which that Judge appeared to consider that that case was wrong decided.

The authorities referred to in the course of the argument before the Lord Ordinary and the Inner House, were, 2 Bell's Com. pp. 222-3-4; *Eccles*, M. 1128, 4th Feb. 1729; *Mansfield*, 15th

Dec. 16. 1851. Feb. 1771, M. Ap. Bkt. No. 6; *Houston*, 20th Feb. 1772, M. 1170; *Spottiswoode*, Nov. 19. 1783, M. 1177; *Brough v. Duncan*, June 5. 1793, M. 1160; *Brough v. Spankie*, June 5. 1793, M. 1179; *M'Lean v. Primrose*, 16th Nov. 1799, 2 Bell's Com. p. 225; *Bank of Scotland v. Stewart*, 7th Feb. 1811, F.C.; *Johnston v. Burnet and Home*, M. 1130; *Mitchell v. Finlay*, 12th Nov. 1799; *Cormack v. Anderson*, July 8. 1829, S. and D; *Cranstoun v. Bontine*, 6 W. and S. p. 79; *Inglis v. Mansfield*, Court of Session, June 28. 1833, 11 S. 813, House of Lords, April 10. 1835, 1 S. and M'L., pp. 203-229-230-244-246. *Anderson v. Walker*, March 29. 1842, D. 4. p. 1180.

The LORD PRESIDENT referred to the more important cases bearing on this case, especially *Inglis v. Mansfield*, and the opinion of Lord Brougham in giving judgment. In the present case it was quite clear that, although the Union Bank had an opportunity of making themselves quite secure, by asking Messrs Tod and Hill to sign a bond, they contented themselves with the mere letter of obligation. It is true in point of fact, that the bonds and policies of insurance passed into the hands of the bank, but that was of no value as a security, without the assignation; and until within sixty days of bankruptcy, there was no requisition to grant it. Is it not plain that if this transaction was inoperative originally as a security, not being a completed transaction between the parties, that what followed this requisition was in further security of a debt which had by that time been fully established? He concurred in the opinion of the Lord Ordinary.

LORD FULLERTON was of the same opinion. It is impossible to hold the opinion of the Judge in the case of *Inglis v. Mansfield* to be a mere *obiter dictum*. And the present case is much stronger against the security. It is sometimes difficult to distinguish between an obligation to grant a security at some future period, and a security granted at the time: but there is no great difficulty here. There is no evidence that the instant granting of the security was to be the condition of advancing the money. The security was to be granted when required. There was no immediate obligation on Measrs Tod and Hill to grant it; and it was only at the expiry of six months, when the bill became due, that for the first time they are required to grant it. During the whole currency of the bill, the bank held nothing, and required nothing in security but what the bill itself gave them. This therefore is a case which is struck at by the Act 1696.

LORD CUNNINGHAME concurred. Under that statute, the execution on the eve of bankruptcy of a security, though in virtue of a prior obligation renders such security totally invalid. Dec. 16. 1851.
Moncrieff v. Union Bank.

LORD IVORY remained of his former opinion as Lord Ordinary.

The COURT, therefore, adhered to the Lord Ordinary's interlocutor, and refused the reclaiming note, with additional expenses.

Anderson and Wood, W.S., Reclaimers' Agents.

Ferrier and Murray, W.S., Respondent's Agents.

FIRST DIVISION.

JOHNSTON v. HAY.

No. 90.

Sequestration—Claim—Proof.—Circumstances in which a claim on a sequestered estate was rejected in consequence of the unsatisfactory nature of the proof led by the claimant in support of it.

This was a claim for £30 by Helen Hay, upon her brother's sequestered estate. That amount she claimed as her share of £360, the moveable means left by Thomas Hay, her father, besides an heritable estate left by him, and which were taken possession of and intromitted with by the bankrupt upon his father's death. The trustee rejected the claim, alleging that the amount of debts left by the deceased Thomas Hay, who was a farmer, exceeded the value of his property. The Sheriff (of Stirling) on appeal sustained the claim. The Lord Ordinary (Rutherford) on appeal altered the Sheriff's judgment, and the case now came on a reclaiming note before the Inner House. Proof was led before the Sheriff as to the value of the stock on the farm at the father's death; and in the note appended to the Lord Ordinary's interlocutor, his Lordship remarks,—“The proof was incumbent on the claimant, as in a question with her brother's creditors. In the Lord Ordinary's opinion she has failed to prove her debt, and the failure is not more remarkable in what she has attempted to prove, than in the omission of proof plainly within her power; when she was founding upon an inventory and valuation of the farm stock and crop made up nearly two years after the tenant's decease, it was plainly of the greatest importance to shew the extent, nature and condition of the farm, and yet she has neither called for production of the lease, nor has any evidence been led in the matter.” Dec. 17. 1851.
Johnston v. Hay.

P. Fraser and T. Mackenzie appeared for the reclamer.

Hallard and Penney for the respondent.

Dec. 17. 1851. The COURT agreed with the Lord Ordinary as to the unsatisfactory nature of the proof, and were also of opinion that it did not support the pursuer's claim.

Johnston v. Hay.
They therefore refused the reclaiming note with additional expenses.

Andrew Howden, W.S., Reclaimer's Agent.
William Miller, S.S.C., Respondent's Agent.

FIRST DIVISION.

No. 91.

Prescription—Tradesman's Account.—Where the contractors for a building employed a tradesman to excavate the foundations, *Held* that the tradesman's claim for the price prescribed in three years, and that prescription ran from the completion of the work on which the tradesman was employed, and not from the date of the measurer's report, on which the claim was founded.

Dec. 17. 1851. This case originally depended before the Sheriff of Lanarkshire. It having been held that the action was cut off by the plea of prescription, the defenders thereupon charged the pursuer for payment of the expenses, of process. The pursuer raised a suspension of the charge, and conjoined with the suspension an action of reduction and payment. The question now before the Court was, how far the plea of prescription originally given effect to, was well founded; and the facts out of which it arose, were as follows:—

Mackay v. Christie.
In the summer of 1841, the Company of Carmichael and Christie contracted with Messrs Rintoul, merchants in Glasgow, to execute the mason work of certain stores. And it being necessary to excavate the foundation for the building, they employed the pursuer to execute what is called the digger work, excavating the foundations, carting away the rubbish, and the rubbish of an old house taken down to make way for the stores. The agreement, as is usual in such cases, was, that the work was to be paid for at so much per cubic yard. The digger work was completed in December 1841; and on 7th May 1845, the pursuer raised an action in the Sheriff Court, for payment of L.129 : 3 : 3, as the alleged balance of the price due to him for the work. It is the custom to ascertain the quantity of such work as that in question, by the measurement of ordained measurers. The pursuer's claim was founded on a measurement of the work by Messrs J. and A. Sands, dated 14th May 1842, who had been employed in

the first instance by the Messrs Carmichael and Messrs Rintoul, Dec. 17. 1851. to measure the work. "It consisted of such charges as 'To 407 carts, rubbish from Mr Connel's store, &c. ' Balance of cutting a foundation,' &c. ' Cartage of 63 carts of sand,' &c. And from the amount, he allowed certain deductions, such as the price of a quantity of sand received by him from the foundations, the measurer's fee, and various payments made to him by Carmichael, one of the contractors, as alleged by the pursuer, in Carmichael's individual capacity, but applied by him, the pursuer, towards the amount of his claim. To this action, defences were lodged, pleading, *inter alia*, prescription; and the Sheriff-substitute (Skene) sustained the plea of prescription. He held that the term of prescription must run, not from the date of measurement, but from the completion of the work when the price became exigible, and allowed the pursuer proof of resting owing by writ or oath. Various procedure followed in the Sheriff Court, as set forth in the process of reduction, but the details need not be specified here. On the point of prescription, minutes of debate were prepared by both parties, before the Lord Ordinary (Robertson); and his Lordship held that the triennial prescription was applicable, in respect of there having been no written contract between the parties, and more particularly in respect of the decisions in the cases of *Bayne*, 21st Dec. 1692, and *Tweedie v. Williamson*, 8th June 1694, M. 11,092.

The pursuer reclaimed.

Pattison and *Inglis* for the claimer. The pursuer's claim being founded on a specific contract of location for the performance of a particular piece of work, as an *unum quid*, which renders the party employer liable not for the market value of the commodity, but for the contract price, the claim does not fall under the triennial prescription.

The contract price fell to be ascertained by a measurement and report, and that report was not completed and delivered to the parties till 1842. There are therefore no *termini habiles*, for pleading triennial prescription, as the Sheriff Court action was raised within three years from the date of that report, from which alone prescription can run. The claim is substantially part of, and dependent on the contract between the defenders and the Messrs Rintoul, to which the quinquennial prescription applies; and the defenders having *de facto*, charged the Messrs Rintoul for the work performed by the pursuers, and received payment therefor, are not entitled to plead triennial prescription.

The question comes to be, is this a merchant's account, or like it, according to the fair meaning of the statute, *M'Kinlays v.*

Dec. 17. 1851. *M'Kinlays, ante*, p. 143, or is it wages? This is not a fair ordinary remuneration, according to the market price, but a specific agreement; and where a specific price is agreed on, the party may be considered as a contractor rather than a tradesman, and therefore to such a claim the statute does not apply.

*Mackay v.
Christie.*

Handyside and H. Robertson for respondent. The quinquennial prescription only applies to written contracts with regard to moveable property. All contracts with regard to making of drains, building of dykes, &c., fall within the triennial prescription unless reduced to writing. The application of the one prescription is determined by the limits of the other. The only question here, therefore, is, when was this party entitled to get payment? The measurements were made from time to time during the progress of the work, and it was quite possible for the pursuer to get the report made out when he pleased; *de facto*, the report was not made out till 1842. He may thus have delayed taking measures to get payment, but *sibi imputet* if he did so.

The authorities founded on were III. E. 7, sec. 17, 20; II. Bankton, t. 12, sec. 3; Stair, More's Notes, cclxxiv. sec. 9; 1 Bell, 331; *Hamilton & Co. v. Martin*, 24th Jan. 1795, M. 11120; *Orr v. Duffs*, M. 11083; *Bayne*, 16th Dec. 1692, and *Tweedie*, 8th June 1694, M. 11092; *Ewart*, June 1730, M. 11067; *Nobles*, 11th June 1813, F.C.; *M'Gregor*, 8th Feb. 1811, Hume 472; *Smith*, 13th Feb. 1827, 5 S. 338; *M'Farlane v. Brown*, 17th January 1827, 5 S. 205; *Lawson*, 27th Feb. 1839, 1 D. 603; *Southesk*, March 1682, M. 11066; *Hunter v. Thomson*, 29th June 1843, 5 D. 1285, 15 Jurist, 546; *Donaldson v. Ewing*, 10th Dec. 1819, Hume 481; *White v. Spence*, M. 11065.

THE LORD PRESIDENT was clearly of opinion that the quinquennial prescription did not apply.

The nature of the work on which the pursuer was to be employed was clearly work to be performed by artificers. The claim itself consisted of various items, and the contract or agreement was of the species of *locatio operum*. He took the illustration of the building of a wall. If that was not sued for within the three years, would the claim not fall within the prescription? It is work performed by artificers, and it is a strong confirmation of this view that it is the illustration selected by Erskine in the case of *Bayne* in the passage in which he is explaining the general application of the statute, E. b. 3, t. 17, § 16. Here the work was to be done at so much per cubic foot. It was work to be done by artificers, and clearly fell under the triennial prescription.

Again, it is material that this party, not the builders, was to be employed on the excavation, and the common sense view was that the measurement of this excavation required to be done at the time it was made. It is positively stated by the defender, and it is consistent with reason, that such was the case. Therefore the measurement must be held to have taken place in 1841, when the pursuer had it in his power to render his account. He was therefore of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

Lord FULLERTON could see no authority for holding that whatever does not fall within the quinquennial prescription must be held to fall within the triennial. The quinquennial prescription may or may not apply, but we must just look to the case itself, and see whether, according to the best authorities, there is room for bringing it within the triennial prescription, and in this case he agreed with the Lord Ordinary that it did apply. There is nothing in the nature of the employment, which was artificer's work, to take it out of the prescription, nor was the contract of such a nature as to take it out of the rule.

As to the *terminus a quo* he could not hold it to be other than the completion of the work. It did not appear that it was any part of the contract between the pursuer and the defenders that there should be a measurement by Sands. If there had been, there would have been great difficulty in deciding. But that was not the case, and, therefore, upon the whole, he agreed with the Lord Ordinary.

LORD CUNINGHAME was of the same opinion. In cases of this kind it appeared to him that the only satisfactory rule was to be found in the passages of Erskine to which reference had been made.

LORD IVORY was of an opposite opinion upon both points. The action is laid on a contract to excavate, and the debt is rested on the report by Sands. The sum claimed and libelled in the summons is not the amount which would otherwise have been claimed had the action been for wages for work performed. The sum here concluded for would have no meaning except by reference to the deductions of certain sums, and the date of some of these being within the three years, there is this specialty in the case to elide the prescription. Now of the deductions, one of them is the measurer's fee. If that deduction were in terms of the original agreement, he must hold that the measurement itself was a

Dec. 17. 1851. thing mutually stipulated on by the parties as what was to complete the contract. Holding, therefore, that this was a case in which the party was to be paid by the measurement of the work afterwards made by a person to be mutually chosen, that takes it out of the category of retail dealing, &c. If the principal contract would not have fallen under the prescription, neither would the sub-contract, it was of no consequence whatever whether it was reduced to writing or not. This was a case far beyond any one that had ever been attempted to be brought within the statute, and the discrepancy which prevails among the decisions shews that the Court has at some time or other got beyond the fair meaning and intention of the statute.

Mackay v.
Christie.

Now the ordinary cases of employment which fall under the statute are of this nature, that you may resort to such and such a man or not as you please. You employ him to-day; you need not employ him to-morrow. I do not go on the fact in this case of there being but one item charged. But where there is a contract for an abiding piece of work, uncertain as to its amount and execution, but during which the parties cannot get quit of each other, there is no authority to bring it within the triennial prescription.

The COURT, therefore, by a majority, refuse the reclaiming note, and adhere to the Lord Ordinary's interlocutor.

Charles Fisher, S.S.C., Reclaimer's Agent.

Andrew Dun, W.S., Respondent's Agent.

FIRST DIVISION.

No. 92.

DREW v. DREW AND LEBURN.

Process—Division of Court—Contingency.—Circumstances in which motion to remit from one Division to the other, on the ground of contingency, was refused.

Dec. 17. 1851. The pursuer and the defender Drew, entered into a submission to the defender Leburn, of certain differences which had arisen between them. After the submission had endured for some time, and while it was still in dependence, the pursuer raised the present action, to have it found and declared, that Leburn was

Drew v.
Drew, &c.

disqualified from longer acting as arbiter, on the ground of his Dec. 17. 1851.
having placed himself in a relation to the defender Drew, which
biassed and disqualified him from acting impartially in the sub-
mission, and of certain partial actings under the influence of the
alleged bias. The summons was marked as belonging to the First
Division. After it had been raised, the pursuer brought a sus-
pension and interdict, to have Leburn prevented from further
acting as an arbiter, until the result of the action of declarator
should be known. This suspension came before the Second Divi-
sion, who refused the note.

Drew v.
Drew, &c.

The action of declarator proceeded before Lord Cowan, on a
report from whom it now came before the First Division of the
Court, on the question of issues, &c.

On the case appearing in the single bills to-day,

Penney (with whom *W. Peddie*,) for the defender Drew, and
the *Solicitor-General* for Leburn, moved that the case should be
remitte^d, on the ground of contingency, to the Second Division,
before whom the suspension and interdict had depended. True,
that suspension and interdict was not now in dependence. But
it was not necessary in order to justify a remit, from one Divi-
sion to another, on the ground of contingency, that there should
be a process relating to the same points actually in depen-
dence before the Division to which the remit was moved. It
was enough there had been such a case, *Cleland v. Clason and*
Clark, 27th July 1850, Bell's Appeal, Cases VII. 153; Lord
Brougham's speech.

Neaves, (with whom *Macfarlane*). In the case of *Clason*, the
process on the ground of contingency, with which the remit had
been moved, was actually in dependence. It was before the
House of Lords on appeal, and was subject to be sent back to the
Division from which it had been appealed on a remit by the
House of Lords.

The COURT had no difficulty in refusing the motion.

James Leishman, W.S., Agent for Pursuer.

James Peddie, W.S., Agent for Defender, Drew.

William Miller, S.S.C., Agent for Defender, Leburn.

SECOND DIVISION

No. 93.

MULLAR v. ROBERTSON AND OTHERS.

Process—Defences—Enrolment.—Where, in an action of damages, certain of the defenders had failed to lodge defences, and the case was afterwards enrolled in the printed roll in the list of defended causes against all the defenders, “as per roll,” no decree being taken against those failing to lodge defences,—the Court, notwithstanding the pursuer’s refusal to consent, ordered defences to be received.

Dec. 17. 1851. This was an action of damages at the instance of Dr Mullar against Dr Robertson and Others, the Editor and Conductors of *Mullar v. Robertson, &c.* the “Monthly Journal of Medical Science;” and also against Murray and Gibb, the printers, and Sutherland and Knox, the publishers of that journal. The case having been called, defences were lodged for the editor and conductors, but none for Murray and Gibb or Sutherland and Knox. The case was thereafter enrolled in the Outer-House Rolls, in the list of defended causes, in the following terms:—“Dam. Mullar v. Robertson and Others, per Roll, p. Buchanan, &c.” No decree was taken against Murray and Gibb and Sutherland and Knox, who had not lodged defences. In the course of making up a record with those who had lodged defences, the fact of Murray and Gibb and Sutherland and Knox having failed to lodge defences was noticed and founded on by the pursuer. These parties then applied to the pursuer for leave to lodge defences, but he refused to consent, and they then moved the Lord Ordinary (Wood) to allow them to be received, but the pursuer having objected, he refused to receive them.

The defenders now reclaimed against this interlocutor.

Patton and Dean of Faculty for the defenders. The defenders are desirous of getting on with the case, but on account of the pursuer’s proceedings they could neither move one way nor another. The case had been both called and enrolled, so that they cannot force it on by protestation, and no decree has been taken against them against which they can be reponed. They are thus liable to decree being taken against them at any time within forty years; moreover, by § 23 of the recent Court of Session Act, the Lord Ordinary and Court have entire control given them over the case from the moment it has been enrolled in the Outer House Roll, and are perfectly entitled to allow defences to be received.

Inglis for the pursuer. The parties are claiming to have defences received as a matter of right. If it is competent to make such a demand now it would be still more competent to do so ^{Dec. 17. 1851.} *Mullar v. Robertson, &c.* when the case is in the printed roll, but defences cannot be then received except by consent. By § 45 of Act of Sederunt, 15th July 1844, the Lord Ordinary has power to do nothing but pronounce decree; moreover, nobody is entitled to move in the case but those who have appeared, and it was accordingly those who had lodged defences who were now asking that defences should be received from those who had not. The § 23 of the recent Act is not intended to apply to a case like the present, and nowhere is a right given to a party to force in defences.

LORD JUSTICE-CLERK. The case is a depending process to all intents and purposes, and subject to the control of the Court. The course followed by the pursuer is not a fair one, and nothing but an explicit declaration in an Act of Parliament will induce us to sanction it. I think the case should be remitted to the Lord Ordinary with instructions to receive the defences on payment of such expenses as he might think right.

The other Judges concurred.

John Cullen, W.S., Pursuer's Agent.
Smith and Kinnear, W.S., Defenders' Agents.

FIRST DIVISION.

NOTE, MARION MITCHELL.

No. 94.

Poors'-Roll—Declaration.

In the Single Bills, application was made for authority to the Clerks to receive for publication in the Minute-Book the declaration of Marion Mitchell, an applicant for the benefit of the Poors' Roll, although signed by the minister of the parish and only one elder—these being the whole number of the kirk-session of her parish.

Ogilvy appeared in support of the application.

The COURT were of opinion that under the circumstances there was here a sufficient compliance with the Act of Sederunt, and they granted authority accordingly.

John Cousins, W.S., Agent.

SECOND DIVISION.

No. 94.

LESLIE v. LUMSDEN AND OTHERS.

Action—Title to pursue—Parties to be called—Joint-stock Company.—In an action at the instance of a shareholder of a dissolved banking company against certain of the directors for the market value of shares, on the ground of fraud and malversation—*Held, first*, that he was entitled to pursue such action, although neither the whole shareholders nor the company were called into the field; and, *next*, that it was not necessary to call all the directors, even although some of the allegations in the action involved them all.

Dec. 17. 1851. This action was brought at the instance of the representatives of the late Mr Leslie of Powis—who was a shareholder of the company, called “The Banking Company of Aberdeen”—against the defendants, who were directors, or represented parties deceased, who were directors of that company, for the marketable value of certain shares of that company, as at 1st January 1828, or alternatively for damages. The contract of copartnery under which the company had existed previously to 1st January 1828, having then expired, its endurance was prorogated for twenty-one years from that date; and on the expiry of the contract of copartnery in 1849, its stock and interest were transferred to the Union Bank. The pursuers allege that, for a great many years prior to the expiry of the contract of copartnery, in 1849, “the directors, and especially” those who have been called as defendants in this action, “did, in violation of their duty to the partners, and of the regulations which they professed and undertook to be guided by, most fraudulently and illegally, and through collusive malversation in office, and abuse of their powers, promote the private interests and objects of themselves, their friends and connections, to the serious loss, injury, and damage of the company and its partners, as more particularly detailed and set out” in the condescendence.

It is alleged that this system was carried on to the extent, not only of involving the whole capital of the company, (L.250,000,) but of pledging its credit greatly beyond that extent, the aggregate amount being upwards of L.521,000. Various contrivances, which it is not necessary particularly to specify, are alleged to have been fraudulently resorted to for the purpose of aiding the objects of the directors, and concealing the true state of matters from the shareholders—such as concealment and misrepresentation in their reports, declaring and paying dividends out of capital instead of profits, permitting and sanctioning the keeping of

false and irregular books, &c. And the pursuers allege, that by and through the false and fraudulent misrepresentations, concealments, and collusive practices of the defenders, who acted as directors, the late Mr Leslie sustained serious loss and damage, and, in particular, that the shares held by him, which are said to have been worth £.6000 at the selling price, as on 1st January 1828, being the commencement of the last contract, and the alleged commencement of the system of fraud libelled, have been lost, or almost wholly lost and extinguished. The summons concludes for the selling price as at 1st January 1828, or alternatively for damages.

The action was met by two dilatory defences. The first is, that the pursuers, being the representatives of only one individual shareholder, have no title to insist in such an action as the present, which is said to be substantially an action to compel the directors to account for their misconduct towards the company—or for a wrong done by them to the company, in their official capacity of directors. The second is, that all the parties interested have not been called; and, in particular, while the wrong is alleged to have been done "by the directors," only some of them have been called as defenders.

The Lord Ordinary (Colonsay) repelled these pleas, and in his note referring to the second, he says,—“As to the parties proper to be called in such an action as the present, it appears to the Lord Ordinary that the action is laid throughout essentially upon fraud, amounting even to delict; and that, in such an action, the party who has suffered the wrong, may sue all, or any, or as many as he thinks expedient, of the wrong-doers. This appears to be consistent with the doctrine laid down in the House of Lords in the case of *Ferguson v. Kinnoull*, 11th July 1842, 1 Bell's Appeal Cases, p. 696, *et seq.*”

The defenders reclaimed.

Leave for the defenders. The directors, the pursuers say, have been the means of loss to the company. If so, they are truly indebted to the company in the amount lost, and a claim for that amount is among the assets of the company; and Leslie, as a shareholder, can only be compensated for this loss in so far as it was really due to the company. The position of the directors who are in fault is that of an agent or cashier, who allows an account to be overdrawn. The claim for recovery is *in bonis* of the company, as against the parties who have done the wrong. The

Dec. 17. 1851. *defenders demur to the title of the pursuers, without the company being in the field, either as pursuers or party, to enter on the investigation proposed, and to call on the defenders to settle an account with them ; for what ? their share of what would have been the general balance of the company, if the balance had been rectified in the manner now proposed.*

Again all the directors should be called. In regard to the general doctrine, that in a case of simple dealing, it may be competent to call any one delinquent, without calling the rest, there is no occasion to contest that point. The case of *Ferguson* does not apply. The basis of the liability here is contract. The relation between the parties is constituted by contract. Although there are allegations of fraud, they are mixed up with allegation of neglect of duty, that is to say, breach of obligation imposed on the directors by this contract, into which they have entered. The neglect of obligation is substantially the ground of the action. Can the pursuers then go on without calling all the directors ? All the directors are blamed. Counsel proceeded to shew from the record, that allegations of neglect of duty and of fraud were made in regard to all the directors generally.

Solicitor-General for Pirie, one of the defenders.—My client ceased to be a director since 1842, whereas much, for which the defenders are blamed, happened between that and 1848, and the conclusion is one of joint and several liability against all.

LORD JUSTICE-CLERK.—The proper ground of action is stated in the condescendence, and must be held to be construed by the plea in law. Now, after a narrative in which unquestionable reference is made to the general actings of the directors, and of the loss thereby said to be occasioned to the pursuer, the 52d statement sets forth, that “the pursuers, by and through the false and fraudulent misrepresentations, and fraudulent and collusive practices and malversation in office, as well as the fraudulent concealments of the defenders, who acted as directors in the management of the bank, and of the parties deceased, who also acted as directors in the said management, and whom the other defenders represent, and by and through their neglect and violation of duty as aforesaid, have, as representing the late Mr Leslie, sustained serious loss and damage.” The plea in law is—“The defenders, by and in consequence of the false and fraudulent misrepresentations, and fraudulent and collusive practices, and by the fraudulent concealments, and violation of duty, of themselves or of the parties they represent, are, in the circumstances condescended on, liable

to the pursuers in terms of the conclusions of the summons." Dec. 17. 1851.
The proper ground of action, then, is fraud on the part of the directors called. Whether the narrative is sufficient to sustain it, *Leslie v. Lumsden, &c.* will be a question for consideration when the relevancy comes before us. The first preliminary defence, is, that the pursuers have no title, in respect that they only represent a single shareholder, to complain of acts which affected the whole company. Now, it is scarcely contended that the pursuers can be compelled to call the whole other shareholders. To call the company would not satisfy the object. If any one is to be called, it must be the shareholders. But why call them? They might not wish to take any step in the action. They may not view the conduct of the directors in the light in which it is viewed by the pursuers. If they refused to appear, would that stop the action? No. Then it is said next, the pursuers have not called all the directors. Now, it is true, that in the narrative of the summons it is said generally, that the acts complained of, the unfair reports, &c., were the acts and reports of the directors generally, and there are articles which speak of neglect of duty on the part of the directors generally. It would not be easy to state such a case of fraud against some directors as this, without supposing considerable neglect on the part of the others. But the allegation of *fraud* is directed against some only, those namely, whom the pursuers call here. The allegation of neglect against the others is only a part of the narrative of the summons. What effect the statements made as to the others may have on the question of relevancy is a different point. Suppose the other directors had been called, they would have said to the pursuers, "you have called us in this action, having no allegation of fraud against us. You don't state that we caused you loss by fraudulent acting, and we are entitled to be assolized." It would not be enough for the pursuers to answer, "We have called you *ob majorem cautelam.*"

It is said that Pirie is in a different situation from some of the other defenders, and is not responsible for acts done after he was out of the direction. That may be a good defence to the action, which will be considered when the acts are proved that caused the damage. If it appears the acts occasioned no loss up to 1842, while Pirie was a director, then he will have good ground to be assolized.

LORD MEDWYN concurred.

LORD COCKBURN.—I am of the same opinion. As to the first
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Dec. 17. 1851. point, I cannot understand how it can even be stated. The pursuers say, they have suffered by a wrong done, and they are told they have no right to complain, unless accompanied by all who have suffered. They are entitled to protect themselves. As to the second point in regard to the other directors not being called, I agree entirely. This is a summons which, in point of fact, concentrates itself in a charge of fraud against these five directors. But I go further. Suppose it did not; assume that the whole directors were said to be accessory, and directly accessory, to the frauds charged, I want to know if a man who suffers by a fraud cannot select his victims, and single out one or more for prosecution. Suppose the directors of a bank choose to mislead and deceive their constituents, by giving a false account of their affairs, say by forgery; or each helps himself to some of the funds; and to conceal their delinquencies all agree to burn the house and books, is a man injured by that act not entitled to prosecute one of these criminals because he cannot prosecute all? This is a strong illustration, but it seems to me completely to test the principle maintained by the defenders.

LORD MURRAY concurred.

The COURT adhered with expenses.

The counsel for the pursuers were *Macfarlane and Inglis.*

For the defenders the *Lord Advocate*, the *Dean of Faculty*, the *Solicitor-General*, *Neaves, Currie and G. Young.*

Graham and Webster, W.S., Pursuer's Agents.

Walter Duthie, W.S.,

James Ross, S.S.C.,

Sir Charles Gordon and Co.,

} Defenders' Agents.

SECOND DIVISION.

No. 95.

SKINNER v. LUMSDEN and OTHERS.

Dec. 17. 1851. Besides the above action, there was another against the same defendants, proceeding on the same grounds, and containing the same conclusions, at the instance of William Skirner, advocate in Skinner v. Lumsden, &c. Aberdeen. A similar defence was stated in it, which was also repelled.

FIRST DIVISION.

KERR AND OTHERS v. MARQUIS OF AILSA.

No. 96.

11 and 12 Vict. c. 36—*Entailed Lands—Application to Sell—Pupil—Tutor ad Litem—Affidavit—Justice of Peace—Personal Interest.*—In an application for authority to sell a portion of entailed lands, where the next heir of entail was the son of the petitioner and in pupillarity:—*Held* that the appointment of a *tutor ad litem* to the pupil is timeously made any time before alienation of the lands; and that a Justice of Peace before whom the requisite affidavit is taken, although the husband of one of the respondents in the application, is not personally interested, his *jus mariti* being excluded, so as to invalidate such affidavit. And it appearing that the affidavit had been made in England before a Scottish Justice of the Peace, opinion of English counsel ordered to be taken as to its formality according to the law of England.

An application was presented under the 11th and 12th Vic. c. Dec. 18, 1851. 36, by the Marquis of Ailsa, for authority to sell certain portions of his entailed lands, which, after the usual procedure, were sold in April 1851. In July thereafter, a minute was lodged for Kerr &c. v. Marquis of Ailsa. and Others, purchasers, bringing under notice what appeared to them to be certain deviations, of a serious nature, from the correct forms of procedure under the application. These were as follows:—

1. The petitioner's son, the Earl of Cassillis, who is in pupillarity, and his uncles, Lord David Kennedy and Lord Gilbert Kennedy, are stated in the petition to be the next heirs, with whose consents, if of the statutory ages, disentail might competently proceed. The petition accordingly prays for service upon them, and as the petitioner is the administrator in law for his son, a special prayer was introduced for the appointment of a *tutor ad litem* to Lord Cassillis.

When the case came into Court, service was ordered as craved, and was duly made. But service was not made according to the form in ordinary cases, on the petitioner, as administrator for his son, nor was there any edictal citation of tutors and curators. The objection therefore was, that having so far adopted the course sanctioned by the Act of Sederunt of 23d December 1848, § 4, which dispenses with such service where the father is the legal guardian of a party called, and in minority, the petitioner omitted, in compliance with the Act, to apply at the usual and proper period for the appointment of a *tutor ad litem* to the pupil, Lord Cassillis; the Act providing that “in the course of the appli-

Dec. 18. 1851. *cation a separate tutor ad litem, or curator ad litem, or curator bonis,* or other guardian, shall be appointed to such party." It was not till fifteen months after the petition was first moved, that the Court, on the motion of the petitioner, appointed a *tutor ad litem* to Lord Cassillis and allowed him to see the process. Prior to the appointment of the tutor, the amount of the debts had been ascertained, the valuators had reported in what lots, and at what upset price or prices the same should be exposed to sale, &c.; and thereafter the sale proceeded on the *data* contained in the report of the valuators. There was no evidence in process of the *tutor ad litem* having made any appearance farther than to borrow the process. There was here, therefore, a series of material steps which took place, not only in absence of the next heir of entail, but without his having been in due course of law made a party to the application. This procedure was consequently irregular and informal, and could not be validated by the mere subsequent appointment of a *tutor ad litem*, not followed by a repetition of the procedure. As to the proper time for such an appointment, reference was made to the case of *Primrose*, 17th November 1849.

2. The petitioner has not complied with the statutory requisite, by producing an affidavit in terms of sec. 6 of the said Act. The affidavit produced is objectionable, in respect, that (1.) it was taken in London before Sir David Baird, Bart., a Scotch Justice of the Peace, who had no authority to administer an oath beyond the kingdom to which his commission applied; (2.) the Justice, before whom it was taken, was one of the respondents in the application.

On these grounds the purchasers submitted that they were entitled to redress; and, if the objections should appear insuperable, that the Court should grant warrant to them to uplift and receive back the sums respectively consigned by them, in terms of the statute and the articles of roup, as the price of the subjects bought by them.

To this minute, the Lord Ordinary (Robertson) appointed the petitioner and curator to put in answers.

The curator accordingly lodged a minute, stating that he had satisfied himself it was not for the interest of the minor to oppose the granting of the prayer of the petition for authority to sell, and formally approving of the proceedings that had taken place under it.

The petitioner (the Marquis of Ailsa) lodged answers, in which he maintained, that the first objection was obviated by the minute

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Ailsa.

lodged by the curator. With reference to the second objection, Dec. 18. 1851. it was, in the *first* place, competent for a Justice to administer an ^{Kerr, &c. v.} oath in the form of an affidavit, *extra territorium*, that being a Marquis of mere ministerial act of voluntary jurisdiction—Ersk. b. i. tit. 1, ^{Ailsa.} 2, 4; *Cochrane*, Feb. 3. 1688, M. 7294; Tait on Justices of the Peace, p. 272; Bell's Law Dict. *voce* "Affidavit," and "Justice of the Peace;" *Turnbull v. Smellie*, March 1. 1828, 6 S. 676. And, in the *second* place, Sir David Baird had no interest in the matter to which the affidavit related; for, although called in the petition, he was only called as the husband of Lady Ann Baird, and, as stated in the petition, his *jus mariti* was excluded.

The Lord Ordinary reported the case to the First Division, who thought they could more satisfactorily dispose of the question, if brought before them in the shape of a suspension and interdict at the instance of the purchasers, as of threatened proceedings on the part of the Marquis of Ailsa, to compel them to complete their titles. In this shape, therefore, the case now came before them.

Duff and *Dean of Faculty* for the suspenders.—The case resolves into a question of title. The purchasers cannot be asked to take the risk of this title in its present shape; *Macdougall*, 9th March 1850, 12 D. 906.

Mure and *Marshall* for the respondents.—This is an application under sec. 35 of the statute, not for authority to disentail, but to sell portions of the land for payment of debts; and the appointment of a tutor is timeously made at any time during the application. The commission of a Scotch Justice of Peace is not a Scotch, but a British commission; it passes under the Great Seal, but not the special Great Seal applicable to Scotland; *Nelier v. Hundred de Benhurst*, Chas. I., Croke's Reports, vol. iii. p. 211; 6 Queen Anne, c. 6. The circumstance of a magistrate having an interest in the subject-matter of an affidavit is not an objection to his going through the ministerial act of taking an affidavit.

The LORD PRESIDENT was of opinion that the objection as to the validity of the affidavit ought not to be sustained. There is a great deal of force in what has been urged, that the commission of a Justice of the Peace passes under the Seal adopted at the Union, which came in place of the old Seal of Scotland, and that although the commission is granted to a Justice of the Peace of a particular county, it is in reality for the whole of Great Britain. The administering of the affidavit here was, therefore, a legal performance of duty, and the objection ought to be repelled.

Dec. 18, 1851. As to the personal objection to Sir David Baird, that is answered by the fact, that his *jus mariti* is excluded.

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Ailsa.

As to the other objection, grounded on the failure to apply for a tutor at the proper time, the purchasers of the lands were entitled to be satisfied with their title, and to come to the Court to have it settled. But there is nothing in the Act of Parliament, or in the Act of Sederunt which interprets it, which ties down the Court to appoint a *tutor ad litem* at any particular moment. It is not too late to apply to the Court to make such an appointment before an alienation, or attempted alienation of the lands. Here an application has been made; a curator has been appointed and charged with the interest of the pupil. That gives effect to all that has been done in the course of the proceedings. Everything, therefore, has been done which, in his apprehension, was required, according to a fair construction of the Act of Parliament.

LORD FULLERTON was not disposed to give effect to the personal objection to Sir David Baird; but as to the affidavit itself, his doubts were not removed. Sir David Baird holds a commission in Scotland, and by the law of Scotland, he might have acted beyond the proper limits of his county; but here he is called on to act out of Scotland altogether; and the question comes to be whether this is an affidavit according to the forms of the law of England. It would be satisfactory to know how the matter stands in this respect.

With regard to the other matter, he was disposed to adopt the opinion of the Lord President. Could it be made out that there was a violation of a statutory regulation implying nullity, there would be an end of the matter; but he could not come to that conclusion. There is no declaration in the statute, and no requirement in the Act of Sederunt, making it clear that the application for a curator must be instant, and may not be made at any time in the course of the proceedings. The effect of that appointment, and the legal powers of the parties, thus depend, not on any specific enactment, but on the ordinary rules of law. There is nothing so irregular as to nullify the proceedings at common law. The consent given by the curator is a sufficient compliance with the Act of Parliament.

LORD CUNINGHAME concurred in thinking the appointment of a curator could be made at any time during the application. The curator has expressed himself satisfied with all that had been done; and the proceedings were, in every respect, conformable to the statute.

The objection to the affidavit is equally groundless. It is

said Sir David Baird is one of the respondents in the application, Dec. 18. 1851.
 but he truly is not so ; and at any rate, the objection would not extend to the ministerial duties of a Justice of the Peace in taking ^{Kerr, &c. v.} Marquis of Ailsa.

LORD IVORY felt the responsibility of this case, because it was a very serious question whether these purchasers were to be compelled to accept a title over which any doubt hangs ; and on the other hand, it is hard to oppose anything to the beneficial working of the statute. The Court is dealing with a case in which mere formality is of the essence of the proceedings. The question comes to be, is there anything of that kind here which, being omitted, is fatal to the proceedings ? He did not think there was anything in the objection which rested on the personal interest of Sir David Baird ; but he agreed with Lord Fullerton as to the difficulty arising from the circumstance of the affidavit being given in England. This is not a question for a Scotch lawyer to decide, and therefore he thought the opinion of English counsel should be taken on the subject. He had also difficulty as to whether the constituting the debt, in respect of which alone the Court could authorise the sale, was not such an essential part of the procedure that the consent of the curator could not afterwards be adhibited to it, and therefore whether the appointment should not have preceded the cognition of debt. He was clearly of opinion that the parties could not be called on to part with their money until there be *res judicata* on their title.

The COURT, therefore, by a majority, repelled all the objections, except as to the affidavit being taken by a Scottish Justice of the Peace, with regard to which they directed the opinion of English counsel should first be taken.

Hunter, Blair, & Cowan, W.S., Petitioner's Agents.

John Patten, W.S., Objector's Agent.

FIRST DIVISION.

THOMSON'S TRUSTEES *v.* ALEXANDER and OTHERS.

No. 97.

Foreign deeds—Construction—Foreign Counsel—Court of Session.—In the construction of a foreign deed, where foreign counsel has reported that the *ter loci* attaches no definite meaning to the terms of the deed, either by technical appropriation, or by judicial construction :—*Held* that the Court is entitled to take the construction upon itself.

Consulted Judges—Unsigned opinion—A case having been laid before

Dec. 18. 1851. the whole Judges of the Court for their opinion, and one of the Judges dying before having signed the Record copy of his opinion :—*Held* that such opinion could not be received.

*Thomson's
Trustees v.
Alexander,
&c.*

This case related to the validity and construction of a will executed by a Scotsman in the colony of Newfoundland. The question before the Court arose out of an action of multiplepoinding and exoneration, raised by the executors of the testator, for the purpose of determining the right to the residue of the estate, which formed the subject of the fund *in medio*.

The late John Thomson of St. John's, Newfoundland, was a native of Scotland, and in the year 1807 he went to Newfoundland, where he resided and carried on business as a merchant, till the year 1838. In June of that year, he executed a holograph last will and testament, regulating the distribution and disposal of his whole succession, real and personal, and also a relative letter addressed to the trustees under the will. In the following month of July he returned to Scotland, and died in October, possessed of considerable property, consisting chiefly of lands, houses, and other real estate in Newfoundland, which he acquired by purchase after he went to reside in that island. He was unmarried; but he had a natural daughter of the name of Charlotte Mary Ann Thomson. She married Walter Alexander of Glasgow, and is now dead, and her children claim to be preferred to their grandfather's succession under certain provisions in his will in their mother's favour, which, they allege, import, according to the law of England, the whole beneficial interest in the trust estate. The right to the succession is also claimed by the testator's next of kin, and their representatives.

Questions being raised as to the due execution and construction of the will, and it being admitted that English law regulated the affairs of the colony, a Case and Queries applicable to the matters in dispute between the parties, were prepared under the authority of the Lord Ordinary (Cunninghame) for the purpose of obtaining the opinion of Sir John Romilly, then Solicitor-General of England.

The learned counsel returned an opinion affirmatory of the valid form and execution of the instrument as a will; but with respect to the construction of the will, he expressed an opinion that there was no clear expression of the meaning of the testator as to the fee of any part of his property, after the expiration of certain annuities in favour of his child and grandchildren, and that the whole must pass, as an undisposed residue, to his collateral next of kin. He

remarked that "the great point of difficulty in this case arises from Dec. 18. 1851. the obscurity of the will of the testator and the consequent difficulty of ascertaining the true import of the expressions he has used, and upon which, in my opinion, none but judicial authority can affix an intelligible meaning."

This opinion appeared to the Lord Ordinary conclusive as to the execution and validity of the will as a statutory instrument, but he conceived that Sir John Romilly's construction of the words of the will deserved reconsideration. The case was accordingly again laid before the learned counsel, with an interlocutor and note (21st Dec. 1849) by the Lord Ordinary. No alteration of opinion, however, was indicated on any of the points previously expressed, but this statement was added to the opinion :—" In answer to the Lord Ordinary's question, I have no hesitation or doubt in expressing my opinion that the import or construction of the will is not purely or exclusively a question of English law,— that it does not depend on any technical rule of English practice, but that it is a question on which the judge of any Court, conversant with the language in which the will is written, is entitled and bound to give his judgment according to his understanding, and the plain interpretation of the words used."

Lord Cuninghame having taken his seat as a Judge of the First Division, the cause came to depend before Lord Dundrennan as Lord Ordinary. In June 1850 his Lordship issued an interlocutor, in which he found, *inter alia* :

"(3.) That by the law of England the will in question gives the said Charlotte Mary Anne Thomson an annual income, subject to the discretion of the trustees under the deed, to the extent of £150, and afterwards to her children during their minority, but that there is no disposition of the property by the testator after the youngest child of the said Charlotte Mary Anne Thomson shall have attained majority.

(4.) That the residue of the estate, after securing the whole special legacies provided in the settlement, was undisposed of by the will, and that it passed as personal estate to the next of kin of the testator living at the time of his death: Therefore repels the claim of the present claimant to theforesaid sum of £3000, &c.

In the note appended to this interlocutor his Lordship remarked,—" The preceding interlocutor proceeds on the footing that the competition in this case involves the distribution of a foreign succession under a foreign will, and that the import and effect of this will, in all its parts, has been conclusively ascertained by the opi-

Dec. 18. 1851. *Thomson's Trustees v. Alexander, &c.* nion of a foreign lawyer, obtained for that purpose, with the sanction of the parties, and under the authority of the Court." He could find no authority for a plea strongly relied on by the counsel for the claimant at the debate, that the opinions of Sir John Romilly are only conclusive of the intention and effect of the will in question, in so far as they rest on technical or peculiar grounds of English law; and that in all other respects the instrument is liable to be construed by the courts of Scotland " according to their understanding and the plain interpretation of the words used, as language well understood in all parts of the empire, and thus becoming, in fact, a question of international law." His Lordship referred to the cases of *Trotter*, Dec. 5. 1826; *The Aberdeen Banking Company*, June 1. 1837; *Lord Cranstoun v. Cunningham*, Feb. 16. 1839, as corroborative of his view that the intention of a foreign will or instrument is in all respects a question of foreign law.

Against this interlocutor Alexander reclaimed.

On advising, the Court, in respect of the state of the opinions of the Judges of that Division, ordered minutes of debate to be prepared and laid before the Judges of the whole Court, for their opinion.

The case was again called on 16th December.

Inglis and *Christison* appeared for the reclaimers.

J. Campbell and *Neaves* for the raisers, and the testator's next of kin.

Ross and the *Lord Advocate* for the representatives of the elder brother of the testator.

The *LORD PRESIDENT* remarked that, among the opinions of the Consulted Judges, the opinion of *Lord Dundrennan*, who has since died, (and who had signed a proof copy of the opinions of the consulted Judges, but had not signed the record copy,) could not be counted, as that would raise the number of Judges beyond the proper number.

Christison referred to the cases of *Innes v. Duke of Gordon*, 4 W. and S. Ap. Cases, 314, and *Shepherd v. Grant*, 4th Jan. 1844, to shew that *Lord Dundrennan* having signed his opinion, it ought to be received. He contended that the opinion of his Lordship's successor, *Lord Cowan*, ought not to be counted; and, also, that the opinions of *Lords Rutherfurd* and *Colonsay*, who were not Judges at the date of the remit, or of the consultation of the Judges, should not be counted.

The COURT considered it necessary to consult with the Judges Dec. 18. 1851.
of the Second Division on the point.

Thomson's
Trustees v.
Alexander,
&c.

The case was again called to-day, when

The LORD PRESIDENT announced that Lord Dundrennan's opinion could not be received, and that a majority of the Judges were for altering the interlocutor. He himself remained of an opposite opinion.

Of the Judges of the First Division, Lords Fullerton, Cuningham, and Ivory, concurred with the majority, as now constituted, consisting of Lords Medwyn, Robertson, Rutherford, and Cowan.

The grounds upon which the opinion of the majority proceeded, may be stated in the following condensed argument, gathered from their Lordships' printed opinions:—In so far as regards technicalities, on the observance of which the validity of the deed depends, the *lex loci* must afford the test of that validity; and even in the matter of construction, the Court is bound to hold that the party using certain terms or certain forms of expression, uses them in the sense which the law of the place of execution has attached to them. Those technicalities, and that judicial construction, may be held facts, of which the opinion of the foreign lawyer is the appropriate evidence. But then, the application of this principle seems to require, that the foreign lawyer should be able to say, on his professional authority, that there is law fixing the meaning of the terms of the deed, either by technical appropriation, or by judicial and authoritative construction. If he reports that there is neither one nor another, there is, in truth, no fact established by his evidence, by which the Court requiring evidence, can be informed; and therefore the Court has no alternative but to decide the meaning of the deed according to its own view of the force of its terms. The question on that supposition is not a question of foreign law, but of language common to both countries, of which the Court is clearly competent to judge. The answer of counsel here states, that the Colonial law gives no rule or canon to regulate the matter, but that the intentions of the testator are to be gathered from the instrument by the judge of any court conversant with the language in which the will is written. This shews that the reference to foreign law was uncalled for, and leaves the Court not entitled only, but bound to take the construction upon itself.

The COURT, therefore, in conformity with the opinion of the majority of the whole Judges of the Court, recalled the interlocu-

so far as it relates to the claim of
the Plaintiff, and the cause to be farther heard.

In consequence of the question being now decided, the words of
the Plaintiff's motion, which the case falls to be reported on the

Plaintiff, Brodie, W.S., Reclaimers' Agents.
Agents for Raisers, &c.

} Respondents' Agents.

IN THE DIVISION.

M'LEROUY, HAMILTON, & Co.

Assessment—Means and Substance—Locus
A manufacturing company had their works
in the Barony parish of Glasgow, and occupied a counting-house in the
city of Glasgow. In virtue of § 47 of the Poor Law Statute,
they were bound to assess proportionally on the means

of all persons in the several parishes now conjoined and raised for the
poor in the Barony or City of Glasgow. The Plaintiff sued for the poor in the Barony or City
parish, and the Defendants resisted the action. The present action was a declarator at the instance of the Plaintiff, for the Barony parish of the city of Glasgow, the object of
which was to ascertain whether Messrs M'Leroy, Hamilton, and Co.,
occupiers of a large manufacturing establishment situated
in the Barony parish, were assessable on their means and sub-
stance, in respect of such establishment, by him and not by the
poor in the Barony parish, who was also called
the Plaintiff. By § 47 of the 8th and 9th Vict., c.
xviii, no person in any parish or combination in which
any lands or heritages, or means and substance, any company,
or individual, shall occupy any lands and heritages, or shall
have any interest in any premises within such parish
or combination, shall be assessed in such parish or combi-
nation, for the means and substance, derived from, or re-
sulting from, any trade, or business, although none of
such company, nor such individual, should be ac-
cessible to the poor in such parish or combination; and such company
or individual, and individuals, shall not be liable to be as-
sessed for the means and substance in any other parish or

It was admitted, on the one hand, that the defenders' works, Dec. 18. 1851. where the goods they deal in, are manufactured, and the premises where the goods, after being manufactured, as well as the raw material is kept, until disposed of, were situated in the Barony parish; and, on the other hand, that the defenders' counting-house, where the transactions relating to the sales of their manufactured goods, and the purchase of their raw material are usually conducted, is situated in the city of Glasgow parish.

The pursuer contended that the object of this 47th section, in conformity with the general scope of the Act, was to embody into one statutory provision those principles and usages which, previous to the passing of the Act, had regulated the imposition of assessments on means and substance, and that the statute was to be construed with a large and liberal and equitable latitude. See opinion of Lord Corehouse, with reference to the Act 1579, in *Buchanan v. Parker*, 21st February 1827, 5 S. p. 390.

The defenders maintained that they derived no profits from the occupation of the counting-house; but that their whole profits or income were derived from the manufacturing operations carried on at their works in the Barony parish, and so assessable there.

Minutes of debate were ordered by the Lord Ordinary (Wood,) in this, as in all the other conjoined processes, and great avizandum having been made to the Lords of the First Division, it was thought proper by their Lordships to consult the whole Court on the matter.

To-day the case was advised.

J. Campbell and *T. Mackenzie* appeared for the City parish.
Macfarlane and *Inglis* for the Barony parish.

The result of the opinions of the consulted Judges was a majority in favour of dividing the assessments between the competing parishes. Of this opinion were Lords Cockburn, Murray, Rutherford, and Cowan. For holding the Barony parish exclusively entitled to assess, there were the Lord Justice-Clerk, Lords Wood and Robertson. For sustaining the exclusive right of the City parish, Lords Medwyn and Colonsay.

It was remarked by one of the Lords of the majority (Rutherford), "There is no doubt a provision to prevent double assessment—that such parties shall not be liable for assessment on the same means and substance in any other parish. But there is nowhere any provision in the statute to make a company liable for their trade or business in one parish only, although it may be carried on in several different parishes; nor is the limitation of assess-

"means the necessary legal consequence
of a taxable assessment."

The proposition for dividing the assessable value between two parishes is the course most consonant with justice and convenience in the case. No doubt it is impossible to ascertain with exactness the proper authorities which point as the proper place of assessment to the counting-house, where a trading company carries on great part of its transactions. The rule which has been carried on gives the rule as to the place of assessment. M'Leroy and Co. are manufacturers, and the rule according to which the Court decides is by asking, Where is the business carried on? This was done in the case of *Parker, v. Walkinshaw*, Nov. 29. 1850. But this is not always a safe rule. Doubt the purchases and sales are made in one parish, and the firm has their manufactory in the Barony parish. It is not always the fairest and most reasonable construction of the law to suppose that the new statute is that suggested by the four judges in the case of *Parker*, in dividing the assessment between the two parishes. I grant that there is that I see considerable difficulty in the application of the rule; but that cannot be helped.

It may be said that the man has his counting-house in one parish and his residence in another, he is liable to be assessed in both. This is a well-known fact of business in both parishes, and his means of assessment do not relate from or relate to his trade or business. The question is, in view of the definitions of domicile, a man, although having his residence in different countries, can have but one domicile. This is against the inflexible rules of law; but this does not go to support of the proposition that a man can have more than one business.

I am not in entire accordance with the view taken by the Lord Chief Justice. He thinks that difficult questions might arise in some cases, where the residence in one parish and the counting-house in another. In the circumstances of this case we must hold that the counting-house company is chiefly carried on at the manufactory, and the counting-house is a mere adjunct of it.

I am in entire accordance with the majority. Looking to the facts of the case, I thought the case clear. Can it be said that the counting-house occupy premises in the Barony parish? They occupy and carry on busi-

ness in both parishes. The provision at the close of the 47th Dec. 18. 1851. section as to the right of a party assessable in more than one parish, to elect "in which of such parishes he shall be assessed on his means and substance," applies to cases of residence in different parishes, and not to cases like the present. The parties should settle how the assessment is to be divided between the two parishes. If they will not, the Court must do so.

THE COURT therefore found that the said company were liable to be assessed in both parishes in terms of the statute, on their means or substance derived from or relating to their occupancy, trade, or business, respectively in each parish, and remitted to the Lord Ordinary to hear parties in regard to the amount of such assessment payable by the said defenders to the pursuer, and to decide thereon.

*Campbell & Smith, S.S.C., Agents for the City Parish.
G. & G. Dunlop, W.S., Agents for Defendants.*

FIRST DIVISION.

GILLAN v. MEKK.

No. 99.

8 and 9 Vict. c. 83—Poor's Assessment—Minister's Stipend—Where Assessable.—Held that a minister's stipend is assessable only for the poor of the parish of which the incumbent is minister, and of the rental of which parish the stipend forms part.

This was a suspension of a threatened charge at the instance of the Parochial Board of the Barony parish of Glasgow, for payment of poor's assessment, and was one of the conjoined actions (see preceding case of *M'Leroy & Co.*) raised for the purpose of determining the parish in which certain classes of persons were liable to be assessed for poor's rates. The suspender in this action is one of the city clergymen of Glasgow. The parish of St John, in which he officiates, is wholly situated within the burgh or royalty of Glasgow, and his stipend is wholly payable from the common good of the corporation. He resides in the Barony parish, and his only domicile is within that parish. The complainant pleaded that his income being wholly derived from his office as one of the parish clergymen, and payable to him by the magistrates and council as representing the community of the city, he was legally assessed for the poor of the City parish.

The respondent maintained that as the complainant did not, in

occupy premises or carry on any trade or business within or outside the burgh or royalty of Glasgow, he was not liable to be assessed for the poor of the City parish, nor for the poor of the Barony parish, as an inhabitant.

The advocates were unanimously of opinion, that a minister of religion, who resided from or taken into account out of the city, could not be deemed an inhabitant, and of the rental value of his residence forms part.

Mr. Justice Campbell, in the day.

Messrs. MacKenzie appeared for the complainer.
Messrs. MacLennan & Co., for the respondents.

Mr. Justice Campbell entirely with the opinions of the counsel for the respondents.

Mr. Justice Campbell held that the complainer was liable to be assessed for the poor of the City parish, and sustained the reasons given by the respondents, notwithstanding the expenses due.

Mr. Justice Campbell, S.S.C., Respondent's Agents.

Mr. Justice Campbell, W.S., Respondent's Agents.

RENT DIVISION.

MCLEOD v. ADAMS.

Sect. 1. — Assessment — Procurator-Fiscal — Where a person, who is not himself one of a Procurator-Fiscal, is assessable for the poor of the parish where his chambers are situated.

In the conjoined actions (*ante*, pp. 202-205) it was held that a procurator-fiscal, by reason of his payment of poor's rates in Glasgow, and was a member of the Incorporated Society of Almoners, or Almond, procurator-fiscal of the Sheriffdom of Lanarkshire, against a threatened action by the parochial board, of the City parish of Glasgow, where the plaintiff occupies chambers within the City parish, and resides in the Barony parish.

It was held that as his business as procurator-fiscal does not extend to the City of Glasgow, or the City of Glasgow parish, but extends to the Barony parish, and the whole lower ward of Glasgow, and in respect, he is not an inhabitant of

the City parish, he does not, in the meaning of the statute, carry on business, and is not possessed of income from means and substance therein. *Salmond v. Adams.*

The respondent argued, that as the proper business of his office, from which his emoluments are derived, is carried on at his chambers in the City parish, he was properly assessable there.

The consulted Judges were clearly of opinion, that Mr Salmond carries on his business in the City parish, and cannot be assessed on that business in the Barony parish.

The case was advised to-day.

Macfarlane and Inglis appeared for the complainer.

J. Campbell and T. Mckenzie for the respondents.

The COURT expressed their unanimous concurrence in the opinions of the consulted Judges, and therefore repelled the reasons of suspension, but found no expenses due.

G. and G. Dunlop, W.S., Complainant's Agents.

Campbell and Smith, S.S.C., Respondent's Agents.

FIRST DIVISION.

NAPIER v. ADAMS.

No. 101.

8 and 9 Vict. c. 83.—*Poor's Assessment—Journeyman Bookbinder—Where Assessable.*—Held, that a tradesman is liable to be assessed in the parish in which his employers conduct their business.

This was one of the conjoined actions, (*ante*, pp. 202 *et seq.*) raised Dec. 18 1851, regarding the assessment of the poor in Glasgow, and was a suspension by Thomas Napier, a journeyman bookbinder, of a threatened charge, at the instance of the parochial board of the City parish of Glasgow, for payment of poors'-rates. *Napier v. Adams.*

The complainer has resided for five years in the Barony parish, and so acquired a domicile therein under the poor law act. He is employed by a bookbinding company, who occupy premises within the City parish, and are assessed on the means and substance derived by them, in respect of such occupancy and business, for the relief of the poor of the City parish of Glasgow. The complainer receives wages from the company to the amount of L.62 : 10 : 8 *per annum*, and that constitutes his whole income. His engagement is fortnightly, and he is paid L.2. 8s. per fortnight. He has no share in the profit or loss of the company by whom he is employed.

he is only liable to be assessed on his means and substance in the parish wherein he carries on a trade or business in the sense of the Act.

It was admitted, that as the complainer's income is derived from the exercise of his trade or business carried on in the City parish, he was liable to be assessed on that account of the poor of the City parish.

Lord Cottenham, Lords Cockburn, Rutherford, Colquhoun, and Mr. Justice MacKenzie, were of opinion, that he was properly assessable. In support of his opinion, Lord Cockburn remarked that there was no substantial difference between this case, and that of Mr. Napier, a member of the Glasgow Insurance Company, who resided in that city, and worked for work done in that city, but lived in another parish. So (as it appears to me) does the present complainant. The journeyman is paid by *wages* each fortnight, and not by a *salary*. But surely the name makes no difference.

Mr. Justice MacKenzie said, "A day."

Mr. Justice MacKenzie appeared for the complainer.
Mr. Justice MacKenzie for the respondents.

Mr. Justice MacKenzie was of opinion that in this question, the Courts and Judges had adopted the principle on which they decided the case of Mr. Napier, in 1850. This man gets £.62 a year of wages, and it makes no consequence whether these are paid to him weekly, monthly, or the year. No doubt his dwelling is in another parish. But that does not affect the question of the whole means and substance for doing his work. He works in his workshop, and the workshop is in the City parish.

Mr. Justice MacKenzie said, "It is no doubt true that Walkinshaw was a day labourer, and a pauper while in this case Napier is paid in the month. But I do not think this circumstance constituted any material distinction between the two cases. The decision in Napier's case will stand in *Walkinshaw's*. He therefore adopted the opinion of Lord Cockburn, and that of the Judges who con-

sidered the question as it occurred.

Mr. Justice MacKenzie said, "It has occurred. When we have once introduced

a principle, we must apply it broadly and not narrow it by subtle-
ties and nice distinctions. *Walkinshaw settles this case.*

Napier v.

Adams.

The COURT repelled the reasons of suspension, but found no expenses due.

G. and G. Dunlop, W.S., Complainor's Agents.
Campbell and Smith, S.S.C., Respondent's Agents.

SECOND DIVISION.

HUTCHISON OR CRAIG *v.* CRAIG.

No. 102.

Process—13 and 14 Vict. c. 36—Consistorial Summons—Summons—Signet—Held, first, under the Act 13 and 14 Victoria, c. 36, that a consistorial summons is not void because it has passed the Signet; second, that a summons was not void because its date was not inserted in the body of the writ after the words “signed at Edinburgh,” but was placed opposite the signature of the Writer to the Signet; but opinion expressed, that the former is the more correct mode.

The pursuer raised a summons of separation and aliment against her husband. The summons was in the form prescribed by the Act, 13 and 14 Vict. c. 36—that is to say, the statements of fact were contained in a condescendence annexed to the summons. The will of the summons ended thus:—“ Given under our Signet at Edinburgh.

(Signed) “ HENRY TOD,

Twenty-fifth October “ Written on these six pages by

Eighteen hundred Henry Tod, junr., my Clerk.

and fifty-one.

—the date being written on the left hand, opposite the signature. This date was not authenticated in any way by the signature or initials, either of the party signing the summons, or of any one else. The summons bore the impress of the Signet.

The defender stated, as a preliminary defence, “ No process—the summons being informal and irregular, and without date, and not duly signed.”

Lord Cowan reported the point verbally to the Court.

Pattison was for the defender, and Crawford for the pursuer.

The exact grounds of objection to the summons will be seen from the opinions of the Court.

LORD JUSTICE-CLERK.—Three objections have been taken to this summons.

- I. That there is no separate and independent date to the sig-

the Signet. I don't quite understand your objection. We have an Act of Parliament does not require a Writer to the Signet; it only requires the summons of some sort or other, and it is provided in the Act that the date, if properly the date of the summons, is to be the date of the signature of any

Writer. This is founded on the case of *Buxton*, 16th Vict., c. 36, which, we are told, a summons of divorce, &c., was held to be bad. But that objection is not made in the present case of the case of *Buxton*. That case is founded on the 1 Will. IV., c. 69, sec. 40, which provides that in maritime and consistorial cases, &c., the principal or depute-clerk of Session, and that they pass the Signet. In the case of *Buxton*, the summons was not signed by the principal or depute-clerk of Session, and it was held that they did not pass the Signet; and it was held that the order of the Clerk of Session could not be disregarded, because he had passed the Signet, which the Act of Parliament makes necessary. In the present case, however, the summons is signed by a Writer who has passed the Signet, and the question is, whether the Court has done so.

The authority against such a summons passes in 1 Will. IV., c. 69, says simply, it provides that such summons shall pass the Signet. It also provides that such summons shall pass the Signet. After the Act Will. IV., c. 69, comes the 36th Vict., c. 36, which makes an important addition to the form and signature of summonses. It declares "that all summonses before the Court of Session" — "shall be signed by the Signet" — "shall set forth in such manner as the Court, having regard to the form of schedule A, &c. &c., the name and address of the plaintiff and defendant, and the conclusion of the cause, &c., and statement whatever of the grounds of action, &c., and general declaration as to all summonses before the Court of Session. Accordingly this consistorial summons is in the statutory form, because it is a summons before the Court of Session. It is therefore to be in the form of schedule A, &c., which schedule contains these words in its conclusion, 'Signed by the Clerk of Session' &c., [insert the will in common form, &c.,] 'and sealed under our Signet at Edinburgh,' in-

clusive.] [To be signed on each page by a writer to the Signet, and signed in common form.] Therefore, according to the Act of Parliament and Act of Sederunt of October 1850, ^{Dec. 18. 1851.} ^{Hutchison or Craig v. Craig.} consistorial summonses are to be in a form which implies at least that they may pass the Signet. No doubt the same statute, in § 15, says, "all summonses in consistorial or other causes which are at the passing of this Act required to be signed by a clerk of the Court of Session, may be signed either by such clerk, or by a writer to Her Majesty's Signet; and the signature of such writer to Her Majesty's Signet shall be in all respects equivalent to the signature of such clerk." But there is nothing said as to passing the Signet. Allowing a clerk of the Signet to sign such summonses as well as a clerk of the Court does not import that they must not pass the Signet. We need not inquire whether a consistorial summons is not good which has not passed the Signet if signed by a clerk to the Signet, or whether § 1 of the new statute has superseded that in Will. IV., c. 69, by which it is declared not to be necessary that such summons shall pass the Signet. All that I would decide now is, that a consistorial summons under this Act *may* pass the Signet. The second objection, I think, is not well founded.

3. The third objection proceeds on the assumption that the present summons is properly a signeted writ, but it denies it to be duly signeted, because it has not a date. That, if well founded in fact, would be a valid objection. And § 18 of the new Act, having reference to the loose and anomalous practice that existed before its date, contains this enactment, that "no summons passing the Signet shall bear any date but the date of signeting, which shall be held to be the date of the summons." Here then it is said the date of the signeting is the date of the summons, and that it shall bear no other date. It is not said that the summons shall set forth *in itself*—in the body of the writ—the date of signeting. Now this summons is signeted. There is written on it the date twenty-fifth October eighteen hundred and fifty-one. This date, both parties admit, was affixed at the Signet Office. Can I say it is not a signeted writ, and void, because the date is written at the side and not in the body of the writ? I cannot. The mode of giving the date in this summons is not, indeed, a handy or neat compliance with the statute. But it is a compliance. The schedule says, "Given under our Signet at Edinburgh." And the summons should stop with these words to let the date be filled up at the Signet Office by the officer of

the Sheriff Court ought to be, in the writ, in this form,—
"Summons issued at Edinburgh, the twenty-fifth October
one thousand seven hundred and forty-one." Of course, all that the scheme
requires is to put the words down to the date. Still,
if the date is to be correct, I cannot hold the summons
valid. The actual date is put at the side as in this
case, in accordance with the Diligence Act, where it was of im-
portant consequence that the mode and place of giving the date should
be distinctly given. Here we have not.
The objection since the act was passed would not de-
fer the court from holding the objection. But it is not to be lost
in the fact that the objections, that if they are sustained
will render the summonses void, the third nearly all summonses
are given in accordance with the Act.

Mr. Justice Campbell argued. He was of opinion that the 13 and
14 sections of the Sederunt make away the necessity of giving a date
and signature, and substitutes for it the marking at the signet
and the signature of the authentified. The first section of the
Sederunt provides for summonses before the Court of Session,
and it as little applies to summonses before the Sheriff
Court as it does to summonses before the Sheriff
Court. And even the former does to summonses before the Sheriff
Court as to consistorial causes commence
with the same date as the former; and every section and § 16. By the former
section, it is evident that these summonses to be signed
by the Sheriff or by a clerk of the Court of Session;
and the former is in all respects equivalent to the
signing of the writ. The Signet did not move on the signature
of the Sheriff, but it on the substitution of a writer to the
signature of the Sheriff. Observe that the Act of Sederunt, 31st October
1741, directs that "all summonses," directing them to be
signed by the Sheriff, "in the first section, and in the form given in
the second section, shall apply to apply it beyond the use of these
summons, and we must apply the same limitation to
the sheriff summonses, that we did as to the Judicature
summons, that the privileged summonses shall pass on six
days, and that this did not apply to defenders in
defences, who were entitled to an *inducie* of forty days.
But the interpretation of the statute as to the date being the
date of the Sheriff's signature to passing the Signet, it cannot
be denied, that there being no authority for their
altering, which he perceived that a change has taken
place in the Statute, without the authority of the

Court, the practice authorised by the Act of Sederunt 1618, as Dec. 18. 1851. well in consistorial as in other causes. He was therefore of ^{Hutchison or} opinion that this summons had no date of any kind; and, as a date ^{Hutchison or} Craig v. Craig. is an essential part of a summons, that it is defective, and cannot be sustained.

LORDS COCKBURN and MURRAY concurred with the Lord Justice-Clerk.

The COURT, by a majority, instructed the Lord Ordinary to repel the defences, and proceed with the cause.

*Henry Todd, W.S., Pursuer's Agent.
R. Deuchar, S.S.C., Defender's Agent.*

FIRST DIVISION.

GORDON v. MOSSE.

No. 103.

11 and 12 Vict., c. 36.—*Petition to disentail—Succession—Heirs female—Heirs whomsoever and their assignees.*—When the destination in a deed of entail is to “heirs whomsoever and their assignees,” and the succession of heirs female is declared to be the eldest heir female, &c., and succeeding without division, whether of heirs of tailzie, or of heirs whatsoever, heirs portioners being excluded:—*Held*, in a question between the last heir of entail called in the deed, and the daughter of the immediately preceding heir, that the exclusion of heirs portioners does not qualify the implied power in heirs whomsoever to assign; that the heir of entail in possession was the last heir called to the succession, and so entitled to apply for authority to acquire the estate in fee-simple.

This was an action of declarator at the instance of Benjamin Gordon, Esq. of Balbithan, brought for the purpose of having it found and declared that the pursuer is the only heir of entail now in existence of the lands of Balbithan, and that, as such, he is entitled, under the 11 and 12 Vict., c. 36, to obtain authority to disentail and acquire the said lands in fee-simple. The late General Benjamin Gordon of Balbithan executed an entail of his estate in favour of his sister, and other parties therein named; whom failing, to the pursuer and his heirs male; whom failing, to the pursuer's elder brother and his heirs male; whom failing, to Sir John Gordon, captain in the Coldstream Guards, and his heirs male; whom all failing, and no further nomination being made by him, “then to his own nearest heirs whomsoever, and their assignees, &c.” The pursuer, the heir of entail in

*Gordon v.
Mosse.*

The estate in question, which is a large estate, is unmarried, and has no heirs male. The deceased's brother died many years ago without issue. The deceased's son, John Gordon also died many years ago, leaving his wife and two daughters, one of whom is still living. In these circumstances, the pursuer, who is the widow of the deceased, presented a petition to the Court, setting out her case, and praying for authority to disentail. She supported her case by affidavit, in which she stated that the pursuer was the only heir of the deceased, and that she had no objection to the continuation, and maintaining that she was an heiress, and entitled to succeed under the destination to the estate. The other heir, John Gordon, who possessed the estate at the time of the death of the deceased, had died before the pursuer; and that, as her consent as a widow to the disentailment had not been procured, the petition fell.

The Court, after consulting with the parties, sisted the petition until an enquiry could be made as to whether or not it could be brought at the pursuer's instance, and whether or not she was entitled to formally decide whether or not he should be admitted to the right under the deed in question.

This question was accordingly raised; and the record being consulted, it was found that the Lord of Colonsay (Colonsay) made great avizandum to the effect that the question was to go to the First Division. It was now

settled, however, that the question was to go to the pursuer. The defender claims that the estate belongs to the person whomsoever, which is not subject to the institute, and that the institute and the other heirs of the deceased are entitled to the estate. The meaning of such a clause is settled by the law of Scotland, and the authority of this Court, to the effect that the estate is to be let to the institute instead of letting the estate go to the heirs. See *Stair*, t. 19, § 8; 3 E., t. 8, § 32; *Macmillan v. Macmillan*, 1832, 10 S. 644; *Farquhar*, 29th Nov. 1839, 10 S. 644; *Craig v. M' Culloch*, 21st Feb. 1839, 10 S. 644; *Mure*, 21st March 1843, 5 D. 861.

There is a material difference to the succession of heirs, between the case of an heir-female and the descendants of her female relations. The former, and the descendants of her female relations, and succeeding 'always with the whole course of the female succession,' are entitled to the estate, 'and the whole course of heirs whatsoever, who may succeed to the estate, according to the destination before specified,' &c. There-

fore the destination to heirs whomsoever of the entailer, being specially mentioned in the deed of entail as distinct from, and not comprehended within the tailzied destination, the defender, as claiming under the destination to heirs whomsoever, cannot be held or considered as an heir of entail. The pursuer, therefore, as the last heir of entail, is entitled, unless in a question with heirs-male of his own body, to exercise all the rights of a fee-simple proprietor of Balbithan; *Leslie v. Dick of Grange*, Dec. 15. 1710, M. 15358; *Earl of March*, Feb. 27. 1760, M. 15412.

Hector and Penney for the defender. The pursuer has no right to the lands except under the fetters of a strict entail. Failing the pursuer and his heirs-male, there is a destination under which the defender will be entitled to succeed to the entailed lands without division—heirs-portioners being expressly excluded. The pursuer therefore is not the last or only existing heir called to the succession, and is not entitled to insist in the conclusions of this action.

THE LORD PRESIDENT.—In all cases of this description, it is taken for granted that where there is a destination to heirs whatsoever, and their assignees, an absolute power of alienation is conferred. Is it possible to hold, because this ample and complete power is followed by the qualification that heirs-portioners are not to succeed, that these words are of a nature to qualify what has preceded? Where a destination comprehends heirs and assignees, the prohibitions of the entail do not affect the person who takes under it; and, therefore, holding that this entail had come to an end, in the person of the pursuer, he was for giving effect to the conclusions of the action.

LORD FULLERTON was of the same opinion. The conclusions of the summons go beyond what is necessary. It is enough, in a declaratory action, to have it declared that the pursuer is the last heir of entail. Here the entail is at an end, not only by law, but by the clear intention of the testator himself, so far as that can be gathered from the deed of entail. The exclusion of heirs-portioners does not affect the implied power of assignation in this case. The only question, therefore, is, Is the pursuer the last heir of entail? There cannot be a doubt that he is so; and therefore the conclusions of the summons are well founded.

LORD CUNINGHAME.—When the destination comes to heirs whatsoever, the entail is at an end in the person of the immediately preceding heir. He was of opinion that the entail was bere terminable when it arrived at the first heir portioner; that

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person of the pursuer, and that he was
not entitled to any relief in respect of his claim:

In view of the above, the Court remitted the cause to the other Judges.

In terms of the second conclusion of the
Court, it was necessary to pronounce any farther finding
as to the question of the right of appeal, and found neither party entitled

to any relief in respect of the same.

W.S., Pursuer's Agents.

S., Defender's Agent.

DIVISION.

v. GAVIN'S TRUSTEES.

Defences—Prospective Reference.—In an action
between the pursuer and the trustees of the late John Gavin, separate records were made up, and pro-
ceeded against each of the defendants to any of the grounds
of defence which might be applicable to such defendants, which in any view might be appli-
cable to the solvent partners, and closing on such reference, with a denial
of the right of the trustees, of the right of the defendants so to put
in issue the record, and incompetent to open up the record to the effect
of the particular statement of the defences founded on.

The pursuer had brought by certain partners of the Forth
Company, who had been distressed and obliged
to sell their shares, against the solvent partners, and the
trustees of the deceased, of such as are deceased, for relief in
respect of the shares held by such partners. The
action was dismissed, and was now reported by the Lord
Ordnance, as incidental matter which arose in the
action, which required, in his opinion, to be
considered by the Commission could proceed upon its merits,
and a report was made to the consideration of the Courts from its
recommendation, in some respects, in reference to the
causes where there are numerous de-

fendants. After the prosecutor reporting the case, the Lord Or-
dnance, and the other parties, appearance in the action
and executors of the deceased John
Gavin, Their defences were lodged in Novem-
ber, 1853, and various allegations tending to establish the
defences relied on, viz., that their constituent, Mr

the defenders, neither as his executors and trustees, nor as individuals, were under any such liability. A separate record was adjusted and closed between the pursuers and those defenders.

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Trustees.

Besides their special defence, a general allegation of mismanagement on the part of the directors was inserted in the defences; and it was added, that it was to "be understood that the defenders intend, if necessary, to avail themselves of the ground of defence now referred to, and must be held as here repeating any of the grounds of defence stated by the other defenders, which, in any view, may be applicable to them." The 13th statement in the closed record repeats the same general averment and reference; and the 4th and 5th pleas are directed to these points. While the *special* defence thus set forth is *non-liability* as partners, the defenders maintain that the above general statement and reference entitle them to urge statements and pleas, to be found only in the pleadings of other parties called as defenders.

The pursuers denied the competency of this procedure, and held the defenders barred, not less by the state of the record, than by the proceedings that had taken place in the cause which had all along been conducted as an independent action, from founding on any other defence than the special ground of non-liability, to which their own defences and record were mainly directed; and this objection, the pursuers contended, was entitled to more effect, in respect that, in their answers to the 13th article of the defender's statement, it was stated that "the present defenders are not entitled, on any ground, to avail themselves of any defence not pleaded by themselves." The defenders, it was urged, were thus fairly warned to insert in their own record, whatever statements in fact, or pleas in law, they meant to rely on and seriously to press.

The Lord Ordinary ordered the defenders to lodge a minute specifying the pleadings on which they considered themselves entitled to found; and, by the minute, it appeared that these were defences and answers for Forbes's Trustees, with regard to whom the action is now out of Court, and in which action there had been no closed record. The question therefore was, whether, seeing that the record in this case had been closed without the statements of fact and pleas urged in the pleadings with Forbes's Trustees being embodied in the record, they can now be made available by the present defenders as grounds of defence to the action.

The pleas in law stated for Forbes's Trustees in their defences are twelve in number, of which the first six are directed against

and the formal correctness of the summons, which may involve questions on the merits,—the pursuers contended for, *inter alia*, in respect of the non-performance of duty on the part of the directors, and the defenders maintained that they were entitled to rely upon the summons, as well as those upon the record, in view of this, reliance was placed upon the practice of the Admiralty and of the Inner-House respecting the action of Forbes's Trustees, by which the pleas of the pursuers were rejected, and the cause disposed of after the record was adjusted. The pursuers, however, contended that the Trustees, were not parties to that

plea, and that attention to this distinction in the record would enable the defendants to found, if they chose, a cause of action against them, or consider that there might be room for adding new defences, or bringing into statements and pleas affecting the record, which would render them excluded from now maintaining the action, and which might lead to the dismissal of the action, or to a declaration of incompetency or informality.

It was argued on general for the defenders.—The only question is, can the Court add to the record to make this addition? Where there is no statement in the record, and it is of a general character, specific, it has been the practice to add to the record in order to make such addition. The argument is, however, that where there are several defendants in an action, it is not competent for any one to adopt the pleas of another, without his authority, repeating them *verbatim*.

It was argued on the side of the pursuers (whom Donaldson) for pursuers. This question has been considered in the defences of other parties, which have been referred to under the Judicature Act, and relative to the question of adding to the fair meaning of the Judicature Act, it is held that it does not travel out of the record to disallow the defences of other parties. This is a practice of the Court, in order to add new defences, the ground of which is, *ad eundem actionem, sicut veniens ad notitiam*. The action is brought in one record for several defendants.

It was argued on the side of the pursuers that the Court could dispose of this question, by referring to the true meaning and intention of the record, and that the record is closed with this statement

by the defenders adopting all the defences of the other defenders, Dec. 19. 1851.
 who were supposed to be more conversant with the acts of mis-
 management referred to—the pursuers, in their answers, denying ^{Richardson} ~~Gavin's~~ Trustees.
 the right of the defenders to do this. He would not have been
 inclined to allow the record to be closed thus; but does this clos-
 ing the record now preclude the Court opening it up for the pur-
 pose of forwarding the ends of justice? He thought not.

LORDS FULLERTON and CUNINGHAM were of the same opinion.

LORD IVORY also concurred. This does not affect the Judica-
 ture Act. No doubt the parties are not entitled to go beyond the closed record; but if the record does not contain a specific state-
 ment, but merely statements by reference, it cannot be said that the record is to be closed to the exclusion of such statements by reference. The record is closed on the reference, as well as on the other facts contained in it.

The COURT, in respect the record as between the present de-
 fenders and the pursuers was prematurely closed, while it was yet a question between the said parties whether the matters generally referred to in article 13 of the defender's statement of facts were to be held as duly forming part of the same, upon the record, and that the same now falls to be disposed of, as in regular course it ought to have been, before closing; and that the matters referred to, as restricted and explained in the defender's minute, ought not to be excluded from the record, &c., but ought not to be made part of it, by general reference to the pleadings of the defenders, as to what these are, and that now, from their being no longer par-
 ties to the cause, there can be no closed record, and that the same ought to be set forth specifically and articulately as the proper statements of the present defenders themselves; find that the record being now again open, the defenders are not foreclosed from still setting them forth in that way, and remit to the Lord Ordinary, that the same may be carried into effect, reserving all questions of expenses, &c.

J. and J. Macandrew, S.S.C., Pursuer's Agents.

Thomas Ranken, S.S.C., Defenders' Agent.

FIRST DIVISION.

MELROSE v. HASTIE.

No. 105.

Process—Verdict—Application.—On a motion to apply a verdict: Held
 incompetent to enter upon any objection to the verdict.

..... to a jury on the issue whether the defendants..... retained a quantity of sugar; and the pursuer..... got negative of the issue,

..... (Johnstone & Lane) now moved the Court to apply the verdict to the defendants.

..... the pursuer, entered into an analysis of the evidence, and said that the defence at the trial was different from that in the record; and he, therefore, contended, that it was his duty to ask the application of the verdict to

..... which the application of the verdict can be made. This applies to the conclusions of the summons and the bill of exceptions, and that is the only question which we have to dispose of at this stage of the proceedings. The defence of the defendants, being negative of the facts in the bill of particulars, and we are entitled to absolvitor. We cannot now enter into a new trial on the ground of the verdict having been given, and an objection to the law on which the verdict has been given has been repelled. Therefore there is no question of a new trial. It is incompetent to go back to the trial of the jury. *Speir v. Dunlop*, 4 S., p. 92. The bill of exceptions is not now open, as it has been already disposed of.

..... The pursuer proposes to go into the bill of exceptions and apply the verdict. We have nothing to do but to accept the verdict.

..... question put to the jury was, whether the defendants wrongfully withheld a quantity of sugar? The answer was in the negative. We cannot now enter into a new trial on the verdict. We have nothing to do but to accept the verdict.

..... After the bill of exceptions has been disposed of, there is no redress except by appeal to the House of Lords.

..... The court then applied the verdict, assailed the defendants in the course of the action, and found them entitled

..... Agent for Pursuer.

..... Agent for Defender.

SECOND DIVISION.

BALLINTON and MANDATORY v. CONNON.

No. 106.

*Commission and diligence—Witnesses and havers in England—
Masters Extraordinary in Chancery.*

This was an application by the pursuers for commission and Dec. 19. 1851. diligence to examine witnesses and havers in England, in the course ^{of a proof going on before a Commissioner in this country, as to} Ballinton, &c. ^{v. Connون.} the residence of a person of the name of Leisk, at a certain date. The pursuers craved commission to Mr James Anderson, barrister, London.

Shand, for the defender, opposed the motion. There was no reason stated why the witnesses should not attend the Commissioner, as the other witnesses from England had done. The course proposed would be attended with unnecessary delay and expense.

Inglis for pursuers.—We are ready to produce affidavits that the witnesses named will not come to Scotland. As we cannot compel them, we are clearly entitled to get a commission.

LORD JUSTICE-CLERK.—We may continue the case till to-morrow, that the affidavit may be produced; but the other party will have to pay the expenses of to-day's appearance.

Shand.—Under such a penalty I will not further oppose the motion; and as we anticipate the probability of requiring to verify some documents, in different parts of England—such as a marriage-certificate, and writings, called post-bonds—we ask your Lordship to extend the commission to any Master Extraordinary in Chancery who may be resident in the particular locality. This will save much expense.

LORD JUSTICE-CLERK.—This is an application of an unusual description. We have no security that the parties suggested as Commissioners are competent for the duty. They are, I believe, frequently solicitors or attorneys, knowing nothing of our forms or practice. I think the proof, in England, as to all the witnesses and havers, ought to be before Mr Anderson.

Commission granted accordingly.

James Marshall, S.S.C., Agent for Pursuers.

Shand and Farquhar, W.S., Agents for Defender.

DIVISION.

**TORS IN GLASGOW v. DOUGLAS, HILL,
ND OTHERS.**

quarter-Sheriff-Reduction and Declarator.— The Sheriff and other local Courts in Glasgow had, by royal charter, as a faculty, with exclusive jurisdiction, power of suspension and interdict, that admission to the bar should be disregarded of these privileges, is incompetent to determine such admission suspended, and interdict declared, that the proper form in which to try the cause, and the usage with reference to it, was by action

...ued on the 9th December, came before the Faculty of Procurators in Lanarkshire, who had admitted Douglas in his Court, without regard to the privileges of the complainers. The Faculty, however, to his interlocutor admitting one of their members, and took his course for the purpose of enacting a Bill against the Procurators and the respondents, Douglas and ... in the Supreme Court.

the complainers set forth that they are
the subscribers to a charter, dated the 1st July 1796, in favour
of the subscribers, and of the Commissaries of the district, and of the
Courts. This charter declares that the
subscribers shall be, and be called, one corporation
in the name and style of "The Faculty of Pro-
fessors." It sets forth the previous usage and the
complainers as a constituted body. It also
declares that they shall be entitled or be qualified to plead
before the Commissary, Sheriff, and other courts of
the district. Every person shall have served a regular
apprenticeship for five years, with one of the
subscribers, and shall have been duly entered in the
books as an apprentice and shall
be admitted by the Commissioners and Dean of Faculty a com-
petent man in their hands and the seal of the said
Faculty shall be affixed to such fees for his admission as are then

usual and prestable, and engage to contribute to the funds of the Faculty along with the other members."

It was farther set forth that the narrative of the charter was correct in point of fact, and various minutes, articles, regulations, and bye-laws contained in the Faculty's books, were pleaded, as &c. shewing the legal status and exclusive rights of the body. The complainers therefore maintained, *inter alia*, that they were entitled to be protected against the acts and proceedings of the respondents, as illegally invading and infringing their exclusive rights and privileges; and that the Sheriff of Lanarkshire had exceeded his powers, in disregarding the same.

The respondents, by their answers, admitted the charter, but they denied the alleged usage and practice before or under it, and that the complainers had any exclusive rights and privileges in reference thereto. They therefore pleaded, *inter alia*, that the complainers had no title to challenge their admission by the Sheriff; that in so admitting them the Sheriff acted in the due and competent exercise of his powers; and that the charter, so far as it might be construed to import a deprivation or limitation of the Sheriff's right to admit persons otherwise duly qualified to practise in his court, is invalid and inoperative. They farther maintained that the Crown in 1796 had no power to admit practitioners in the Sheriff-Court of Glasgow, and that the charter can receive effect only in so far as it is consistent with, and does not prejudice or interfere with pre-existing rights and powers.

The Lord Ordinary, (Cowan,) in respect of its peculiar nature, reported the cause to the Lords of the First Division of the Court for their decision.

Neaves and the *Dean of Faculty* for suspenders. The charter did nothing but confirm and establish what was in existence before. This is the first time that the Sheriff of Lanarkshire has exercised the power of admitting practitioners of his own authority. The charter was given effect to in the case of *Dinning*. *Hume's Cases*, p. 156; see also *Macandrew*, 11 *Shaw*, 806.

G. Young and *Inglis* for the respondents. Neither in the case of *Dinning*, nor in *Macandrew*, was the Sheriff involved at all. But he is so here. Had the Sheriff the power under the Act of Sederunt to admit the respondents? Previous to the charter the Sheriff had the right to admit any body he liked. When did he lose this power? The suspenders, in fact, ask to interdict the Sheriff from exercising his office of Sheriff. All the Sheriffs in Scotland

... but it is said the Sheriff of Lanarkshire

... advised.

The Sheriff did not concur with the Sheriff in the course of procedure which he had adopted. Dinning's case was followed by a writ of habeas corpus, a deduction and declarator, from the conclusion of which the Sheriff assailed the defender; and the whole series of proceedings, from 1817 down to the present case, have been directed to vindicate the rights and interests of the pro-secutors in the way and manner that they contend for. It is now admitted by the Sheriff that there is a *status* which exists in Scotland, in which the pro-secutors are in the enjoyment of, and which may be suspended or inverted, in such a summary manner. It is also admitted that this sort of process by suspension is a sufficient answer to the question of this nature. It is quite evident, however, that before the long course of judicial pro-cesses can be suspended, and before the pro-secutors can be deprived of their right, deprive the Faculty of Procurators of their franchises, and establish a new code of regulations, the intervention of a procurator is the proper course. Let them, therefore, if they would, establish the point that, independent of the action of the Faculty of Procurators, the Sheriff has no right to do what he did. If, in such an action, that be decided in his favour, he must be given to it; but he had no conception of the power of any court whatever proceeding at once to admit A, B, and C, irrespective alto-gether of the rights of other parties. He was, therefore, of course, in error, and that must be rendered perpetual.

It is now to be observed. The Sheriff remarked that he had pursued in this case simply to put the matter in a better light, and he would have put it into quite as good a light, if he had decided against the claim of these pro-secutors, as he has decided in favour of it. He ex-plained the importation of the arguments that had been advanced by Mr. Dinning; namely, that the charter was an instrument of the power of the Crown; but in the present case, the writs had been directed not to the illegality, but to the right of practising—but with this proviso, that it confers the right of practising on the body of procurators. The words are very explicit, and the right of practising is limited to that of being a member of the Faculty.

of Procurators. He was of opinion that, to try the case, it would have been distinctly necessary for the respondents to have brought an action of declarator.

LORD CUNINGHAME. There can be no doubt of the general powers of the judges of local courts to take cognizance of, and to ascertain, the qualifications and fitness of the agents proposing to practise in their courts; but the right of preparing instructions for candidates for admission has been given to other bodies. This is clearly established by the Acts of Sederunt relative to the admission of members of inferior courts. The Act of Sederunt, 12th November 1825, in the regulations which it enacts for the admission of procurators before the Inferior Court, contains the following most important qualification, "without prejudice of the legal rights of chartered bodies." Under these words, all the rights and privileges of chartered bodies are reserved entire, and cannot be disregarded by any judge ordinary without special cause shewn. None is offered to be proved in the present instance. There can be little doubt that the Faculty of Procurators of Glasgow is one of the chartered bodies referred to in the Act of Sederunt. Therefore, as the case stood, the regulations of the Sheriff must be suspended *in hoc statu*. The parties, if they choose, may bring an action of declarator and reduction, as was done in the case of *Macandrew*, but, as the case at present stands, the interdict must be sustained.

LORD IVORY was of the same opinion as the Lord President. It seemed to him, from the outset, that the question fell to be considered as one of possessory interdict. There is no question of declarator—no question as to whether the regulations are ill or well enacted. The charter continued to be recognised, uninterruptedly, till the case of *Dinning* occurred, when the Court sustained the exclusive privileges of this Faculty, and the original ground of possession remained intact. Then comes the Act of Sederunt of 1825. He did not say that this Act conferred, or could confer, rights that did not previously exist; but it is to be regarded as a solemn recognition, by that Court, that the rights of the chartered bodies were not to be interfered with. While there is a case, on the one hand, of a continued and uninterrupted course of the possession of exclusive privileges, and of a *status*, for nearly half a century under a charter so old, what is there on the other hand? Has the Sheriff asserted any right in himself, because the assertion of a right in himself was implied in what had now been done? On the contrary, he has hitherto given obedience

in his case arose, when he took leave, all
the court, and to exercise most extraordinary authority, to infringe
the exclusive privilege of the corporation, and to admit, in a way that had
never been done before, a procurator to practise in his court
and to exercise the exclusive privileges hitherto possessed
by the procurators in Glasgow. When the case comes
before them in their present shape — when it comes before them
as to the exercise of the right, but as to the
privileges at all, it would be considered
what they had heretofore considered
that this is a sound construction of the
section, no doubt, not negatived in the
derived no support from the case of
Watt, who was very zealous, and he was jealous of all novel
things, and had not been so long familiar to them.

They obtained an interlocutor, by which they sus-
pended the action, and declared the interdict per-

S.C., Agents for Suspenders.
W.S., Agents for Respondents.

SECOND DIVISION.

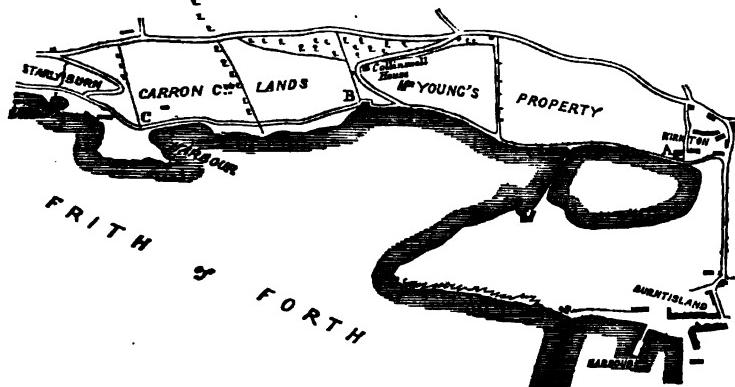
AND OTHERS *v.* YOUNG.

Issue—Record.—In a trial of a public
right of way, to prove that the public, for 40 years prior
to the exercise of the right was temporarily stopped,
it is not necessary to shew that
the way crossed the owner's estate, through which the way claimed
extended; but it is necessary to shew that the issue is alone to be looked to,
and not to any record or previous interlocutors in
respecting the issue.

In a public right of way through the de-
fender's property, at Burntisland; in which the following issue was
admitted, that for forty years and upwards, prior to
the year 1770, immemorial, there existed a public
right of way for passengers, from the Kirktown of Burnt-
island, or one or more royal burghs of Burntisland, or one or
more towns or villages westwards, along, or upon the margin of
the river Burn, proceeding to Starleyburn port and har-

hour, and to the port and harbour, and old and new villages of Dec. 20. 1851. Aberdour, or to one or more of them?"

The following sketch will shew the path along which the right and Others v. Cuthbertson of way was claimed, and its relation in point of position to the Young. localities alluded to :—



The line from A to B indicates the pathway through the lands of Colinswell, the defender's property. B to C shews the continuation of it passing through the adjoining lands of the Carron Company; and from C it passes westwards to Starleyburn harbour; and thence, through the lands belonging to Lord Morton, towards Aberdour.

The trial took place at Edinburgh on the 6th and 7th days of November 1851, before the Lord Justice-Clerk and a Jury, when a verdict was returned in favour of the pursuers. In charging the Jury his Lordship gave certain directions in point of law, to which the counsel for the defender excepted, in so far as his Lordship directed the Jury :—

1. That the pursuers' case, under the words of the issue, did not render it necessary for them to prove a right of foot-path through the grounds or policies of Lord Morton, to the port and harbour, or the old or new villages of Aberdour.
2. That it was sufficient if a public right of way should be established to Starleyburn.
3. That to support such public right of way, it was not necessary that Starleyburn port and harbour should have existed for forty years prior to 1847; and that the fact of that port and harbour being the private property of Lord Morton, would be no answer to the pursuers' claim of a right of way, if proved in point of fact.
4. That the right of way claimed would be completely esta-

older, if foot-passengers could and did pass through the old and new villages of Aberdour, without passing through Lord Morton's policy

ship declined, when requested by the pursuers, in point of law—

for the pursuers, in order to entitle them to issue, to prove either that Starleyburn was a public highway forty years prior to 1827, or to prove that it was so for the period, along the sea-beach, through Burntisland or Kirkton, to the port

new villages of Aberdour.

it, under the issue and record, to require the public right of way from Burntisland or Kirkton to Starleyburn and harbour, and thence to the highway, which may be any way to the port and harbour, or old village of Aberdour; but if it be competent that there

be no such right, to the Jury of such a right for forty

years, notwithstanding the interruption of the right of way claimed for the period prior to 1827, acquiesced in by the public for forty years, and the law to exclude such right of way on the

testimony given to them, satisfactory to their satisfaction, of a public footpath, as far back as the time when it could be expected to extend—although such evidence, or in any instance, or only in a few cases, as far as forty years prior to 1827—it would be reasonable to presume, and, when the evidence contradicted, the Jury ought, in point of law, to give the verdict corresponding to the manner in which the evidence during the period embraced in the record, and under was not entitled to the verdict of the Jury, supposing that the testimony did not directly reach to these earlier years.

Advocate (with whom Hutchison and others) supported the bill of exceptions. It is to be observed that the public termini at both ends of a public highway are to be proved, *10; Rodgers v. Harvie*, 27th Feb. 1827, and the Lord Chief Commissioner's opinion in *Crawford v. Menzies*, 11 D. p. 1130.

It is not sufficient to say I walk up one field and down another—Dec. 20. 1851.
 this would be a mere servitude *spatiandi*. There is a great distinction between a servitude road and a public right of way; the one can only be used by the owner of the dominant tenement, the other may be used by all the world. Starleyburn house and harbour are the private property of Lord Morton—and the defender's offer to prove that these had not existed for forty years prior to 1827 should have been allowed; and no immemorial possession can be presumed contrary to such offer of proof. The summons, condescendence, and pursuers' proof, embrace a right of way from Burntisland to Aberdour, by Starleyburn, and the defender is entitled to refer to the terms of the summons and condescendence, as explanatory of the issue.

Counsel proposed to read an interlocutor pronounced in the case, but which interlocutor had not been given in evidence at the trial.

The COURT objected to the relevancy of this proceeding in the argument in the bill of exceptions, which could only be considered with reference to what actually took place at the trial. But after discussion the interlocutor was allowed to be read.

Inglis and *Solicitor-General* (with whom *Macfarlane*) for pursuers. No one can make an arm of the sea private property, by merely building a pier, &c. Starleyburn is on the sea-shore, and it is therefore unnecessary to prove it a public place. It is naturally a public place. Any point on the sea-beach—as, for instance, on the banks of Forth,—is a public place, and may therefore be the terminus of a public road, more especially if a royal burgh be the other terminus. There is no authority for holding a public right of way must go from one town to another town. Stair, in the passage referred to by the defender, had in view, not a public footpath, but a high road, which is regulated by statute. It is quite sufficient to make up the prescriptive period of forty years, that one line of road may have been used for twenty years, and another line for twenty years—if the terminus has been the same during the whole period. It is incompetent to refer to the summons, or other proceedings in process, in explanation of the issue; Lord Brougham, quoted by Lord Justice-Clerk, in *Berry v. Wilson*, 1st Dec. 1841, 4 D. 139. It is sufficient to go from a public place, merely as a walk, and return; *Oswald v. Lawrie*, 5 Murray, p. 6.

The LORD JUSTICE-CLERK, with reference to the issue and the directions he had given to the Jury, explained that, westward of Mr Young's lands, and of Starleyburn, were the policy grounds of

Cuthbertson and Others v. Young.

Dec. 20. 1851. the Earl of Morton; and the defender had contended at the trial that, if he satisfied the Jury that there was no right of way through Lord Morton's grounds, and that all parties who took advantage of any private footpath within these policies, did so either by permission, tolerance, or trespass, he was entitled to a verdict—in other words, that the pursuers could not prove a right of way through the defender's grounds, if the defender proved there was no right of way through Lord Morton's grounds. This struck him as a most extraordinary way of meeting the case; but that the defender relied on such a defence as the principal part of his case was evident; for when he intimated that such evidence would not avail the defender, his counsel led no counter evidence to shew that there had not been a full and complete public use of the footpath through his own grounds, and contented himself with excepting to his decision. The pursuers could not be called on to prove that, which, though proved, did not establish any right; for Lord Morton was no defender here, and the issue did not put any question to the Jury respecting his lands. He did not think it necessary, in this case, to prove a public place at both ends of the road, although he gave no opinion on that abstract point which should preclude him from considering it, should it come before him in another shape. No doubt, the use or position of the footpath might acquire a more important character by the changes that took place at either end during the forty years; but as many of the oldest witnesses talked of it as an unquestionably open path prior to 1792—the date at which Starleyburn pier and harbour was built—he considered it of no importance in the case, that the pier and harbour did not exist at the beginning of the forty years, during which period it was necessary to prove the public use of the foot-path. Then the fact, that the pier and harbour were Lord Morton's private property, could not affect the pursuers' right, if such a right could be proved, to pass through the defender's lands. It was enough for the pursuers to prove that the public, for forty years prior to 1827, asserted, enjoyed, and exercised a right of footpath through the defender's grounds, without troubling themselves how they proceeded farther westward; and that, though the defender shewed tolerance or permission for every man that had passed through Lord Morton's grounds, that would not affect the exercise of a public footpath to the extremity of the defender's property.

LORD MEDWYN. If it were competent—which the case of *Berry* told him it is not—he would not construe this issue with

reference to the summons or record, or any interlocutor in the Dec. 20. 1851. cause. It seemed to be very distinct and intelligible in itself, ^{Cuthbertson} and requires the pursuer to establish during the specified period ^{and Others v.} ^{Young.} the public right of way for foot-passengers through the defender's grounds, by proving, 1st, Such right from the Kirkton harbour or burgh of Burntisland, leading westward; 2d, Along or upon the sea-beach through the defender's lands; 3d, To the western extremity thereof; 4th, And thence proceeding, that is, the footpath, to Starleyburn port and harbour, and to Aberdour port and harbour, and villages, or one or more of them. It must be a right of way—one footpath—from Burntisland to one or other of the four places mentioned to the westward—a public right of way—from one place of resort for the public to another place of the same character, which character is not put in the issue, but must be proved at the trial. This quality of a public right of way is explicitly laid down in Stair, and so stated in the case of *Rodgers*; and by Lord Fullerton in adjusting this issue; and apparently assented to by the other Judges. Therefore if the pursuers stop at Starleyburn in their proof of a public right of way, it would be necessary to establish that the Starleyburn port and harbour is a public place; and if they wish to avoid this necessity, they must prove this right on to some of the Aberdours, when the right of way being established westwards to a public place, any intermediate place is public also, and will give to its inhabitants settling there the public right which has been acquired for the place. There is nothing in the issue as to the public road in continuation of the footpath, or the footpath abutting upon it; and he hesitated to hold that, by getting from Starleyburn to the high road at the old toll-bar, any how—even by trespass, for instance—a continuous public right of way to be connected by means of the high road of Aberdour, so as to preclude the necessity of proving Starleyburn to be a public place, was thereby established. He was aware that in a process to which Lord Morton is not a party no right of way through his grounds can be established, but this cannot prevent the necessity of the pursuers shewing and proving a right of way along the defender's lands to a public place.

He was for sustaining the 1st and 4th exceptions in connection with the 5th negative one. As to the 7th, it is excluded by the issue, but it was not pressed by the Lord Advocate, who thought he could plead it at another period of this cause. The direction in the 8th exception seems to lay down sound law.

first thing to be done here, is to ascertain what the issue.

The first question put to the Jury, was, whether for forty years past there had been a public footpath from Burntisland *over the land of the defendant's lands*, to the western extremity of the same lands; and it was to be tried, and the issue might, and did, arise, whether it had been so proved here; whatever other actions the pur-
suer may have, or may contemplate against the defendant, or any other parties, their business in this case is limited to the lands alone; and therefore it was agreed by both parties, that the footpath had been established *through* the lands of the defendant, and goes on to mention the subsequent course of the path, asking whether, after it reaches the extremity of the lands, it thence proceeds to certain spe-
cific places, or *towns, villages, and hamlets* of them. These places are, "Star-
leyburn, and the port and harbour, and old and new villages." It was admitted to us by both parties,
that these places, or *any two of them*, include Starleyburn, and are situated on the coast, near the port and harbour, and new and old villages in the neighbourhood. One of the questions put is, whether there is any particular place through the defendant's lands, "and thence to the port and harbour. This port or har-
bour is not mentioned as public, nor is there any specification of any particular road, after it leaves the defendant's lands, or *any part of them*; there is no mention of its going through the lands of the plaintiff, which is merely referred to as a road which, after it reaches the western extremity, proceeds, *no mat-
ter what*, to the port and harbour or the villages of Aber-
dour, or *any other place* in them.

In arriving of the issue, I disregard entirely the *defendant's* written statement, which its own words do not war-
rant, and does not cover the *commons*, or to the record, or to judi-
cial notice, and I presume that the issue, as adjusted by
the parties, is what its framers meant.

Now, as to the first two questions except to the deductions which
the *defendant* did give, I think that the answer to
them is necessarily out of the issue. Nor are the
last two questions of much importance. As to the last, the 8th, I think the
rule is, that if a man's act is agreeable to common sense and to
justice, and according to the *defender's* principle, it would be ille-
gally to require many years' possession to be proved, if
it could be shown to be less than a month, or even a day,

counted, to which the direct testimony of a witness did not extend Dec. 20. 1851. positively. We have the authority of the House of Lords in the case of *Harvey* for holding that this is not law. I therefore think ^{Cuthbertson and Others v. Young.} that the whole exceptions ought to be disallowed.

LORD MURRAY concurred in thinking the exceptions should be disallowed. In regard to the grand objection by the defender, that there is no public place as a terminus to the road in question, he is wrong. The road went along the margin of the most public road in the world, the sea. Besides, the notion that there should be two public termini to a road along which a public right of way was claimed, although supported by the opinion of Lord Stair, is erroneous. On this subject, Lord Elchies, one of our greatest lawyers, gives a different and a more sound opinion. Elchies' Annotations on Stair, b. II. tit. vii. p. 233.

The COURT, by a majority, disallowed the bill of exceptions, with expenses.

*Wotherspoon and Mack, S.S.C., Agents for Pursuers.
Alexander Hutchison, S.S.C., Agent for Defender.*

SECOND DIVISION.

DARLING (MEIN'S TRUSTEE) v. MEIN.

No. 109.

Antenuptial Contract—Sequestered Estate of Husband—Wife ranking with Creditors.—An absolute conveyance to a wife, by antenuptial contract, of the household furniture, will not entitle her to rank along with her husband's creditors on his sequestered estate, during his life, for the value of the furniture.

By antenuptial contract of marriage, of date 28th September 1846, James Mein made over to his wife the liferent of certain subjects in event of her surviving him, and further, "conveyed, disposed, and made over, to and in favour of his said spouse, absolutely, the whole household furniture and plenishing then absolutely belonging to him, or which he might acquire and use for household purposes during the subsistence of his marriage, including silverplate and heirship moveables." The contract also contained a declaratory clause, to the effect that no heritable or moveable subjects presently belonging, or hereafter to belong to, his wife, should fall to the husband in virtue of his *jus mariti*, or be liable to his deeds, or subject to the diligence of his creditors.

On 15th August 1850 the estates of James Mein were sequestered, and he died on the 9th February 1851. The household

trustee, and the proceeds of the sale
of the furniture were distributed *pari passu* with the other creditors of
the estate, the sum of £314 : 2 : 1, as the value of

the furniture was so fixed by the trustee, whereupon an appeal
was made to the Sheriff Court, who gave judgment to the widow to the Sheriff of Roxburgh, who
held that the claimant had a preferable *jus in re* in the articles of furniture, and that a *jus creditum* was thereby
conferred upon her, enabling her to be ranked along with the other
creditors, and to receive for the value. Against this deliverance
appeal was brought by the trustee.

Appellant contended, that the claimant had accepted the furniture under the contract of marriage to the
respondent, and that she had possession at the date of the sequestration,
and that notwithstanding his sequestration he was completely divested of
his personal obligation remained of such a
character as to entitle him to a right to rank.

For the respondent it was held for the respondent contended that the
contract of marriage being an onerous deed, and the terms of the
actio causa de presenti, are sufficient to confer a *jus*
to rank upon her husband's sequestration, and the sum of £314, 2s. 1d., the proceeds of the fur-

This is a very clear case. Mein by
contract makes over his furniture absolutely to his
wife for the purpose of making her
a member of his estate, but not as against
third persons during his lifetime. He is sequestered; then the
claimant claims to be ranked for the price of it.
The question is, whether her whole liferent rights provided by
the contract of marriage appeal must be sustained with expenses.

The court accordingly sustained with expenses.

Agents for Appellant.

Johnstone, Baird and Greig, W.S., Agents for Respondent.

SECOND DIVISION.

M. P. STEWART AND OTHERS (STEWART'S TRUSTEES) v. STEWART AND OTHERS. No. 110.

Trust-settlement—Legitim.—A testator left his whole property to trustees, to be divided among his children—the shares payable at certain fixed periods, and the deed being in terms which satisfied the Court that the shares were not to vest till those periods. Eight children survived the testator, three of whom died in minority. *Held* that the survivors, who themselves took under the deed in preference to their legitim, could not claim the legitim of the predeceasers.

Trust-settlement—Construction—Share—Right to dispose.—Where a testator left his property to be divided among his children, sons and daughters, the trustees being required to re-invest the daughters' shares, and take the securities to them “in liferent for their liferent use allenarly,” and the lawful issue of their bodies in fee; and where the testator also provided generally that in the event of any of his children dying without lawful heirs of their body, their share should be divided among the survivors. *Held* that the daughters have power during their lifetime to dispose of the sums left to them in the event of their not having issue.

In 1825 the late James Stewart conveyed, by trust-disposition Dec. 20. 1851. and settlement, his whole property to the pursuers as trustees. After specifying various purposes which the trustees were to fulfil, the deed appoints the trustees to convey to the issue of his then marriage, “equally among them, share and share alike,” the whole of his means and estate, and he appointed “the said conveyance to be made at the periods, and subject to the conditions following, namely, if a son or sons, upon his or their attaining the age of twenty-five years complete, but not sooner;” “and if a daughter or daughters, upon her or their severally attaining majority. But my said trustees are, in this last case, hereby directed and required to reinvest the share or shares of my estate, heritable or moveable, coming to her or them, on such security as they shall see proper, taking the conveyances or securities thereof in favour of my said daughter or daughters in liferent, for their liferent use allenarly, and to the child or children to be lawfully procreated of her or their bodies in fee;” and he declared that, in the event of his children dying before these ages specified, his trustee should make over his property to his brother William.

Stewart and
Others v.
Stewart and
Others.

Stewart executed a supplementary deed in 1830, which directed his trustees “upon my daughters attaining majority or being married, or upon my sons attaining the full age of twenty-five years, to divide themselves of their respective portions of my estate, in terms of the foresaid proviso in his deed of settlement; and in the event of

the wife, and leaving nothing without lawful heirs of their own. The wife, however, had a right to the share or shares of the deceased, which were to be equally divided among, or invested in the name of the survivors or survivor, share and share alike, under the said deed of settlement. Stewart died in 1840, leaving his wife, and leaving eight children, Mary, now Mrs Kennedy, William, Robert, John, Margaret, and Joanna. Of these William, Robert, and John were attaining ten years of age.

On the 21st November 1848, and Miss Helen Love being then a minor, having attained majority, and Mary being then a minor, about to marry, the trustees raised a question respecting the application, with a view to the distri-

buting the deceased claims, the Lord Ordinary (Ivory) made avizandum to the Court.

In the competition, one of which was dis-
puted between the parties, whether the shares of the deceased were to be distributed. The Court decided that they had been left to the minors till the age of twenty-five in the case of sons, and of marriage in the case of daughters.

The first question before the Court. The first question was, whether the legitim of the predeceasing children, if any, should be given to some of the survivors.

There were two questions.

John Gordon, with whom Gordon, for Mrs Kennedy, and the trustees, and Shaw Stewart, and their curators. The trustees had the shares of the deceased children under the settlement. But their legal rights are unaffected. They had not succeeded them; the children themselves had not succeeded them. At common law, therefore, they were entitled to the legitim, which vests *ipso jure*, and by common law, in the next of kin:—Bell's Principles, sec. 1586; 1 D. 131, 2 D. 8170. Were it not, therefore, that the trustees had the shares under the settlement, their claim for the legitim would be indisputable at common law. But the authority of *Breadalbane's Trustees v. Bingham*, 5th March 1840, 2 D. 131, shows that after the settlement, they cannot also claim the legitim accruing to the deceased; if they do, they must reprobate the settlements. But

that case differs from this. *There* the child had claimed legitim ^{Dec. 20. 1851.} in his own right. Counsel referred to the case of the *Duke of Buckingham*, 15th December 1843, 6 D. 250: If any of the pre-deceasing children had, by settlement, conveyed to the surviving brothers and sisters their shares of legitim, the survivors could undoubtedly have taken it without repudiating the settlement. Why may they not also take it by the operation of common law? *Turnbull*, 17th March 1848.

The Court did not call for an answer.

LORD JUSTICE-CLERK. The deceased children died before they were capable of judging whether they should claim the legitim or take under the deed and nobody could have exercised this right of choice for them while they were in life. Therefore, up to the date of their death, we cannot say the legitim was theirs more than the provisions; and I know of no authority for saying that after death an option of this sort can be exercised on behalf of an individual who died in pupillarity. But the present claimants come forward as in right of the deceased children, and they ask us to look on the legitim as the only right in these children at the time of their death. We cannot do that, for we see the right in the child of a greater interest, viz. to the provisions; for that it was greater appears from this, that the other children claim their provision under the deed, and in preference to their legitim. The right under the succession opened to the deceased children as much as the legitim. Their shares under the settlement did not indeed vest; but their right of succession, and claims under the settlement, opened by the death of the father.

The other Judges concurred, and the COURT refused to sustain the claim.

In the same case another question came before the Court, on a claim by Mrs Kennedy and Margaret Stewart, to have it found, that during their lifetime, they have power to dispose of the sums directed to be invested in their favour in liferent—and their issue in fee—the former (Mrs Kennedy) in the event of her not being survived by issue—the latter in the event of her surviving the period when such investment falls to be made, and dying without issue.

Millar and Marshall, for James Stewart, objected. The daughters have by the settlement a mere liferent—the conveyances are to be taken to them in liferent for their “liferent use allenarily,” which is the term used in the deed. Therefore they have no

in the event of their dying without issue, to give the shares liferented by them. For example, if a testator gives directions for the disposal of it "in the event of his children dying without lawful heirs of his body," he would appoint the share or shares of the deceased equally divided among them, or in the event of all dying, in behalf of the survivor or survivors, according to the terms of the said deed of settlement.

It is the policy of our law to encourage the transfer of money, and it may be laid down that such transfers may easily be made by very precise declarations of intention, or by some other form of expression carrying out this intention. When a trust was constituted and the trustees directed to invest the shares of the testator's estate in the event of his death, it might have been provided that they should do so by a supplementary constitution; but this is not done. The testator directs in the supplementary deed to divide the shares of his estate even among, or invest them for the benefit of his wife, during the period of division and investment. The event contemplated is one which has already occurred, and the testator does not look forward to any future contingencies. It is a duty on the trustees, to provide for the wife until the date of their denuding and investing, and the remainder of the daughter's portion is for the benefit of her children. They are not directed to provide for the wife in case of the non-existence of such children. If there is no substitution put into the securities of the wife, and the absence of such substitution make provision, the testator dies intestate. In such a case, the wife's fee as well as the liferent of each child's portion will survive by giving it to the children of his wife. The effectual may depend on the existence of such children. The disposition of it is clear in their favour, and the contingency so far as the testing on it is concerned.

The suit was tried, and the COURT sustained the claim.

W.S. Agents for Trustees.

Agents for Children.

(See Note for the Christmas Recess.)

HIGH COURT OF JUSTICIARY.

BEFORE THE LORD JUSTICE-CLERK, LORDS COCKBURN.
AND IVORY.

SIMPSON v. CRAWFORD AND DILL.

No. 111.

Suspension and Liberation—2 and 3 Will. IV. c. 68, sec. 12—Poaching—Requisites of Statute.

This was a suspension and liberation for the complainer, who Dec. 22. 1851. had been convicted at the instance of the respondents, who were ^{Simpson v.} ^{Crawford, &c.} the joint procurators fiscal in the Justice of Peace Court of Lauder, of contravening the 2 and 3 Will. IV. c. 68, § 2, by trespassing on the grounds of the Earl of Lauderdale in search of game, and sentenced to pay a fine of L.2, 10s., with 17s. 6d. of expenses, failing which, to be imprisoned for two months.

Ogilvy, for the suspender, *inter alia*, objected that the complaint in the Court below had not been preceded by the oath of a credible witness, required by the 11th section of the above statute; *Smith v. Forbes*, 22d July 1848, *Arkley's Justiciary Reports*, p. 508.

Penney, in support of the conviction, referred to the case of *Philips v. Lord Rosslyn*, *Scottish Jurist*, v. 433, 14th June 1833.

The COURT held the objection fatal to the conviction. They therefore passed the bill with expenses.

J. Cozens, W.S., Agent for Suspender.

Gibson-Craigs, Dalziel, and Brodie, W.S., Agents for Respondents.

HIGH COURT OF JUSTICIARY.

BEFORE THE LORD JUSTICE-CLERK, LORDS WOOD AND COLONSAY. No. 112.

PARK and OTHERS v. EARL OF STAIR.

Court of Justiciary—Jurisdiction—Review—Solway Fishing Act.—A conviction under the Solway Fishing Act, 44 Geo. III., c. 45, secs. 9 and 17, followed by the infliction of a penalty and imprisonment, is not reviewable by the Court of Justiciary.

This was a suspension and liberation for the complainers, who, Jan. 12. 1852. in a prosecution at the instance of the Earl of Stair, had been con- Park, &c. v. victed at Stranraer before certain of the Justices of the Peace for Earl of Stair. the county of Wigton, of a contravention of the 44 Geo. III. c. 45,

Fishing Act. Under sec. 9 of that statute, if any person or persons, not being the owner, master, or co-owners of a fishery, or the agent, servant, or fisherman of a fishery, or any farmer of a fishery, or other person by whom any fishery is let, thereunto lawfully authorised, shall at any time commit any offence of fishing, as prohibited by the statute, he or they shall be guilty of a first offence, forfeit and pay the sum of fifteen pounds, and for every subsequent offence, the sum of fifteen pounds, and for every third offence, the sum of twenty pounds, and shall also pay all costs of prosecution, &c. And by section 17 it is, *inter alia*, that "any person who shall sustain distress or distresses shall not be liable to any fine, penalties, and costs, shall not be imprisoned, and may be lawful for any such person to sue for damages, or to sue for peace, or Sheriff, or Stewart-depute, or any other officer or magistrates aforesaid, and he and they is or may be lawfully authorised, empowered, and required, to cause to be committed every such offender or offenders to prison for the space of one month for the first offence for the county, shire, stewartry, or burgh or town where such Justice or Justices aforesaid shall be sitting, not exceeding three months, nor less than two months; and for the second offence, for any time not exceeding two calendar months; and for the third offence, for any time not exceeding nine calendar months, there to be kept at the said prison, and to remain without bail, or mainprize."

The complainants were proprietors of the fishings in the water or river Luce, which runs into and communicates with the River Dee, as described in the 44 Geo. III. c. 45; and the complainants complained to the Justices of Wigton, setting forth that the offences had been committed by the complainers, and the judgments contained in the above sections of the statute, relating to the infliction of penalty and imprisonment, were demanded. The complainers were convicted, and the court proceeded to pronounce the following

judgments:—John Parks, blacksmith, New Luce; John Luce, son and heir of the village of New Luce; and Robert Luce, son of the said village of New Luce; have respectively been convicted before us, three of Her Majesty's Justices of the Peace for Wigtonshire, of having on or about the 1st of January last, or on or about that time, with a pointed iron rod, or other sharp instrument, laid, or destroyed, or attempted to take,

kill, or destroy, a salmon, grilse, salmon trout, or some other fish, Jan. 12. 1852.
in the Cross Water of Luce, in the parish of New Luce, and Park, &c. v.
that in contravention of the ninth section of the Act 44 Geo. Earl of Stair.
III. c. 41, entitled, &c.; and have been sentenced and adjudged
to pay and forfeit for the said offence the sum of five pounds
sterling each of penalty; the said several sums to be paid to
the Right Hon. John Hamilton Dalrymple, Earl of Stair, the
complainant: And whereas the said John Park or Parks, John
Waugh, junior, and Robert Dickson, have failed to pay down to
the complainant the said penalty and expenses, in terms of the said
statute, warrant is hereby granted to commit the said John Park
or Parks, John Waugh junior, and Robert Dickson, respectively,
to the jail of Stranraer for the period of three months from this
date, unless the said penalty and expenses shall respectively be
sooner paid, and warrant also to the keeper of the said jail to re-
ceive, detain, and liberate them accordingly."

The complainants presented their bill of suspension and libera-
tion in this Court, on various grounds of irregularity and incom-
petency, and answers were given in for Lord Stair, in which an
objection in *limine* to the jurisdiction and power to review by
the Court of Justiciary was taken.

M. Bell and *the Dean of Faculty*, for Lord Stair, supported this
objection. The proceedings in the Court below do not shew a proper
criminal offence. There is a mere statutory instance—there is no
public prosecutor, or concurrence of such officer; and no public
interest appears to be recognized. The prosecution was simply
for a contravention of the statute. This contravention is not
shewn to have been of a criminal nature. The primary sanction
is a pecuniary penalty, and there can be no review in this Court;
McDonald, 17th February 1844, 2 Brown, 107; *Dunlop*, 20th
June 1835, 13 Shaw; *Phillips*, 12th January 1847, 9 D.; *Som-
merville*, 1st June 1844, 2 Brown; *Addison*, 22d July 1848, Ark-
ley's Reports; *Robinson*, 16th February 1837, 15 Shaw, 572;
Campbell, 22d November 1847, Arkley's Reports.

Logan and *the Solicitor-General* for the complainants, and in
support of the bill, referred to the case of *Clark v. Johnston*, 1787,
Mor. 11818. It is sufficient if the object against which the law
is directed is of public importance, and here it is not a private
interest merely that is involved. The interest shewn does not
pertain to a particular stream, but to a large arm of the sea.
The whole statutes relating to salmon-fisheries have been con-
sidered matters of public policy.

The Court are of opinion that this previous decisions. We can draw no sustain the objection, and dismiss the expenses.

S.C., Agent for Complainant.

, Agents for the Earl of Stair.

DECISION OF JUSTICIARY.

SAME LEARNED JUDGES.

BIRCHES v. M'BAIN.

4 Vict., c. 33, § 345—Procedure before Court—Apprehension—Defence.

Tait or Blyth, complainers, against Independent of Police and Procurator Fiscal

town of Galashiels and neighbourhood, manufacturers of woollen goods, many of whom by winding yarns, either belonging to them or to others, in their hands for the purpose; and it was the common practice to sell the waste falling from the process of winding. In this trade the complainers, one a merchant and licensed hawker, and the other a many years.

In 1851, the Magistrates of Galashiels caused a notice of the following tenor:—
That certain waste yarn waste are being daily sold in the said burgh without the knowledge or consent of the said burgh, and whereas such sales are illegal by law. Notice is hereby given, that the officers of police of said burgh have received instructions to apprehend all persons found within the burgh, unlawfully and otherwise disposing of said waste. Notice is also afforded to parties thus unlawfully disposing of said waste by individuals resident in said burgh, to appear before the said officers. Notice is also hereby given, that persons purchasing waste in lieu of goods will be punished

Under this regulation the complainers were, on the 13th day of Jan. 12. 1853. December 1851, apprehended on a charge of theft, or reset of theft, of which latter charge the complainers were convicted before William Rutherford, one of the magistrates of the town of Galashiels, and sentenced as follows:—the female complainer, Agnes Tait or Blyth, to be incarcerated in the prison of Selkirk for twenty days from the date of conviction; and David Blyth to be fined and amerced in the sum of £10 sterling, with the alternative of imprisonment till said fine be paid, but not exceeding thirty days.

Certain rules and regulations, and forms of procedure for the Police Court of Galashiels, were, under the authority of the General Police Act, 13th and 14th Vict., c. 33, framed and established by the Magistrates of that burgh and the Sheriff of the county of Selkirk, with the advice and approbation of the Lord Justice-General and the Lord Justice-Clerk. These rules and regulations, *inter alia*, provides (sec. 6 and 7) “That when any party applies for time to summon witnesses, the clerk shall make a note of such application if it is refused, and the Magistrate may, if he thinks fit, call upon the party to state the nature of the facts which he wishes to prove, and if he shall refuse, or is unable to do so, then the application shall not be marked. And when any party offers proof at the time, the Magistrate may require him or her to state the nature of the facts he or she proposes to prove, and if the proof is refused, the offer of proof, and the nature of the proof so offered, shall be marked by the clerk. And that the Magistrate may, at the desire of either party, delay procedure till a future Court day, in which case the defender or defenders shall, in the meantime, be furnished with a copy of the complaint.”

It was stated that these regulations had been disregarded, inasmuch as the complainers having desired to avail themselves of the benefit of the same, by applying for time, in order to prepare their defence, were not allowed this advantage, but their application for time was refused. They were, without any previous service of the complaint, summarily apprehended and brought before the said William Rutherford, the acting magistrate, when the charge was at once gone into, and evidence led for the prosecution.

Pattison and the *Dean of Faculty*, for the complainers, argued that the procedure in the Police Court was altogether illegal and irregular, and ought to be suspended.

Logan and the *Solicitor-General*, for the respondent, supported the conviction.

on that there must be some inquiry in the Police Court, and the refusal of the court to give the complainers time to prepare the defence, he issued the following interlocutor :—“ *Edinburgh, 29th June, 1858.* The Lord Justice-Clerk and Lords Commissioners in Council, having heard counsel for both parties, do hereby declare, that the suspender avers that he did distinctly apply to the Sheriff to have time to lead evidence on his behalf, or for time to lead evidence on his behalf, though not minuted by the clerk, was granted by the Sheriff before answer allow the suspender a sufficient time to serve to the respondent a conjunct probate of the said interlocutor, and to the Sheriff to take the said proof before the Sheriff, and to bring the same to a close without adjournment, if such be necessary, and grant diligence at the instance of the suspender for summoning witnesses and havers.”

Some terms was pronounced in the case

C., Agent for Respondents.

, Agent for Respondent.

LEFT DIVISION.

JOHN BARR.

circumstances in which sequestration of an inheritance, in consequence of a purchaser of the property, notwithstanding the non-completion of a process of reduction of the sale.

He prayed for recal of the sequestration of which he had become the purchaser. The former proprietor, Robert Napier Sharp, in consequence of the property, it was under various circumstances, under embarrassment and difficulty having made certain transactions and the legal proceedings were at the time deemed necessary that the property be under judicial management. Accordingly, he caused the said Robert Napier Sharp, the proprietor, to be removed from the sequestration of the rents and feu-duties and the appointment of a judicial factor. The court then arranged sequestration, and appointed a factor

with the usual powers, who entered on his duties, and had continued in the management of the property.

Jan. 13 1852.

Pet. Barr.

One of the incumbrances referred to was an heritable debt of £2000, due to M'Arthur's trustees. These parties had demanded their money, and had taken proceedings under the powers in their bond; which proceedings, however, had been stayed by an action of reduction brought by a substitute heir under an old entail of the lands, including a reduction of the bond to M'Arthur's trustees. On this last head, however, the reduction had been dismissed, and M'Arthur's trustees thus stood in the right and title to recover their debt. After various delays, proceedings with a view to a sale were carried into effect. The lands were exposed to public sale and purchased by the petitioner for L.7000. Out of this sum M'Arthur's trustees had received the amount secured by their bond, and a multiplepoinding had been raised with the view to the distribution of the balance among the other claimants.

The petitioner, having thus acquired the estate of Kilmahew, was desirous of entering into possession; and he now therefore prayed that the sequestration, and the appointment of the factor, should be recalled. He added that a considerable saving would thus be effected, by getting quit of the factor's fee, and also enabling the petitioner forthwith to pay off the bonds prior to his own, on which interest at the rate of 5 per cent. was running.

Answers were lodged for Alexander Barclay Sharp and others, and the said Robert Napier Sharp, in which it was stated that an action of reduction of the sale to the petitioner, at the instance of the respondents who were postponed heritable creditors, was now depending in Court, on the ground that the sale was not preceded by the necessary intimations; that various other irregularities had taken place; and that the proceedings were so improperly and so recklessly carried through, as to preclude all chance of a sale of the estate for an adequate price. The respondents therefore submitted that until the result of this action of reduction should be seen, it would be inexpedient to disturb existing arrangements, and that the petition should be refused, or at least superseded *in hoc statu*.

Dean of Faculty (with whom *Moir*) for the petitioner. There was a complete alteration of the circumstances under which the sequestration had been awarded. There had been an application for interdict presented at the respondent's instance, in which process the ground of reduction relied on had been mainly decided. There was really no ground for keeping up the sequestration.

...ents, referred to the case of *Kerr v. Kerr*, 28 Dec. 1848, 11 D. 301, relating to a ...the same property.

...ound for maintaining the sequestration, ...e settled, but without expenses.

...C., Agent for Petitioner.

...S., Agent for Respondents.

TEST DIVISION.

MICHAN and HUSBAND v. MITCHELLS.

Agreement with Personal or Moveable Estate.—

...or the purpose of carrying out certain family ... executor-testamentary or executor-dative to the deceased, and had ... personal and moveable estate:—held that collation ... action against the heir to account dismissed.

...of a decree of the Steward of Kircud-... Mitchell, father of the pursuer and defen-... December 1822, leaving a widow and nine ... property consisted of two leases and a ... month of December following his ... took place, at which the pursuer, ... present. At that meeting a proposal was ... three sons should carry on the farms, ... family with them; and that as the surplus ... as estimated not to exceed the debts by ... should be granted by them for that sum, ... draw the interest, and the principal ... among her daughters at her death. On ... after the foresaid meeting and agree-... who had married one of the daughters, ... letter, dated 11th December 1822, to Mrs ... daughter of the family, then at King-... been here these few days past, and ... the state of affairs, along with the rest ... country, who was all present at settlement ... requested by your mother to let you know ... and, for your satisfaction." He then ... amounted to £1442, and the available estate ... and farming utensils, &c., was £1633;

thus leaving a balance of £191 in favour of the deceased's representatives. The letter goes on to say—“ All parties present have agreed, in your absence, that this reversionary balance shall lye for the support of your mother in her old age, after the appointment in not having it in her power to give to each of their children what was expected a few years ago.”

Jan. 13. 1852.
Mitchell or
Mc' Michan, &c.
v. Mitchells.

The arrangement with regard to the bill for £200 was then proceeded with; the three sons put their names to it, and it was not denied to be a genuine document. A few years after, in 1828, the defender, Quintin Mitchell, the eldest of the sons, was decerned executor-dative *qua* nearest of kin, and after due service of an edict, and no objection stated, an inventory was given up by him, the amount of which was £1407 : 15 : 7. It appeared that this proceeding was adopted in order to facilitate certain of the family arrangements, and the pursuers, although denying that they agreed to what was done, did not allege that they took any steps in objecting, and no demand for any accounting was brought forward by them until after the death of old Mrs Mitchell, the mother, which occurred in the month of September or October 1842, a period of twenty years having thus elapsed since the original agreement had been made, and on the footing of which the family affairs had since been allowed to stand.

In January following, 1843, the action now under suspension was instituted in the inferior Court, against the eldest son and his youngest brother, in respect these defenders had intromitted both with the heritable and moveable property, and proceeding on the assumption that in the case of Quintin Mitchell, the eldest son, collation had taken place, the action concluded for a count and reckoning on that footing. A record was made up, in which it was stated that the defenders were ready to pay the pursuers their share of the £200 contained in the foresaid bill, and the Steward-substitute pronounced an interlocutor, afterwards affirmed by the Steward on appeal, by which the defenders were appointed to give in an account of their intromissions with the heritage, reserving all questions as to their liability to account for the moveables. It was stated that none of the other children, or their representatives, objected to the arrangement alleged to have been made on the death of their father, but were willing to settle with their brothers on the footing of the same.

The defenders having been charged on the extract decree and precept of poinding pronounced in the Court below, they now suspended on the ground, *inter alia*, that there had been no pro-

... upon is a privilege to be exercised by the ... exclusively, whereas the summons pro ... compulsory collation of the heritable ... said that the pursuers were barred by ... the heir, from requiring a general count and

... and that "the mere confirmation in ... drawing of the rents of the heritage, ... collation, which is a privilege compe ... his discretion; but that the said ... having taken place with the express ... of the family, excepting, as is alleged, ... and the said pursuers being in the ... arrangement, which was not on the ... reverse, and they having taken no steps ... years to break up the said arrangement, ... or acquiesced therein, and are barred ... of collation as against the heir, and that ... that the heir ever did collate or in ... principles on that footing: Therefore alters ... repels the preliminary objections ... called, and that the action was in ... Court: But on the merits, Finds that, ... to take place between the parties, the ... to be included therein; and appoints ... take their share of the £200 as offer ... exist upon a count and reckoning as to ... and on any objection which the de ... count and reckoning, reserving in the ... expenses."

(... reagents) reclaimed.

... for the reclamer.—It is admitted that ... other property with the whole estate. They took the ... property, and the eldest brother was con ... called to account. Collation is a mat ... the heir, but the discretion must be used ... acted. If the heir has done that which ... his discretion is at an end.

... remember a case in which Lord Jeffrey,

then at the bar, invented a doctrine which he called *gestio pro col-* Jan. 18. 1852.
latore, which he applied in his argument with great ingenuity and
anxiety.

Mitchell or
M' Michan, &c.
v. Mitchells.

The *Dean of Faculty* for the defenders, (suspenders). This is precisely a case of that kind.—The heir here has not collated in fact, nor has he done that which amounts to collation. He merely consented to act as he did for the sake of his mother. He introduced in his character of executor, and he accounts to his sisters. There was no collation whatever, nor is there any ground to presume it.

The LORD PRESIDENT. I agree with the Lord Ordinary. see no ground that this person collated. As a matter *inter rusticos*, what was done was very proper; and certainly after the lapse of such a length of time, a claim of the kind must be made very clear.

LORD FULLERTON concurred.

LORD CUNINGHAME. The case of the pursuer is totally unfounded. There may certainly be collation *rebus ipsis et factis*, but here we have a mere family arrangement, a very reasonable arrangement, just what would have happened among sensible considerate people. Having regard to the whole history of the case, I entirely approve of the interlocutor of the Lord Ordinary.

LORD IVORY. I am entirely of the same opinion. I see no ground whatever for holding that there has been any collation at all, and I am surprised that it should ever have occurred to these pursuers to hold that there was.

The COURT adhered and remitted back to the Lord Ordinary to proceed farther in the cause as might be just, with power to award expenses since the date of his interlocutor.

Hunter, Blair & Cowan, W.S., Agents for the Reclaimers, (Pursuers.)

Webster & Renny, W.S., Agents for Respondents, (Defenders.)

SECOND DIVISION.

No. 116.

SUSP.—TULLIS AND OTHERS v. CLARK.

Process—Reclaiming Note—Bill-Chamber—Division.—*Held* that it is not necessary that an interlocutor pronounced by an Inner-House Judge, as Lord Ordinary on the Bills, should be reclaimed against to the Division of the Court to which he belongs: but that it may be competently brought before the other Division.

This was a suspension in which Lord Fullerton, as Lord Ordin- Jan. 18. 1852.
ary on the Bills, had pronounced an interlocutor refusing the Tullis, &c.
note. v. Clark.

to the Second Division; and on the general question of the Single Bills,

the Agent for Suspenders.

The Agents, objected. It is incompetent to bring such a suit before the Second Division; it should be brought before the Committee, of which Lord Fullerton is a Judge. In the case of *Small v. P.C. Sec. 18*, there is an express provision, that bills of costs should be addressed to the Division to whom the suit belongs, by whom the interlocutor reclaimed the same. Accordingly, it was found, in *Small v. P.C. Sec. 18*, xi. S. p. 9, incompetent to reclaim the same before the Second Division, even although it was brought before a Justice of the Peace officiating in the place of a Judge of the Second Division. True, the statute 1 and 2 Vict. c. 43, provides, that the Lords Ordinary in the Outer-House, should belong to both Divisions, and that the Clerk of the Crown should mark on his summons the Division to which the suit belongs; but that provision is only applicable to suits in the Inner-House. The Judges of the Inner-House, however, belong to their own Division.

The practice is universally against the Agents for Suspenders. In the Bill-Chamber belongs to the

Agents for Suspenders' objection.

C., Agent for Suspenders.

S.C., Agents for Respondent.

SECOND DIVISION.

JOHN JAMES HOPE JOHNSTONE v. JOHN JAMES HOPE JOHNSTONE.

Works—Contract—Personal liability—Relief. A company of contractors against a railway company denied their liability, and pleaded, that the damages for which they claimed arose were such as they had no power to meet, by their statutes—Held, in an action of relief brought by the chairman, had signed the original agreement, and still the other directors as defendants.

A company engaged for the construction of the "General Harbour Railway," and by another

Act, in 1847, power was given to the said Railway Company to Jan. 14. 1852.
extend their line to the Caledonian Railway. Power was also given to the General Terminus Railway to sell or lease their line, and Co. v. or any part thereof, to the Caledonian Company, or the Glasgow Johnstone. and Ayr Company. After the passing of the Act in 1846, the Glasgow Terminus Railway contracted with the pursuers, M'Ilquham and Company to construct the works connected with the railway, and likewise those intended to be authorised by the Act of 1847. Thereafter the Caledonian Railway Company purchased several lots of the ground which had been acquired by the General Terminus Company, and undertook to construct certain of the lines and branches authorised by the General Terminus Railway Acts. The Caledonian Company adopted the contract which had been entered into between the General Terminus Railway and the pursuers, so far as the same related to the portions of the works to be made by the Caledonian Railway Company, and several payments were made by them to the pursuers. The Caledonian Company having failed to make further payments, the pursuers ceased, in 1848, to carry on the works. Thereafter the pursuers entered into an agreement with the Caledonian Company, and the works were resumed. This agreement was signed by the defender, as chairman of the Company.

In September 1850, the pursuers raised an action against the Caledonian Company for payment of the work done, and in that action he reserved all and every claim competent to him against the General Terminus Railway. In defence to that action, the Caledonian Company denied their liability, and pleaded that the transactions out of which the pursuers' claim arose, were such as the Caledonian Company had no power to enter into under their statutes; and they also pleaded that the General Terminus Railway had not been called. This action is still in dependence.

In consequence of this defence by the Caledonian Company to the action against them, the pursuer raised the present action of relief against the defender, Mr Johnstone, as the party who signed the agreement under which the work was executed. The defender pleaded, as a preliminary defence, that all the parties had not been called, and that the pursuers were bound to bring into the field the General Terminus Railway, with whom they originally contracted, and the other members of the Board of Directors of the Caledonian Railway Company, of which the defender was chairman.

The Lord Ordinary (Robertson) repelled both these defences.
Mr Johnstone reclaimed.

for the reclamer.

of Faculty for the pursuers.

The court held that, in this action of relief, it was competent for the pursuers to call the Directors of the Caledonian Linen Company as defendants. But of consent the pursuers had given to the preliminary defence which superseded. They therefore proceeded to trial by jury which, of consent of the reclamer, rejected the preliminary defence, and found in favour of the pursuers, on the evidence of the preliminary defence, that the Caledonian Linen Company had not been called as defendants because they adhered to the interlocutor re-

JAMES W.S., Agent for the Pursuer.

WILLIAM W.S., Agents for the Defender.

ND DIVISION.

v. LIDDELL and Co.

A party who indorsed for the accommodation of a drawer, a bill which was discounted with a bank, and retired from the business, brought an action to recover from the acceptor, although he had no longer any interest in the bill, for the accommodation of the drawer.

The pursuer sued for the recovery of £228, 0s. 10d., being the amount of a promissory note for £360, by the defenders, James and John Marshall, manufacturers in Kinross. The pursuer, for the convenience of Marshall, endorsed this note, and Marshall indorsed it to the English Linen Company's Bank at Kinross. On the 23d August it was not taken up by the bank, and a course was had by the bank upon the pursuer to recover the balance of the bill, after deducting a sum for discount, arising out of the sale of some property belonging to Marshall. Marshall paid the balance of the bill, and he gave a personal action for payment of the balance.

The defendants contended that the promissory note in question was of no value. They did not, however, make any attempt to offer to prove, that the pursuer was ignorant of the value. They contended in the Inner Court, that the knowledge of this circumstance could be gathered from the plea maintained by them in the Inner Court, without the effect of his knowing it. Besides this there

were other pleas founded on other statements of fact put forth in Jan 14. 1852.
the record; but as they were abandoned in the Inner House, they
need not be stated.

Beveridge v.
Liddell
and Co.

The Lord Ordinary (Rutherford) repelled the defences, and
decerned in favour of the pursuers.

The defenders reclaimed.

Shaw (with whom the *Solicitor-General*) for defenders. The defenders truly interposed in accepting the bill as guarantee and security for Marshall, although in the bill they are the primary obligants, and Marshall applied to the pursuer (who is his uncle) to endorse it, in order to enable him to raise money on it. This the pursuer did, knowing, as the record shews, that the bill was granted without value, [counsel proceeded to argue from the record that the pursuer knew of this.] Now, suppose the pursuer had kept the bill in his hand, and charged Liddell and Co. to pay it, they might have suspended the charge on the ground that he was not an onerous holder. The question therefore comes to be, what effect the discounting the bill had? Both the pursuer and the defenders put their names to the bill for Marshall's accommodation; they are, therefore, in the position of joint cautioners. The retiring of the bill does not put the pursuer in a position as if he had paid value for the bill to Marshall. By retiring it he came into the position of a cautioner entitled to relief, to the extent of one-half from my client. Therefore he is not properly an onerous holder.

LORD JUSTICE-CLERK. Then an indorser who retires the bill comes to be a joint acceptor, according to your argument.

Shaw. He knew, before endorsing, the bill was not for value.

LORD JUSTICE-CLERK. But if a friend of the drawers, knowing it was an accommodation bill, endorses it and pays value for it, are you, the acceptor, not to pay him, you having undertaken to raise money for Marshall by giving your name?

The other Judges concurred. And the COURT, "in respect that the pursuer retired from the bank the bill of which the defenders are acceptors," adhered to the interlocutor, with additional expenses.

Cook and *Dean of Faculty* were for the pursuer.

John W. Mackenzie, W.S., Reclaimer's Agent.

John Marshall, S.S.C., Respondent's Agent.

1ST DIVISION.

Interlocutor—Accountant-General.

The factors appeared personally at the Bar in pursuance of a former order of the Court made on the application of the Accountant-General that these parties had not committed any offence against the Act of Sederunt. The Court was present, and several of the factors, and various excuse for their non-appearance were urged. The factors were all remanded to prison to be dealt with according to law. In the meantime, the visitors, on whom the interlocutor of the Court had called, went to the house of the applicant who was not present, and made no discovery. The Court granted warrant to apprehend

1ST DIVISION.

*LIZABETH DICKSON.**Certificate by Minister and Elders.*

“I do solemnly commit to the reporters on the *probabilitas* of the truth of the statement relating to the Poor’s Roll, 21st December, 1852, sec. 3, that where the certificate of the Minister and Elders is solely on the statement of the applicant, he or she shall be required to certify whether he or she be of good character and of good credit.”

“The reporter would bore that the truth of the pauper’s statement was to be tested by his own credit, and then proceeded thus—‘We certify that the applicant, so far as known to us, is of good character.’”

“The reporter, against whom the applicant contemplated an action, contended, that the certificate produced did not violate the provisions of the Act of Sederunt.

The reporter overruled the objection, and remitted to the

*J.W.S., Applicant’s Agent.**S.S.C., Objector’s Agent.*

SECOND DIVISION.

HAY v. FERGUSSON and LENNOX.

No. 121.

Poor Law—Settlement—8 and 9 Vict., c. 83, sec. 76.—Held, *first*, that a person who was blind, and had been supported mainly by contributions of benevolent individuals, but who had not applied for parochial relief, nor had recourse to common begging, had acquired a residential settlement in the parish where she had lived; *secondly*, that she was not “a proper object of parochial relief,” in terms of sec. 76 of the Poor Law Act, 8 and 9 Vict., c. 83; *thirdly*, that she could not be held to have had recourse to “common begging,” although contributions had been obtained on her behalf from various persons by one who took an interest in her.

This action was raised by Hay, who is Inspector of the Poor Jan. 15. 1852. for the burghal parish of the city of Edinburgh, against Fergusson ^{Hay v. Fergus-} and Lennox, who are Inspectors of the Poor for the parishes of May-^{son and Len-}bole and Ayr respectively, for relief of certain sums expended in the ^{nox.} maintenance of a pauper named Catherine M' Ardle or M' Arthur, on the ground that, at the time when she became chargeable to the said burghal parish of the city of Edinburgh, one or other of these parishes was the parish of her legal settlement.

From a proof which was allowed by the Lord Ordinary (Dundrennan), it appears that M' Ardle, who is a native of Ireland, was brought to this country by her parents in the year 1809. The family after residing for about two years in the parish of Ayr, removed to the parish of Maybole, and continued to reside there for eight years. They again went to Ayr in 1819, when her father deserted his family. The wife and family thereafter continued to reside in Ayr for about eight years, during the first part of which period she maintained herself and them without applying for parochial aid; but, for the last four years of her residence in Ayr, she applied for and received aid from the parish of Maybole, in which her husband had acquired a residential settlement prior to his abandonment of his wife and children. From her infancy the pauper had been blind, and in 1822 she was, by means of the benevolent contributions of private individuals, sent to the Blind Asylum in Edinburgh, where she continued to reside until 1834 or 1835. After leaving the Asylum, she resided first, for a short period, in the West Church parish; then, for about seven years, in the parish of Canongate; and afterwards in the parish

the period of her residence in the parishes above mentioned, the pauper maintained herself in a small degree by earnings, and more briefly by charitable contributions from friends, and had recourse to some extent by aid from the Society of Friends, but was unable to apply for or obtain aid from the parochial authorities. She resided in the said parishes till January 1849, when she removed to the City of Glasgow, and from the City parish the sums now

in dispute were paid to her. It is pleaded for Fergusson, that assuming the facts to be as he states, she obtained at the time a settlement in Maybole by her residence in the parishes above mentioned, and that by her residence in the parishes above mentioned, she may have had in Maybole a residential settlement under the provisions of 8 and 9 Victoria, c. 10, which provides that no person shall be held to have obtained a settlement in a parish unless he have resided there for twelve months, and have maintained himself "without reference to common begging, either by himself or by others, and having received or applied for parochial relief."

It is further pleaded that she never had acquired a residential settlement in the parish of Ayr, and that, even assuming she had, it was not in accordance with the above mentioned statute.

With respect to the facts above mentioned, the Lord Justice Clerk states, "that the pauper having maintained herself 'partly by earnings, and partly by charitable contributions' and 'without reference to common begging, and without applying for or receiving aid from the parochial authorities,' was not incapable of maintaining a residential settlement by her residence for twelve months successively within each of the parishes of Maybole and Ayr, and at all events, that in the circumstances of the case, she cannot be held to have been incapable of maintaining a residential settlement in the parish of Maybole, because she had left in the year 1819, and to which she has since returned, and therefore sustains the defences," &c.

The Lord Justice Clerk, his Lordship states, that in his opinion, as expressed by *Hay v. Cumming*, and *Forbes v. Gilmour*, in the judgment of 16th June 1851. "The interlocutory judgment in those cases expressly finds that the pauper had 'acquired a residential settlement by acquiring a residential settlement, and had maintained herself 'partly by earnings, either by herself or by others, or by work, or employment, and partly from charitable contributions of individuals,' the fact being that she had

not been obliged to apply for parochial relief. And in the opinion ^{Jan. 15. 1852.} of the Lord Justice-Clerk the test of such incapacity in a question between parishes, is stated to be, either that of relief granted, or ^{Hay v. Ferguson and} the demonstration of pauperism by living on public begging. The ^{the Lennox.} case of *Forbes v. Marshall* gives effect to the same principle, which had also, to a certain extent, been recognised in the case of *St Cuthberts*, 13th February 1851, where a party, permanently disabled by paralysis, had resided for more than five years in the parish, and been supported entirely by his father. Farther, in the earlier case of *Skene v. Beaton*, 16th February 1849, Lord Fullerton stated that 'the actual receipt of parochial relief' must now be taken as the test whether there existed such a state of pauperism as to render the party a proper object of parochial relief."

"The question of residential settlement cannot now be considered merely in reference to the views acted on or recognised prior to the recent statute, but must be determined with due regard to the terms of the 76th section, and the provisions as to the "acquisition of a settlement therein embodied." That clause "seems to the Lord Ordinary to be tantamount to the declaration, that a person by residence for five years, shall be held to acquire a settlement, provided only he had maintained himself without deriving the means of his maintenance from 'common begging, or from the parochial funds.' And this construction of the first branch of the statutory provision is confirmed by the closing *proviso*, excepting from its operation parties who had acquired a settlement prior to the Act, by a residence of three years, and who shall have become 'proper objects of parochial relief;' i.e., shall have been in the actual receipt of parochial aid, as these words have been held to import."

Against this interlocutor the pursuer reclaimed.

A. R. Clark and T. Mackenzie for pursuer. It cannot be contended that during the residence of the pauper in the Blind Asylum from 1822 to 1835 she acquired any parochial settlement. The question then comes to be, as to the effect of her residence from 1835 to 1849. During the whole of this period she was supported by private charity. The case of *Hay v. Cumming* was an extreme case. It related to a servant supporting herself chiefly by her own earnings, but obtaining assistance from private friends on account of ill health. This case is like the case of *Runciman*, reported by Dunlop, p. 377, sec. 52. The present case also comes within the sec. 76 of the recent act, when it provides that no one shall acquire

RESCIDED IN THE
and recourse to "common begging;"
did not herself beg, she received
assistance from others. The *proviso* referred to a portion of the pauper
class, which was supported by private friends: Elizabeth
Campbell with whom the pauper
had resided had the same effect. Again, this case
is excluded by the *proviso* in sec. 76. Although
she received parochial relief, she was still
a pauper. And such is sufficient to bring her case within

the category of paupers.

I certainly understood, and intended,
to comprehend such a case as this. This
was done to a large extent—almost entirely—by
the *proviso*, which provided for parochial relief. Now the object
of the *proviso* in the Court was to exclude the possibility of
any party had been supported by private
means, and his own earnings. How should the
Court know if a portion of assistance from others was ne-
cessary to place the person in the category of paupers? Can there
be any difficulty? Was he or she a burden on the parish,
in this case, what is to exclude her from
the parish, where she was for five years
engaged in "common begging?" For it is this clause
which is truly to be decided. Now, com-
munity of property recourse to herself; but, it is said,
for her, because she had mentioned
those who had contributed to her support.
The pursuer must be, that this lady is
a burden on the girl's family. But these words in
"common begging on his family," relate obviously to a man's
case. The pursuer next goes to that part of
the previous enacting clause should not
be allowed to stand, previous to the passing of this act, shall
not be entitled by virtue of a residence of three
years, to become proper objects of parochial relief;"
comes under it. But were the Court
to decide that she was not proper objects of paro-

chial relief were to be determined by any other consideration than Jan. 15. 1852.
this, "who had received it?" we should be led into endless in-
quiries and disputes.

*Hay v. Fer-
gusson and
Lennox.*

LORDS MURRAY and MEDWYN concurred.

LORD COCKBURN. I entirely agree in the result to which your Lordships have come. But there is one point I have some doubt about. There certainly was no "common begging" in the case of this girl. But I am not prepared to say that nobody can be a proper object of parochial relief without either applying for relief or getting it. I think a person may be a proper object of parochial relief who has not applied—a lunatic, for instance, who has not sense to apply, or a person may apply, and be unjustly refused; therefore I am not at present prepared to say there is no other test of a man being a proper object of relief except the application for, or receipt of, charity. But then I proceed on the facts of this case. Do these shew M'Ardle to be a proper object of relief? I think not. I see the difficulty of drawing the line between different cases. But had she made application I think she would have been refused.

The COURT adhered, with additional expenses.

James Morgan, S.S.C., Pursuer's Agent.

Patrick, M'Ewan and Carment, W.S., Agents for Defender, Fergusson.

Robert Anderson, S.S.C., Agent for Defender, Lennox.

OUTER HOUSE.

BEFORE LORD RUTHERFURD.

[The following case, decided by Lord Rutherford on the 25th November last, is now reported, his Lordship's interlocutor having been acquiesced in.]

BROCK v. HAMILTON.

Pro indiviso proprietors—Division and Sale—Roman Law—Actio de communi dividendo—Where two parties were pro indiviso proprietors of certain subjects not divisible, either separately or by apportionment: Held, that declarator of division and sale at the instance of one of the parties was competent, and action sustained to that effect. Observed, that the

Jan. 15. 1852. principle of the action in the Roman law *de communi dividundo* is recognised by the Court of Session, and applies to such a case.

*Brock v.
Hamilton.*

This was an action of declarator, and division and sale, of certain subjects in Glasgow held by two *pro indiviso* proprietors, one of whom was bankrupt, Brock (the pursuer) being his trustee.

T. Mackenzie and Marshall were for the pursuer.
Macfurlane and Inglis for the defender.

LORD RUTHERFURD pronounced an interlocutor, by which he " Finds it admitted by both parties, and especially founded upon by the defender, that the subjects are not divisible, either separately or by apportionment, between the parties : Finds, therefore, that the conclusions for sale and division of the price are competent, and sustains the action to that effect accordingly : Finds that no relevant defence otherwise has been stated against the conclusions."

He added a note in which he explained the legal principle applicable to the case. His Lordship said :—The present action is of the nature of an action *de communi dividendo*, and concludes for division of the common subjects, or in the event of its being found that they are indivisible for sale under authority of the Court, and division of the price. The pursuer, while he inserts the conclusions of division, following the style book in the matter, avers that the subjects are indivisible, meaning, as was distinctly explained, that they could not be divided into two equal lots, either separately, or by any apportionment of the three. The defender admits this statement to be correct, and, indeed, founds upon the fact that the properties are indivisible in either of those senses, as the ground of the plea on which he has mainly insisted, namely, that the action, though it might be competent in its conclusions for division, if division were possible, is altogether incompetent, in so far as it concludes for sale and division of the price. This view of the matter raises a question of importance. The elements of the decision exist in the case, on the admission of the parties, and without farther inquiry.

The competency at common law of an action for division between co-proprietors of a common subject, and at the suit of one, does not seem to be denied by the defender. It cannot, indeed, be disputed, in the face of clear authorities, that we have borrowed from the Roman law, and introduced into our common law actions of the same nature and import with those of the Roman law *familiae erciscundae* and *de communi dividendo*. The defender re-

ferred to *Erskine*, 3, 3, 56, *et seq.*, as shewing that the action of Jan. 15, 1852. division was, by the law of Scotland, limited to moveable subjects, ^{~~~~~} and that an action for division of heritable subjects, except under *Brock v. Hamilton.* a brief of division, as between heir and tercer, and between co-heirs, had no place in the law of Scotland, but required the aid of statute, as in the case of commonties, or of judicial sale. But if the passage of Mr Erskine referred to be held to express anything beyond a statement, and that, too, in itself vague, of the progress of the law, it must be disallowed as plainly of no authority. *Lord Stair*, 1. 7, 15, says expressly, "under the obligation of restitution is comprehended the obligation of division, whereby what we possess in common with others, or indistinct from that which they possess, we are naturally obliged to divide with them, whosoever they desire to quit the communion, for thereby we restore what is their own, and we are not obliged thereto by any contract or delinquence. It is true the contract of society includeth the obligement to divide after the society is ended. But communion falleth many times when there is no society nor contract;" he then refers to the actions in the Roman law already mentioned, but adds, "because they do chiefly concern immovable or ground rights," he proposes to treat of them thereafter. Accordingly, in his fourth book, in mentioning the brief of division in which the partition is to be made by the writ of division between the *portionarios dictarum terrarum*, he defines portioners to be such "as bruik, *pro indiviso*, whether they be heirs portioners or *portioners by apprising or adjudication*, or if there be divers tercers who have not been kenned to a particular division, for in that case the brieve of terce is not the competent way of division, for that is only competent between the tercer and the heir." There can be no question, it is thought, after the authority of Lord Stair, referring to the Roman law, that an action for *division* of heritable property held *pro indiviso*, though by *singular* titles, was imported into the common law of Scotland in the form of a brief of division in very ancient times; *Bell's Comm.*, vol. i., p. 64. The remedy easily assumed the form of an ordinary action, the brief of division being one of those which was subject to advocation, even where the proceedings before the inquest resulted in verdict, and an ordinary action being of itself more suitable, when, as in this case, the equitable powers of the Court might require to be interposed. This was strongly recognised in the case of *Milligan*, February 8. 1782, as reported in the Faculty Collection, and also in *Lord Hailes*,

Jan. 15. 1852. volume ii. page 897. The discussion there did not depend upon the fact that the subject had been employed in a co-partnery, but resolved simply into the rights of parties holding, and by singular title, a common subject. And though the more recent case of Stewart, Shaw, vol. xiv., p. 106, 4th Dec. 1835, may have depended upon the subjects having been at one time copartnery property, the action was sustained upon the principles of the Roman law, which applied not only to copartnery, but in those circumstances which created *quasi ex societate* the relation of co-partnery.

Brock v.
Hamilton.

But the defender, while he admitted under these and other authorities that an action of division would lie at common law, as it might be held to have come in place of a brief of division, denied entirely the competency of this action, limited as its conclusions practically must be, by the shewing of both parties to a sale under authority of the Court and Division of the price, contending that the reference to the Roman law had no place here, sale and division of the price being matters simply of remedy, not necessarily flowing from the principle upon which the action *de communi dividendo* proceeds. The Lord Ordinary cannot concur in this view, or in any such restriction in the reference to the Roman law. That law and our common law following it, proceed upon the principles that no one should be bound to remain indefinitely *in communione* with another or others as proprietors of a common property ; that for reasons of public policy, and especially to ensure the advantageous management of such property, any joint proprietor should have it in his power, against the will of the others, to put an end to the communion ; and that there arises out of the situation itself an obligation to divide, or where division or any other arrangement is impracticable, consistently with retaining the property to adjust their respective interests by sale and division of the price. Under the civil law accordingly, *sub-hastatio*, was had recourse to in the last resort ; and so it is in most countries in Europe that have adopted the Roman law ; but all this is founded upon the obligation which arises *ex contractu*, where there is a proper contract of society ; and *quasi ex contractu*, where the relation has arisen, not under contract, but by succession or any other title or titles through which parties may hold a subject as joint proprietors. In this last case they were considered by the Roman law as *socii* in the matter, and because as either party could put an end to this, it might be involuntary, society when he chose, there emerged similar obligations to those

which arose on the termination of copartnery, and the law gave Jan. 15. 1852.
similar remedies. *Pothier* accordingly treats the subject in his ap-
pendix to the contract of Society. It is not a matter therefore Hamilton.
of remedy as regards its *form*, that the conclusion of sale and di-
vision of the price is granted ; it is the appropriate remedy in jus-
tice, resulting from the situation of the parties, where the easier
and more obvious remedy of division has no place. The Roman
law looked in the first instance to *division*, and that was the lead-
ing conclusion and object of the action, *de communi dividendo*, but
when that could have no effect from the nature of the subjects, or
where the parties could not agree, that one should take the sub-
jects, paying the other the value of his share, and especially where
the different estimates of value excluded any similar adjustment,
public sale, under authority of the Court, became plainly the only
course.

The Lord Ordinary, therefore, can have no doubt that the action is clearly competent in all its conclusions, and he thinks the Court has full equitable jurisdiction in the matter. He does, not, however, think the pursuer bound to shew equity for division, or, where division is impossible, for sale. He considers the pursuer's *right*, in that respect, to be clear. But circumstances may easily exist in which the defender may shew, in equity, a good defence against the demand for division or sale. No such defence, however, had been made here; for the Lord Ordinary cannot consider the circumstance, that the defender may draw a larger income from the subjects as they now are than the interest of any price that is likely to be realized, affords any ground for binding the pursuer to remain in communion, especially where the rental has fallen, and is probably falling, and where one of the co-pro-
prietors has become bankrupt.

The Lord Ordinary has not thought it necessary to make any observation on the specialty, that the pursuer in this action is trustee on the bankrupt estate, who has an immediate and direct interest in the proper administration of the estate, to dissolve the communion and wind up the affairs of the bankrupt. He wishes to put the case at once upon the broad and satisfactory grounds on which he thinks it would rest if the bankrupt had been pur-
suer,—and the specialty, at any rate, might be subject to the an-
swer, that the trustee might sell his interest. Further, all the difficulties in the case would arise if the action were brought at the instance of any purchaser from the trustee.

Dundas & Jamieson, Agents for Pursuer.

Lockhart, Morton, Whitehead & Greig, W.S., Agents for Defender.

OUTER-HOUSE.

BEFORE LORD COLONSAY AND A JURY.

No. 124. HENDERSON, Donatary of the Crown, v. Mrs ELIZABETH THOMSON or BLACKWOOD and Others.

Reduction of Deed of Settlement—Incapacity—Facility—Lesion.

Jan. 15. 1852. This was an action of reduction brought on behalf of the Crown, as *ultimus hæres*, of a deed of settlement in favour of the defenders, bearing to have been executed by the late Miss Margaret Chalmers. The issue was in the following terms—"1. Whether the disposition and settlement, bearing the date of 6th February 1840, No. 13 of process, is not the deed of the now deceased Margaret Chalmers, whose signature it bears? 2. Whether, at the date of the said deed, the said Margaret Chalmers was weak and facile in her mind, and easily imposed upon? And Whether the defender, Elizabeth Thomson or Blackwood, taking advantage of her said weakness and facility, did, by fraud or circumvention, obtain or procure the said deed, to the lesion of the said Margaret Chalmers?

Henderson v.
Thomson or
Blackwood
and Others.

LORD COLONSAY, in charging the Jury, and before commenting upon the evidence which had been led, at great length, for both parties, said—There are some general rules and directions applicable to this class of cases, which may be of service to you in making up your minds. The issues are twofold here, as they are in all similar cases. The first inquiry in both issues is the state of the party's mind at the date of the deed; but the state of mind both before and after that date may throw great light on the state of mind at the time of executing the deed. The deed is of itself probative, and consequently incapacity, or, to speak more correctly, defect of mind, is the point in both issues. Incapacity to execute any deed at all, is necessary before the first issue can be affirmed. If you are not satisfied that defect of mind to that extent existed, you must go to the second issue. Facility is matter of opinion; capacity may be brought to the test of facts, by things actually done by the party; while, on the other hand, it is difficult to bring facility to the test of practice. You will also remark, that capacity, necessary to make a settlement when the party is left to himself, is less than that required in many pieces of business, such as making bargains, and the like, where there is a conflict of minds and interests. Any defect of memory is important. It may shew defect of intellectual powers; still it may exist,

though there is sufficient power to act when the mind is put in a Jan. 15. 1852. state of activity ; but it may be held to be an indication of feeble ^{Henderson v.} and failing powers. The words in the second issue are—" by fraud Thomson or Blackwood OR circumvention," not AND "circumvention;" but I cannot say and Others. that, in law, there is much difference between the two.

Verdict for the pursuer on the first issue.

The *Lord Advocate, Solicitor-General, and Shand* for the Crown.
Inglis and Ross for the defenders.

J. H. Burnett, W.S., Agent for Pursuer.

Patrick, M'Ewen and Carment, W.S., Agents for Defenders.

SECOND DIVISION.

No. 125.

Judicial Factor—Accountant-General.

A number of Judicial Factors appeared to-day, in obedience to Jan. 16. 1852. a former order of the Court, pronounced on the report of the Accountant-general, when the parties were remitted to that officer, as in the previous day in the First Division.

SECOND DIVISION.

HALL v. WHILLIS and OTHERS.

No. 126.

Property—Sea-shore—Shell Fish—Title to pursue.—A. was proprietor of lands bounded *de facto* by the sea, although no sea boundary was expressed in his titles. Part of his lands were erected into a barony. His titles gave him right to fishings both in salt and fresh water, but without any special mention of shell fish. He raised an action to exclude certain defenders, as representing the public, from gathering limpets and other small shell fish from the rocks *ex adverso* of his lands, but without making any averment of possession on his own part :—*Held* that he had no title to exclude the defenders from gathering these fish between high and low water mark, the right being *publici juris*.

This action was raised by Sir John Hall of Dunglass to have it Jan. 16. 1852. found and declared that the defenders, who are the whole, or ^{Hall v. Whillis} nearly the whole fishermen residing in the burgh of barony of and Others. Eyemouth, have no right to take and carry away the limpets and other small shell fish adhering to the rocks lying *ex adverso* of the pursuer's lands of Dunglass and others. These lands are bounded by the sea. A portion of these lands, but not all, are erected into a barony. The title contains a grant of fishings as well in

Jan. 16. 1852. salt as fresh water, but no special mention of shell fish. The pursuer's titles contain no grant of the sea shore; and although, in fact, bounded by the sea, the lands are not described as so bounded, and no possession was averred by him. But he pleaded that a title to lands which are, in point of fact, bounded by the sea, is a good title to the shore *ex adverso* of these lands, although it does not contain an express conveyance of the shore; that a right of barony adjacent to the sea does not require a specific boundary seaward, and comprehends the whole collections and natural products of the shores and rocks *ex adverso* of the lands within the barony; that these products, including limpets and shell fish, are the natural pertinents of the lands; and that the defenders, as part of the public at large, have no right to carry them off.

The defenders alleged that they took these limpets for the purpose of using as bait in fishing; and they pleaded that the title of the pursuer, as above set forth, was insufficient to support his claim, more especially as regards the rocks and shore of the sea *ex adverso* of the lands as to which no right of barony is pretended; that the right to take limpets and other small shell fish from the rocks and shores of the sea below high water mark is a public right; that as accessory of, and as essential to, the right of white fishing, which is *publici juris*, they are entitled to take limpets and other small shell fish for the purpose of being used as bait. There were other pleas founded on the averment that they had been in the habit, for time immemorial, of carrying away limpets, &c. from the rocks libelled. But this point was not just now before the Court.

The Lord Ordinary (Wood) reported the case to the Court. His note states, that the parties "desired to have a judgment in the first instance upon the rights claimed by the parties respectively, and the title on which they are vested, taking the case apart from any averment of prior possession on either side." And he adds, "The question, therefore, to be decided, would resolve into this, Whether the pursuer's title was sufficient to exclude the defenders from the exercise of the right claimed by them, of taking limpets, and other small shell-fish from the rocks and shore, *ex adverso* of his land, below high water mark, supposing that they had never previously done so; or, what is the same thing, whether any one of the public is entitled to enter upon the shores and rocks, *ex adverso* of the pursuer's lands, for the said purpose, the right claimed being *publici juris*, open to the whole public, and from

which the pursuer cannot, in respect of his title to the adjoining lands, exclude them, whenever they shall choose to assert and exercise it.

Jan. 16. 1852.
H. e. Whillie,
and Others.

Ross (with whom *Inglis*) for the pursuer. The object of the pursuer is to protect the rights of the fishermen on his own property. Counsel referred, in support of his own pleas, to *Macalister v. Campbell*, 7th February 1837, 15 S. 490, and *Paterson v. Marquis of Ailsa*, 11th March 1846, 8 D. 752, and commented on the cases founded on by the defenders.

Wood (with whom the *Dean of Faculty*) for the defenders. The right to take limpets from the shore below high water mark is a public right; Balfour, p. 626, citing *Town of Crail v. Grizel Meldrum*, 24th May 1549; Tait's Cases, *voce* "Fishings;" 5 Brown's Supplement, 445, *Ramsay*, Nov. 22. 1776; *Duke of Portland*, 15th Nov. 1832, 11 S. and D. 14; Bell's Principles, § 646; *Mowat of Garth v. Bruce Stewart of Symbister*, 7th Feb. 1777. The case of *Macalister* differs from the present in this respect, that the subjects in dispute were different: in that case it was sea-ware. Besides, there was, on the pursuer's part there, a distinct averment of possession for time immemorial. *Smith v. Officers of State*, 13th July 1849, Lord Campbell's Speech.

LORD JUSTICE-CLERK. There is no difficulty in the point reported to us, and to that we must limit ourselves. It is a simple question, whether the title of the pursuer enables him at once to exclude the defenders from taking away limpets, wilks, &c., from the shore, *ex adverso* of his lands between high and low water-mark, assuming they got there legally, and without trespass. It is contended that he has this right under the grant of fishings. I am not aware there ever yet was a decision, holding a grant of white fishings from the sea to be a legal grant, although it has been undoubtedly assumed in various cases. But however that may be, this at least is clear, that the right of fishing in the sea has been understood to be simply a right of white fishing. Limpets and shell-fish have never been understood to fall within a grant of white fishing, or of fishing in the sea. Balfour, while he recognized the undoubted right of property in sea-ware, minerals, &c., held that shell-fish were open for any of the public to take, on the ground that they were incapable of appropriation. That they are fixed to the rock at a particular time, is no proof that they do not move. We know well that they are not always fixed. They are, of course, so found when taken; but capable of appropriation, I apprehend, they are not, either by the possession of the subject, or the grant of the

Jan. 16. 1852. Crown. Therefore, I am of opinion his title does not give the pursuer any right to prevent the defenders taking the shell-fish attached to the rocks between high and low water-mark ; and in giving that opinion, I adhere to the doctrine laid down in 1549 in the case cited by Balfour, and followed in all judgments ; and as I understand, the fixed and undoubted law in Scotland. There is, therefore, no necessity to enquire into the state of the alleged possession by the defenders.

LORD MEDWYN concurred. There is a great distinction to be observed between sea-ware and limpets, which last are simply an accessory of fishing. The case cited by Balfour applies to the latter, but not to the former. I see no difference between this case and that. Any person who can lawfully reach the shore between high and low water-mark, without trespassing, is entitled to take these small shell-fish for bait for the purpose of fishing. His title gives no right to Sir John Hall to interfere. Whether grants of white fishing can be given or not, we need not enquire ; but unquestionably I never considered a grant of white fishing implied the exclusive right to limpets and other shell-fish.

LORD COCKBURN. All the difficulty arises from confounding this with the case of sea-ware. This is a case of animals adhering to the rock. The question is, whether the pursuer, without possession, and merely in virtue of being the owner of the adjoining land, can prevent people who get to the shore, without trespass, from taking these animals from the rock ? I think he cannot.

LORD MURRAY. I entirely agree. The pursuer has no title whatever to interfere. It appears to me there never was any point more clearly laid down in the law of Scotland.

THE COURT found, " that the titles libelled on by the pursuer do not give him an heritable and real right to the limpets, and other small shell-fish which are found lying or growing on or amongst, or adhering to the rocks along the sea-shore along the pursuer's lands below high water-mark ; and that the pursuer is not entitled to a decree to exclude the defender from gathering such limpets, and other small shell-fish from the said rocks below high water-mark." They therefore dismissed the action.

Besides this action, there were conjoined with it advocations of two others raised by the pursuer in the Sheriff-court of Haddington, which involved the same question, and in one of which an interdict had been granted against the defenders taking the limpets from the rocks. The Court recalled the interdict, and *quoad ultra*, remitted to the Lord Ordinary.

Tods and Romanes, W.S., Pursuer's Agents.

Sang and Adam, S.S.C., Defenders' Agents.

FIRST DIVISION.

ROBERT and JOHN BROWN v. JOSEPH DOCTOR.

No. 126.

Contract—Assignation—Competition.—In a competition between an arresting creditor and assignees, who were substituted to a contract, proof having been allowed whether the assignees had entered on the contract, the Court found, on advising the proof with the Commissioner's report, that the assignees had performed the contract, and, in doing so, had expended a larger sum than the fund *in medio*, and preferred them.

Sequel of the case reported under the date of Nov. 15. 1851. Jan. 16. 1852.
Supra, p. 23.

The whole of the evidence led before Mr W. H. Murray, the Commissioner, having now been printed and laid before the Court, the case was put out to-day, in order to be disposed of. The assignees had pleaded, and now urged that the arrestment on which the competing claim was founded, was altogether inoperative and inept. It was not laid on, till several months after the date and intimation of the assignation, by which the assignees were substituted in the place of Pennycook; and it was therefore maintained that there was no liability by the trustees to account to Pennycook, and that Doctor, claiming as his creditor, could attach nothing by his arrestment. The objection was, however, waived, and the case was now taken on the evidence, and with reference to, the report of Mr Murray, the Commissioner.

Shand and Inglis for the assignees. The assignees (the Browns) had completely proved their case upon the evidence, and were therefore entitled to be preferred to the whole fund *in medio*, as the sum due to them considerably exceeded its amount. They did not plead that the views of the Commissioner should be held as finally deciding the case. The Court would review the whole evidence for itself, and decide accordingly; but the argument of the assignees upon the proof was certainly not weakened by the fact that the learned Commissioner had expressed a strong impression that, upon the facts as proved before him, the assignees had made out their case.

Macknight and Solicitor-General, contra. Mr Murray, the Commissioner, had not said that the assignees' case was made out upon the proof; and even had he so found, the Court must look at the whole proof, and judge for themselves. The result of the facts, as given in evidence, was in favour of the arrester (Doctor), and much of the evidence of the assignees was exposed to grave observation from the relation existing between them and the witnesses.

Jan. 16. 1852. **LORD PRESIDENT.** The important question here is, did the assignees (the Browns) enter upon this paving contract, and finish what remained to be done of the work. If that is proved they must get the fund *in medio*, as the expenditure they necessarily made will not be met by the fund. I think they have made out their case. The Commissioner, under the first head of his very distinct report, has clearly shewn this; and it is quite unnecessary to go farther.

LORD IVORY. Entertaining a clear opinion in favour of the objection pleaded against the arrestment, I would have been disposed to have decided the case on that ground. But as we are to put our judgment on the evidence, I am entirely of your Lordship's opinion. I have gone carefully through Mr Murray's able report, and have checked it by comparing it with the evidence. I have found the results at which he arrived, under the first branch of the report, completely supported by the proof; and it being thus shewn that the Browns completed what remained to be done of the contract, at an outlay exceeding the amount of the fund, the result is, that they must be preferred to the fund *in medio* here.

LORD FULLERTON concurred.

LORD CUNNINGHAME. The claim of the Browns as assignees (respondents in the advocation) was one entitled to all possible support from the law. They were *cautioners* for Pennycook in serious and onerous contracts to the police of Dundee; the work was thrown by Pennycook on their hands; the principal obligant executed an assignation in their favour, and they *completed the work*. The balance due to them has been proved by every test—by the Police Surveyor, next by the Sheriff, and, lastly, by an intelligent Commissioner selected by the Court, who took a proof. Even if the arrestment had been prior to the date of the assignation, it would require very different evidence on the part of a stranger creditor, than any now produced, to interfere with the preference of distressed cautioners, seeking a balance under a contract in which they are exposed to loss.

The Court, accordingly, approved of the learned Commissioner's report, and pronounced an interlocutor, by which "they advocate the cause: Find that the fund *in medio* consists, after deduction of expenses, of a balance of £48, 7s. 4d., due by the raisers under the contract betwixt them and James Pennycook, which contract, after having been partially executed by the said James Pennycook, was afterwards assigned to, and carried into final implement by, the said Messrs Brown, who had been cautioners for the said James Pennycook, for the due execution of the original

contract : Find in the present competition between Joseph Doctor Jan. 16. 1852.
 and the said Messrs Brown, the latter fall to be preferred to the Browns v.
 whole fund *in medio*, in respect that the costs and expenditure Doctor.
 under the contract, in so far as the same was carried out by them,
 after deducting the payment of £100 already received by them to
 account, have been proved to exceed the amount of said fund ;
 rank and prefer them accordingly, and decern : repel the claim of
 the said Joseph Doctor, and decern : Find the Messrs Brown
 entitled to the expenses of this competition, both in this Court and
 in the Court below, and remit the cause to the Lord Ordinary to
 proceed farther, if that shall be necessary, in order to exhaust this
 multiplepoinding, as he shall see cause, and with power to his
 Lordship, should that be found more expedient, to remit the case,
 with or without instructions, to the Sheriff ; and farther, with power
 to his Lordship to have the expenses audited, and decern therefor.

L. M. Macara, W.S., Agent for the Assignees.

James Macknight, W.S., Agent for the Arrester.

SECOND DIVISION.

M.P.—DUFF AND OTHERS (Trustees and Executors of the late No. 127.
 Earl of Fife) v. EARL OF FIFE AND OTHERS.

Process—*Condescendence of Res Noviter—Lease—Meliorations.*—(1.) Circumstances in which *Held*, that no case of *res noviter veniens* had been made out by a party in an action, to justify production of a writing.
 (2.) Question as to which of several claimants were entitled to the meliorations under a lease.

This multiplepoinding was raised by the trustees of the late Jan. 16. 1852.
 Lord Fife. He had granted a lease in 1801 to a George Alexander, &c. v.
 and upon the expiration of that lease at Whitsunday 1823, Earl of Fife,
 there became due to Alexander, as the ascertained amount of &c.
 meliorations, the sum of L.95, 15s. But the lease being then
 renewed, for nineteen years, in Alexander's favour by the present
 Lord Fife, payment was postponed till Whitsunday 1842. It was
 admitted by the raisers, the trustees of the late Lord Fife, the
 grantor of the original lease, that the present Lord Fife, as the
 heir of entail, was not personally liable for these meliorations ;
 and they brought this process for the purpose of ascertaining to
 whom the meliorations fall to be paid.

The present Lord Fife and his trustees claimed upon an arrangement in the renewed lease of 1823, stating that there was

Jan. 16. 1852. due, under the original lease, arrears of rent by Alexander the tenant, to the amount of L.71; that there was a covenant in the renewed lease, that this arrear of rent should be postponed until the meliorations became payable; and that, under this arrangement, there became due to the present Lord Fife the sum of L.71, with interest from Whitsunday 1823, for which, in this multiplepoinding, they demand the preference.

Duff, &c. v.
Earl of Fife,
&c.

Another claimant was George Pirrie, stating himself to be a trustee under a disposition, for behoof of creditors, granted by George Alexander, the tenant in the original lease, in favour of the claimant Pirrie, William Smart, and certain other parties, and the survivor, as trustees. The disposition is of his whole property, heritable and moveable. Smart alone accepted and acted. He is now dead; but the claimant Pirrie, has now come forward to act under the trust. There is no other party who represents the original tenant, Alexander.

The only other claimants were Mrs Chapman and her husband, who claimed as assignees of the renewed lease, by which the claim for meliorations is reserved; but their claim was subsequently withdrawn.

When the case came before Lord Murray for debate upon a closed record, Lord Fife proposed to produce what he stated to have recently come into his possession—the documents constituting the renewed lease of 1823. This production was objected to on the part of Pirrie; and his Lordship appointed the Earl of Fife to state, in a condescendence, the matter of fact *noviter veniens ad notitiam*, since the record was closed. The condescendence was accordingly lodged by Lord Fife and his trustee, with answers for Pirrie; and the parties having stated that they did not wish to revise their papers upon this point of *res noviter veniens*, the debate was resumed.

The Lord Ordinary, (Rutherford, who had succeeded to Lord Murray's roll,) found "that Lord Fife and his trustee are not entitled to produce the documents referred to as *res noviter veniens in notitiam*, and finds these parties liable in the expenses of this part of the discussion to the claimant, George Pirrie, and decerns; *quoad ultra*, repels the claim for Lord Fife and his trustee," and also "the claim for Mrs Chapman and her husband; ranks and prefers the claimant, George Pirrie," "to the whole fund *in medio*, in terms of his claim, and decerns;" "and subject to the former finding of expenses against Lord Fife and his trustee, finds Lord Fife and his trustee, and Mr and Mrs Chapman," liable in "expenses of process to the claimant Pirrie," &c.

In the note to this interlocutor, the Lord Ordinary says "that Jan. 16. 1852. Lord Fife and his trustee had made out no case of *res noviter ve-*
nientia, to authorise production at their instance. Mr Robertson <sup>Duff, &c. v.
Earl of Fife,</sup> Chaplin, Lord Fife's trustee, was appointed in 1825, two years &c.
 after the date of his lease: the paper, he says, was found in his own possession accidentally, after a laborious search. It is difficult to characterise a discovery in such circumstances as accidental; and it is plain that the same search, if it had been made a short time before, would have enabled the trustee to have discovered and produced this document which he held to be essential to his claim. He came into the management two years after the lease was granted, and it seems difficult to understand how he had not set apart the leases upon the estate. The Lord Ordinary is not aware that any of the cases referred to, such as that of *Wilkie*, March 4. 1834, justifies the demand of Lord Fife and his trustee; and certainly the case of *Wright*, Dec. 10. 1836, was a stronger case for admitting documents than the present. The Lord Ordinary, therefore, on this part of the case, was prepared at the debate to hold, and now holds, Lord Fife and his trustee precluded from making the production.

"The claim by Lord Fife and his trustee, in the absence of the lease, seems untenable; and, even if the terms of the lease were as they allege, it does not appear how they could make good the preference claimed for the arrears of rent. The transaction was right, and would have been effectual according to the footing upon which the parties probably proceeded at the time, viz., that the present Lord Fife was debtor in the meliorations as he was creditor in the arrears of rent, for then there would have arisen a *concurrus debiti et crediti*. But the trustees of the late Lord Fife are the debtors in the meliorations; the lease, according to the alleged terms, contains merely a postponement of the meliorations, but no assignment of the claim to Lord Fife; and it does not, therefore, appear how any preference can be made effectual in favour of the present Lord Fife and his trustee under that instrument. This being the case, the Lord Ordinary conceives that Pirrie must be preferred to the fund *in medio*, as the only party who has produced any title."

Against this interlocutor the trustees of the late Earl of Fife, and Lord Fife and his trustee, reclaimed.

Sandford was for the reclaimers.

Pyper and the *Lord Advocate* for the respondents.

The COURT, "in respect the respondent admits that the words

Jan. 16. 1852. of the interlocutor, in reference to the claim of Pirrie, were not intended to decide that the sum for meliorations bears interest from 1823, refuse the said reclaiming note, and adhere"—with additional expenses against the reclaimers.

Inglis & Burns, W.S. Reclaimers' Agents.

M'Millan & Grant, W.S. Respondents' Agents.

FIRST DIVISION.

No. 128.

FRASER v. HILL and GENTLE.

Bill of Exceptions—Pawnbroking Act—Partnership.—Where a partnership in a pawnbroking company proceeded upon no written contract, but was sought to be established by parole evidence; circumstances in which *Held*, that the requirements of the Pawnbroking Act, as to the publication of the partners' names, &c., not having been complied with, no lawful partnership could have existed.

Jan. 17. 1852. This was an action of count, reckoning, payment, and reduction, which having gone to trial before a Jury, now came before the Court on a bill of exceptions, and also on a motion for a new trial, on the ground of the verdict being contrary to evidence. The action was raised by George Fraser, representing himself as a partner of a pawnbroking company which carried on business in Glasgow from 1840 till 1844, in virtue of a verbal contract of copartnery between him and Alexander Hair, under the name of Alexander Hair and Company; it is directed against Hair, Hill, and Sinclair, the parties to a written contract of copartnery, executed on 23d September 1844, by which the pursuer avers he was illegally defrauded of his share of the stock of Alexander Hair and Company. This contract of copartnery was therefore sought to be reduced; as also a deed of assignation, by which Hair afterwards assigned to Hill his one-third share in the company, and in which share Fraser claimed an interest as a partner.

No appearance was made in the action for Hair; and Sinclair having died, his representatives, Janet Sinclair or Gentle, and her husband, for his interest, were called as parties to the action. Hill and Sinclair's representatives therefore now appeared as defenders.

The defence was, *inter alia*, that the alleged copartnery between Fraser and Hair, was a secret and latent one; and that the pursuer having given to Hair, or at least allowed him to assume the whole ostensible ownership of the concern, he was thereby barred from challenging the defender's rights under the deeds sought to be reduced, both by virtue of the statute 29 and 30 Geo. III. c.

99, and also at common law,—sec. 23 of the statute providing, Jan. 17. 1852,
 “that all and every person who shall follow or carry on the business
 of a pawnbroker, shall cause to be painted or written, in large &c.
 legible characters over his door, &c., the true name or names of
 the person or persons so carrying on the trade or business,” &c.,
 under the penalties therein enacted.

In March 1851 the case went to a jury on the following issues:

1. Whether the said deed, bearing to be a contract of co-partnery, was executed between the said deceased Alexander Hair, the defender Walter Hill, and the said deceased James Sinclair, fraudulently and wrongously, for the purpose of transferring and dealing with stock and property belonging to the pursuer, or in which he had an interest, from its being partnership property, and from his having been a partner of the firm of Alexander Hair and Company, Pawnbrokers, Glasgow, to his loss, injury and damage?

2. Whether the said deed, bearing to be an assignation by Hair, in favour of Hill, was executed between them, fraudulently and illegally, for the purpose of transferring, &c., the stock, &c., as in the previous issue?

3. Whether Hair, Hill, and Sinclair, or any of them, did, in or about the month of August 1844, fraudulently and wrongously take possession of certain stock and effects, belonging in part to the pursuer, or in which he had an interest, from their being partnership property, &c., and whether the defenders, or any of them, have or has retained possession of the said stock and effects, or dealt with, or disposed of the same, to the loss, injury and damage of the pursuer? Damages laid at £2000.

At the trial various exceptions were taken by the defenders.

1. The pursuer's counsel having tendered, and offered to put in evidence, the deeds in question, it was objected by the counsel for the defenders, that the production never had been satisfied, and that the deeds now tendered were not in process when the record was closed, nor until after the order of transmission, and consequently could not now be received as the deeds under reduction in this cause. The presiding Judge (Lord Robertson) repelled the objection, to which ruling the defenders excepted.

2. It being proved by the pursuer's witnesses, that the names of the alleged partners of Alexander Hair and Co., were not on the pawnbroker's tickets, nor license, nor over the door of the premises where the business was conducted, the defenders' counsel objected, that it was incompetent to proceed further to prove, by parole evidence, or by facts and circumstances, the existence of

Jan. 17. 1852. the alleged partnership between Fraser and Hair. And the objection having been repelled, the defenders excepted.
Fraser v. Hill, &c.

3. In consequence of certain proceedings on the part of Hair, a previous action was raised by Fraser against him, which went to trial on the question, Whether, in 1840, Fraser and Hair entered into partnership, for the purpose of carrying on the business of pawnbrokers in Glasgow, and did carry on the said business in partnership, under the firm of Alexander Hair and Company, from the month of September 1840, till the month of August 1844? And Whether, during the said period, Fraser openly and avowedly acted as, and was generally and publicly known by the customers, and others dealing with the said concern of Alexander Hair and Company, to be one of the partners thereof? In this action the Jury found for the pursuer Fraser; and the Court thereafter applied the verdict, with expenses.

The pursuer's counsel now proposed to put in the verdict, and judgment of the Court, in this former case, as also the record and issue, to explain the verdict and judgment. To this the defenders' counsel objected, as not being evidence against the defenders in this cause, being Hill and Sinclair's representatives only, who were not parties to the former suit. This objection having been repelled, the defenders excepted.

4. The defenders' counsel excepted to the charge, in so far as his Lordship refused to direct the Jury, That on the facts proved, there was no lawful partnership between the pursuer (Fraser) and Alexander Hair, in the business of pawnbrokers, between the years 1840 and 1844.

5. That as the name of Fraser was not on the pawn tickets, or over the door of the pawnbroking establishment, or in the licenses, there could be no lawful partnership between Fraser and Hair.

6. That in respect of the violation of the Pawnbrokers' Act, proved on the part of the pursuer, (assuming him to be *de facto* a partner,) he had no interest in the pledged goods transferred or dealt with, by the contract of 23d September 1844.

The Jury found for the pursuer on all the issues, assessing the damages at £760, from August 1844, at 5 p. c. p. an.

J. Shaw, Inglis, and the *Lord Advocate* appeared for the defenders in support of the bill of exceptions, and of the motion for a new trial.

Macfarlane and the *Solicitor-General* appeared for the pursuer.

The authorities cited in the course of the debate were *Warner v. Armstrong*, and *Lewis v. Armstrong*, 3 Mylne and Keen's Chancery Cases, p. 45; and *Burly v. Dynold*, 5 B. and Ald. 335;

10 Bing. 107; *Caudel v. Dawson*, 376, 4 C. B.; Weights and Measures Act; *Gordon v. Howden*, 5 D. 698; 4 Bell's Ap. Cases, ^{Jan. 17. 1852.} *Fraser v. Hill*, 254; *Fraser*, 10 D. 1402; *Ferguson v. Norman*, 6 Scott, 794; &c. *Taylor*, 1093.

THE LORD PRESIDENT. This case has not been properly left to the Jury by the learned Judge who tried it, and I am therefore of opinion that the verdict cannot stand. The cases of *Armstrong* dispose of the whole question. The decisions of the English Judges on the Pawnbrokers' Act are just as binding on the Judges of this Court as their own decisions. The first exception must be disallowed. It relates to a point which has been virtually decided by the granting of the issues. The second exception must be allowed. The Jury should have been directed as to the effect in law of the concealment of the pursuer's name as a partner. Nor can I sustain the Judge's charge as free from the remaining exceptions taken. In arriving at the conclusion I have thus stated, I have been mainly influenced by the opinions of the English Judges in the cases referred to, as they appear to me to be founded on judicial wisdom and substantial justice. I am for disallowing the first exception, but, in my opinion, all the others ought to be allowed.

LORD FULLERTON. This case comes before us in a double form. The ordinary course in such cases is, in the first place, to fix the points of law raised in the exceptions, and if these exceptions are repelled, to consider the import of the evidence in reference to the motion for new trial. But where questions of fact are involved inextricably with those of law, as in this case, the most convenient course is to take the question of fact on evidence first, and to consider whether or not, independently of the exceptions, the defenders have made out a case for a new trial. The question of fact is reduced to this, whether or not there was, prior to the new contract of copartnery between Hair and the defenders of September 1844, and the assignation by Hair to the defender Hill, an existing contract of copartnery between Hair and the pursuer Fraser. For if the connection between Hair and the pursuer amounted to a copartnery, there could be little doubt of the affirmation of the issues. There was, confessedly, no written contract of copartnery. No doubt the existence of such a copartnery may be proved by parole; but as regards direct evidence of such a contract, the case of the pursuer is an absolute blank. It is one of mere repute, or general belief. And in such a case it is impossible to conceive stronger negative evidence than that afforded by the pursuer's failure to do not merely what he was

Jan. 17. 1852. likely to have done, but what by law he was bound to have done, if he had been a partner. And therefore the verdict, resting as it confessedly does, on the affirmation of the partnership between Hair and the pursuer, from 1840 to 1844, was contrary to the evidence, and therefore, on that ground there ought to be a new trial.

But this does not dispense with the necessity of considering the bill of exceptions, because, even if there should be a new trial, these exceptions do raise questions of law which may occur again, and which it is therefore important to determine.

The first exception is passed from.

It does not appear to me that the second exception ought to be sustained. The trial was then proceeding. For anything then known, the contract might have been clearly and conclusively proved; in which case, the facts alluded to, would not have annulled the contract, however they might have led to the infliction of the statutory penalties.

The third exception ought to be sustained. This action is, no doubt, directed against Hair as well as the other parties; but Hair gave in no defence. The question then at the trial was only with the other parties. If those measures had been taken by the pursuer against Hair, while Hair was the only party holding or pretending to hold an interest in the concern, the verdict obtained against Hair would have been admissible and available evidence against any other parties contracting with Hair and obtaining an ostensible title to a share in the concern from him, subsequently to the verdict so obtained. But here the proceedings against Hair took place after the deed under reduction in the present action was granted, and consequently after the interest of Hill and Sinclair was created, and was known by the pursuer to have been created; while all interest originally held by Hair had ceased, in consequence of the assignation by Hair to Hill. In these circumstances, the verdict taken against Hair exclusively cannot be admissible to prove the partnership, prior to 1844, as against the other defendants.

There remains to be considered then, the fourth, fifth, and sixth exceptions. Of these, the fifth and sixth ought to be repelled. The judge was not called on to lay down any law, as to the interest in the pledged goods referred to in the sixth exception. There seems to have been no real reference to pledged goods in any part of the evidence. The issues and verdict, in so far as regards the damages, are quite general; and it does not appear that the ex-

istence of pledged goods, or the value of pledged goods, ever was brought into question.

The fourth exception, however, raises a different question, and one of great importance. The meaning of this exception, though condensed in its form of expression, is clear enough. Although the mere fact of the failure to disclose the names of the partners is not absolutely fatal to the contract, there can be no doubt of the illegality and consequent nullity of the contract, if the non-disclosure of that, which the parties are by statute bound to disclose, forms one of its internal conditions.

Now, by the terms of the exception, the learned judge was called on to direct the jury, that on the facts proved, the compact established was one, in which the concealment of Fraser's name formed a part; and it rather appears that this demand of the defenders was well founded. The copartnery, if proved at all, is proved only by inference. And not only have we proof that the name of the pursuer was *de facto* kept back, but we have the clearest evidence that this was done by his own authority, and on occasions, when, but for the understanding of parties, he must have disclosed it.

On this point, the lease of the premises which he founded upon in argument, is evidence against him. He no doubt is a party to the lease; but the premises are taken to be occupied as a pawnbroker's warehouse, by Hair, personally, or his wife and family; and the pursuer signs his name, not as a partner, but merely as "George Fraser, grain dealer, James Street, Paisley." And it is proved by the evidence of the manager, that his name was, by his own direction, omitted in the licenses, and also in the schedule of income-tax. And, on every other occasion, it is proved that the pursuer disclaimed being a partner, or having any interest in the concern.

In those circumstances, and while there is no proof of contract, except by inference, the whole must be taken together. As a matter of inference then, it seems, that on the facts proved, the contract, if supported by inference, was a contract by which the appearance of the pursuer as a partner was to be withheld from the public; indeed, in regard to this point, the case is much stronger than that of *Gordon v. Howden*, in which the circumstance on which the House of Lords mainly rested, was the stipulation in the written contract, that the firm should be in a particular name, and that the bills and deeds should be signed by one partner,—circumstances which, according to the practice

Fraser v. Hill,
&c.

Jan. 17. 1852. of this country, present no absolute inconsistency with the public declaration of the names of the individual partners. On the whole; *Fraser v. Hill*, &c. then, the 4th exception ought to be sustained.

LORD CUNINGHAME. This claim was met, at least in the first shape of the record, by pleas to the effect that the company of Alexander Hair and Company was an *illegal association*; that it was being altogether carried on under disregard of one of the most express and salutary provisions of the Pawnbroking Act, relative to the mode of publicly announcing the parties by whom the business was carried on. On the assumption that the defenders' averments are true, the conclusion cannot be resisted that an accounting cannot be sustained in a court of law, as to the profits and proceeds of such a trade. It is now no longer disputable, that Fraser and Hair did not obey this injunction of the statute; therefore, their whole trade was contraband and illicit, and cannot be the subject of reckoning in a court of law. This necessarily follows from the adjudged case of *Armstrong v. Wansford*, and many others in the English courts, and of *Gordon v. Howden*, in this Court, in 1842, reversed in the House of Lords in 1845; 5 Dun. p. 698; and 4 Bell's App. Cases, p. 254. Farther authority is not necessary to establish the illegality of an association carried on as the present was. If the partners carried on the business in an illegal manner, the share of such a trade could no more be claimed and sued for in a court of law, than the balance due on smuggling adventures. In truth, this case involves the same question as that tried in *Gordon v. Howden*, which was finally decided in the Court of last resort in 1845. The case may be illustrated by the law uniformly enforced, when the registry of ships, prior to 1831, was as strictly regulated as the signs of pawn-brokers. There is one case on record in our own reports, to the following effect, shewing the very rigid effect given to the Registry Acts, that all the registered owners shall be set forth and concur in every transfer:—"Under the Registry Acts, 26 Geo. III. c. 60, and 34 Geo. III. c. 68, the vendition of a ship which, in the certificate of registry was described as belonging to certain individuals carrying on trade as a company under a certain firm, being subscribed by the firm of the company, held not validly executed, and ineffectual to found an action, either for implement or for damages."—*Leitch v. Berry*, 20th May 1819, 19 F. C. 737.

The present question arises under a statute entitled to be as jealously guarded and enforced as the Registry Act. The statutes which have been here evaded were framed for the protection of

the poor and the abject ; and if the mode of carrying on this business were sanctioned by announcing a business as carried on by one individual, only named " and *Company*," it would be a mode of reducing the statute to a nullity. The present case appears not, on any intelligible principle, distinguishable from those of *Howden*, *Warmsford*, and others, on which the courts in England had no doubt.

On these grounds, without inquiry into the 1st and 3d grounds of exception, the 2d, 4th, 5th, and 6th exceptions should be sustained.

LORD IVORY so entirely concurred in the opinion of Lord Fullerton, that he considered it unnecessary to make any lengthened explanation of his views.

The LORD PRESIDENT. Having heard the opinion of your Lordships, I think it would be proper to put our judgment on the 4th exception.

The COURT, therefore, pronounced an interlocutor, by which they " allow the fourth exception, set aside the verdict, and grant a new trial ; reserving all questions of expenses."

C. and C. Fisher, S.S.C., Defenders' Agents.

Thomas Dunn, S.S.C., Pursuer's Agent.

FIRST DIVISION.

SNARE v. THE EARL OF FIFE'S TRUSTEES.

No. 129.

Reparation—Summons—Particulars of damage.—Where, in an action of damages, the summons libels loss and damage generally, without any conclusion of special damages, or a statement of particulars, it is competent to prove, and for the Jury, in estimating the damages, to take into consideration such special damage and particulars, provided these consequences flowed directly from the defenders' conduct, as libelled.

In this case, which was an action of damages at the instance of *Snare v. Earl of Fife's Trustees*.
Jan. 17. 1852.
Snare, for the illegal seizure and detention of a picture painted by Velasquez, which the pursuer employed himself in exhibiting throughout the country for a pecuniary charge, and for the wrongous use of diligence in the said seizure and detention, the following issues went to trial last July before Lord Cowan and a Jury :—1st, Whether, on or about the 31st day of January 1849, the defenders wrongously applied for, and obtained from the Sheriff-substitute of the county of Edinburgh, the warrant set forth in the schedule hereunto annexed, and wrongfully

Jan. 17. 1852. caused the same to be executed, and the picture therein referred to, to be seized and removed from the custody or possession of the pursuer, in virtue, or under colour, of said warrant, to the loss, injury, and damage of the pursuer? 2d, Whether the defenders wrongfully detained and withheld the said picture, or caused the same to be detained and withheld, from the pursuer, from on or about the said 31st day of January 1849, till on or about the 17th day of March following, to the loss, injury, and damage of the pursuer? Damages laid at £5000.

The Jury returned a verdict for the pursuer, and assessed the damages at £1000, irrespective of *solatium*, which they did not take into view.

The counsel for the defenders excepted to the Judge's charge, 1st, In so far as his Lordship had charged the Jury that, under the issue, in the event of the Jury being of opinion that the warrant was wrongously obtained, carried into execution, and kept up by the defenders, they were entitled to take into view the loss and damage suffered by the pursuer in his business at Reading, provided it was proved, to their satisfaction, that such loss and damage flowed directly from the defenders having obtained and carried into execution, and kept up the said wrongous warrant.

2d, In respect his Lordship refused to direct the Jury that no damage could be competently awarded under the summons and issues, in respect of injury to the pursuer's credit and business, as a printer and bookseller in the town of Reading.

Sandford and the *Solicitor-General* for the defenders, and in support of the bill of exceptions. The claim of damages by the pursuer, in respect of injury or loss to his business at Reading, is not within the issue. The summons of damages asks for damages on the ground that the exhibition of the picture was interrupted, and the portrait taken away for six weeks, in consequence of which the pursuer lost the benefit or profits of the exhibition during that time. There is not a word said about the damage to his business. General damages are claimed for loss of character, and injury to his feelings and health, but no special damage is claimed for the destruction of his business. Lord Cowan, therefore, came to a wrong conclusion when he held that this special claim was competent and within the issue.

Young and *Inglis*, for the pursuer. The exceptions are ill-founded in law, and totally incompetent. It could not be contended, as a general rule, that wherever a man means to claim compensation for loss in his character and credit, it is necessary

to set forth all the particular items of damage sustained. Evi. Jan. 17. 1852
dence was led by the pursuer with the single purpose of shewing
the damage sustained by him in various ways. The meaning of Snare v. Earl
the exception was, that that evidence should not go to the jury ;
but the proper time to have made that objection was when it was
first tendered and admitted. In an action of damages, it was
perfectly competent to prove damages sustained by the pursuer
up to the very day before the trial, which, of course, could not
appear in the record. There is nothing in the summons to make
the case differ from the rest of jury cases in valuing damages. The
very first statement in the summons was, that the pursuer had
carried on trade in Reading for many years. Was it for *solatium*
that the summons concluded ? On the contrary, it claimed
damages for patrimonial loss resulting to the pursuer. The ex-
ception was too late ; but, at whatever time it was taken, it was
in itself totally incompetent.

The LORD PRESIDENT was of opinion that the exceptions ought
to be disallowed. The summons describes the pursuer as a book-
seller in Reading, and narrates the whole proceedings, and this
quality of the summons is the leading feature of the pursuer's
position. It is not said that he abandoned his business in
Reading, though he came here to exhibit this picture. There
is no instance in which the pursuer in an action of damages,
after setting forth the wrong libelled, goes further to state, as
shortly as he can, that he has suffered loss and damage. It is
not necessary to state the particulars of damage. When the evi-
dence was tendered, then was the time to object, if it was objec-
tionable. A more cautious and discreet charge, in reference to
such a matter, than that delivered by Lord Cowan in this case,
he could not conceive. The learned Judge was right in refusing
the direction asked by these exceptions.

LORD FULLERTON was entirely of the same opinion. The
exceptions come to this, that the point was clearly out of the
summons, because it contained no statement of particulars as to
loss of business at Reading. To allow such exceptions would be
to introduce a novel and cumbrous change in the structure of
summonses for damages. The damage is not special, it is patri-
monial or pecuniary damage. The pursuer was entitled to prove
loss in any way he could. It is well known what is meant by a
person in trade, when he says he has suffered loss in his credit, and
patrimonially. He thought the Judge's direction was a proper
and safe one.

Jan. 17. 1852. **LORD CUNINGHAM** agreed. These exceptions are founded on *Snare v. Earl of Fife's Trustees*. The objection, that the presiding Judge at the trial should have directed the Jury to lay out of view all general damage claimed by the pursuer for loss of character and business, as not included in the summons; but that was embraced by the summons, and the Jury could competently have entertained that branch of claim, had there been any *proof* to support it; but there was none, and the verdict, as expressed, is equivalent to a finding that they found no *solutum*, because none was proved. That that part of the verdict, therefore, was not attributable to any error on the part of the Judge. There may be objections to the amount of the damages, but that was a question for the Jury; at all events, it is quite out of place under the exceptions.

LORD IVORY concurred.

The COURT disallowed the exceptions, with expenses.

James Lamond, S.S.C., Agent for Pursuer.

Inglis and Burns, W.S., Agents for Defendants.

SECOND DIVISION.

No. 130.

PETITION, STEELE—in Aitkenhead's Sequestration.

Petition for Sequestration—Expenses.—Circumstances in which the creditor of a deceased debtor was found entitled to expenses of petition for his sequestration.

Jan. 17. 1852. Aitkenhead died in February 1851, leaving children all minors. Andrew M'Ewan was appointed factor *loco tutoris* to his eldest son, and the deceased's brother James was confirmed executor-dative.

The petitioner Steele, who had a claim against Aitkenhead amounting to upwards of £500, due upon bills, soon after his death applied to Aitkenhead's man of business, who was also that of his representatives, for information as to the state in which he had left his affairs. None was given, and on 3d September a petition for sequestration of the deceased's estate was presented by Steele. After citation in common form, the usual Gazette intimation was ordered. Meanwhile M'Ewan's agent had intimated his intention of presenting to the Court an application recommended by the Accountant-General for authority to borrow a sum of money sufficient to pay all debts, and asked Steele to depart from his petition, which he declined to do. When the days of intimation in the Gazette had expired, appearance was made for M'Ewan, by whom the sequestration was objected to, on the ground that

James Aitkenhead, the executor, had not been cited. A supplementary petition was accordingly presented by Steele. On 28th November the Gazette intimation was ordered, and it was not till the 20th of December that consignation was offered by M'Ewan, when the Lord Ordinary (Cowan) dismissed the petition, and found the respondent entitled to expenses, chiefly on the ground that, if the application was not unnecessary from the first, it was at least improperly persisted in after the notice of the course proposed to be followed by the factor *loco tutoris*.

Jan. 17. 1852.
Pet. Steele.

Against the finding in regard to the expenses the petitioner reclaimed.

N. C. Campbell and *the Solicitor-General*, for the claimer, submitted that, as the whole proceedings had been occasioned by the improper and continued refusal of the respondent, either to consign or give any information as to the deceased's estate, the respondent should be found liable in expenses.

T. Mackenzie and *the Lord Advocate*. Here was an estate represented both in heritage and moveables, and perfect solvency. Had the petitioner inquired he would have seen from the Accountant's report that there was a large surplus. The application of the petitioner was unreasonable.

LORD COCKBURN. The larger the surplus the more easily could the factor have consigned, and therefore, as he did not, the more reasonable was the petition. It is difficult to hold a party unreasonable who uses the remedies given by law.

LORD JUSTICE-CLERK. The debt is due on certain bills. Had the debtor been alive, and a charge given, it could have been suspended only on payment or consignation. The factor is not worse off; payment or consignation are equally answers to the petition, which is just the first step of diligence to secure the creditor's debt. No party is bound, unless he pleases, to wait till the representatives choose to take their own time and way of settling claims. Here the factor said, "I have no funds just now either to pay or consign. It is even impossible to apply to the Court at present" (during vacation). So much the more reason was there for the petitioner applying to the Court, as he had it in his power to do. He was clearly entitled to petition.

LORD MURRAY concurred. But had the first petition not been informal, the second would not have been required.

LORD MEDWYN was absent.

The COURT altered the interlocutor; found the claimer en-

Jan. 17. 1852. titled to expenses, except those of the supplementary petition,
 Pet. Steele. and also entitled to expenses since the date of the interlocutor
 reclaimed against; and, of consent of the claimer, dismissed
 the original petition.

Wotherspoon & Mack, W.S., Reclamer's Agents.

J. W. Mackenzie, W.S., Respondents' Agent.

SECOND DIVISION.

No. 131.

CUTHBERTSON AND OTHERS v. YOUNG.

Process—Jury Trial—Motion for new trial—Exceptions to judgment of Court on the motion.—In a case where a bill of exceptions, taken at a trial, had been disallowed, a motion for a rule to shew cause for a new trial, on the ground of ambiguity of verdict, surprise, and of the verdict being contrary to evidence, was made and refused. Exceptions being tendered to the judgment of the Court on the motion were not received.

Sequel of case, p. 226, No. 108.

Jan. 17. 1852. *Gordon and the Lord Advocate* now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground, 1st, That the verdict was ambiguous, imperfect, and not an answer to the issue. 2d, On the ground of surprise; and, 3d, On the ground that the verdict is contrary to evidence.

Macfarlane, Inglis and the *Solicitor-General* supported the verdict.

The *LORD JUSTICE-CLERK* was of opinion that the motion must be refused. The other Judges concurred.

The *Lord Advocate* here tendered exceptions to the opinion and judgment of the Court, but the Court declined to receive these exceptions, and pronounced an interlocutor, by which they “ refused the motion, and appoint the verdict to be applied and judgment followed up: Find the defendant liable in the expenses of the discussion on the motion,” &c.

Wotherspoon and Mack, S.S.C., Agents for Pursuers.

Alexander Hutchison, S.S.C., Agent for Defender.

SECOND DIVISION.

DARLING (MEIN'S TRUSTEES) v. MEIN.

No. 132.

Expenses—Sequestration—Appeal.—Where in an appeal from the judgment of the Sheriff sustaining a claim to rank on a sequestered estate, the Court found for the appellant, and found him “entitled to expenses.” Held, on a remit from the Auditor, that this includes the expenses in the Sheriff Court.

Sequel of case, p. 233.

By their interlocutor in this case sustaining the appeal, the Jan. 17. 1852. Court “Find the appellant entitled to expenses; allow an account Darling, &c. to be given in, and remit to the Auditor to tax the same, and to r. Mein. report.”

The Auditor, accordingly, taxed the account, reserving for the decision of the Court whether or not the appellant is entitled to the expenses incurred in the Inferior Court, “the same not being specifically found due by the interlocutor.”

G. Young, for the respondent, objected, that under the interlocutor the appellant was not entitled to the expenses in question. He referred to *Graham v. Cuthbertson*, 20th Dec. 1828, 7 S. 224; *Martin v. Eastons*, &c. 18th June 1830, 8 S. 952, in the one of which it was held, that a general finding of expenses in a suspension of an Inferior Court decree, and in the other “of expenses hitherto incurred” in a similar case, did not carry the expenses incurred in the Inferior Court.

Neaves was for the appellant.

LORD JUSTICE-CLERK.—All that is done in the sequestration is one proceeding. The process of sequestration is really a process belonging to this Court; although the Sheriff has certain ministerial duties to discharge. It was undoubtedly the intention of the Court to give the expenses before the Sheriff.

LORD COCKBURN. There is no analogy between a suspension of a decree of the Sheriff Court and the present case, because the suspension is a process different from that in which the decree suspended was pronounced.

The other Judges concurred, and the Court found the appellant entitled to the expenses in the inferior court.

Davidson and Syne, W.S., Agents for Appellant.

Lockhart, Morton, Whitehead, and Greig, W.S., Agents for Respondents.

SECOND DIVISION.

No. 133.

Suspension—TULLIS and OTHERS v. CLARK.

Onerous Assignee—Reference to Oath.—Circumstances in which oath of an assignee charging on a decree was held negative of a reference as to whether the assignation was onerous or not.

Jan. 17. 1852. This was a suspension of a charge against each of the complainers for payment of £24 : 4 : 6½d., being one-fourteenth part of a sum due to Thomas Grainger, civil engineer in Edinburgh, under a decree in his favour against the provisional committee of the Dundee and Northern Junction Railway Company, pronounced on 30th May and 28th June 1851. The charge was raised by Clark as assignee of Grainger.

It seems that the complainers were, in the year 1847, along with certain other individuals, appointed members of the provisional committee of the Dundee and Northern Junction Railway.

The undertaking was afterwards wound up, and the complainers averred that matters were so improperly managed, in reference to the division of the funds, by certain members of the committee, and especially by Brown, Cowan, and Henderson, that no money was left for discharging some debts due by the company; and, amongst others, a debt due to Grainger. For this debt Grainger accordingly raised the action in which he obtained the decree, in virtue of which the charge sought to be suspended was given. The complainers maintained that Brown, Cowan, and Henderson, are the only parties liable to Grainger, without any relief against them.

The decree was afterwards assigned to Clark, on his paying to Grainger the sum due. But the complainant averred that the charger neither paid the money for his own behoof, nor was the assignation granted to him for his own behoof, but for behoof of Messrs Brown, Cowan and Henderson, his employers in the matter, in pursuance of a scheme devised by them for having a portion of the liability fixed upon the complainers. They pleaded, therefore, that in the circumstances of the case, as they were not liable to relieve Brown, Cowan, and Henderson, and Clark not being an onerous assignee, all objections pleadable against his constituents, were pleadable against him.

A minute of reference to the charger's oath was put in, in which "the complainants refer to the oath of the charger their whole statements relative to the circumstances under which the charger

obtained the assignation founded on, and in particular the aver-^{Jan. 17. 1852.}ments, that in paying the debt the charger was acting not for him-^{Tullis, &c. v.}self, but as the agent, mandatory, or trustee of Messrs Brown, Clark, Cowan, and Henderson, or of one or other of them; or of those acting on behalf of Messrs Brown, Cowan, and Henderson, or of one or other of them; or of others his employers in the matter; and that he is not a *bona fide* onerous assignee for his own behoof." The charger's deposition was accordingly taken. He deponed, "I first heard about the debt from Mr James Lawson Hill, W.S.

Mr Hill shewed me a list of the defenders in Mr Grainger's action, and informed me that some of the defenders were not inclined to pay their shares of what was due. He asked me whether I would consent to take an assignation to the debt, and proceed against each party, so as to make each party pay his share. He mentioned that some of the parties were willing to pay their shares; and I understood him to say that these parties, or some of them, were afraid that Mr Grainger's agents might proceed with diligence against them for the whole debt, and thus compel them to pay more than their fair share. He inquired whether I would consent to take up the debt, and proceed against all, and said that if I would consent to do so, it would oblige him. I inquired whether he wished me to advance the money? and he said, Yes. Mr Hill is an intimate friend of mine, and I agreed to his request, in order to oblige him; and also, because in looking over the names of the defenders I saw that they were persons of responsibility, and I considered that I would have no difficulty in recovering the money from them. . . . I made no inquiry as to the motives of his (Mr Hill's) intervention, as it was on his own personal account alone that I agreed to take up Mr Grainger's debt. . . . Depones, That Mr Hill stated no reason for his desire that I should advance the money; but I presume that he wished me to take up the debt in the character of an onerous assignee. . . . Interrogated, Had you any written communication with Mr Hill on the subject of this debt, or assignation, or in any way connected therewith, on or after the 29th day of October 1851? depones, When I agreed to take up the debt, Mr Hill gave me his verbal assurance as a gentleman, that as I had agreed to take it up in order to oblige him, he would not see me sustain any loss in consequence of it; and that if I wished any letter from him to that effect, he would give it me at any time. . . . Interrogated, Did Mr Hill at any time explain to you the grounds upon which it was ex-

Jan. 17. 1852. pected that any of the defenders in Mr Grainger's action would resist payment of a proportion of the sum decreed for, or furnish you with information with a view of meeting these grounds? depones, He did not; and the first intimation which I had of the grounds on which any of the debtors would resist payment, was the receipt of Mr Morrison's (agent of the suspenders) letter of 12th November 1851, the statements contained in which were quite new to me. I neither requested nor received any information from Mr Hill in order to enable me to meet these grounds of objection, as I did not consider it in the least essential for me to inquire into them."

The Lord Ordinary, (Fullerton,) found the oath negative of the reference, and therefore refused the note, and found the complainers liable in expenses.

Against this interlocutor the suspenders reclaimed.

Donaldson for suspenders. It is clear the charger is not acting for his own behoof. His deposition shews he can gain nothing, and he confesses he is protected against loss. He was merely acting as assignee to serve the purposes of Brown, Cowan, and Henderson, who are conscious they have no good claim against my clients; *Ledingham v. Mackenzie*, 5th June 1824.

Wood and Penney for the respondents, were not called on.

LORD JUSTICE-CLERK. No previous decision reaches this case. Mr Clark seems to have given his deposition in a fair and candid manner. All the members of the provisional committee were liable to Mr Grainger, conjunctly and severally, under his decree, whatever might be their rights and liabilities *inter se*. Now, it appears that some of them were willing to pay, but others were not. Mr Grainger was disinclined to enter into litigation with the latter, and assigned the decree to Clark, who paid him the amount out of his own funds. Why should Clark not get the full benefit of the decree?

It is said the charger neither gains nor can suffer loss by the transaction. But that does not shew that he is not an assignee for his own behoof. The same thing might be said of an indorser for honour of a bill. This case resembles the case of *Beveridge v. Liddell and Co.*, which we had before us the other day (see *ante*, p. 252), where a party who had indorsed for the accommodation of the drawer, and who had afterwards paid the bill, was held entitled to recover from the acceptor. There must be a plain purpose to oppress a third party before the Court will interfere. But there is nothing of the sort here.

LORD COCKBURN concurred. Clark is just in the position of Jan. 17. 1851.
 Grainger. Much stress has been laid on the motive of assignation. Tullis, &c. v.
 The motive is often important in criminal matters, and some- Clark.
 times in civil. But there is nothing in the charger's motives which
 can deprive him of the benefits of his decree.

The other Judges concurred, and the COURT adhered.

Adam Morrison, S.S.C., Agent for Complainers.

Clason & Clark, S.S.C., Agents for Respondent.

COURT OF EXCHEQUER.

No. 134.

Candlemas Term, 1852.

Before LORD RUTHERFURD.

THE ADVOCATE-GENERAL v. THE COLLECTOR OF POOR-RATES FOR THE ABBEY PARISH OF PAISLEY.

Crown—Poor-Rates—Barrack-Ground—8 and 9 Vict., c. 83.—The Crown is not liable in assessment for poor rates in respect of barrack-ground.

It was moved on behalf of Her Majesty last term, that the assessments made for relief of the poor, and for erecting a poor-house, &c., on the Board of Ordnance, for the Paisley barrack-ground, should be quashed ; and the matter was argued before Lord Rutherford, when his Lordship took time to consider his judgment, which he now delivered.

LORD RUTHERFURD.—If any doubt had occurred to me after hearing the argument of counsel, I should have referred this case to the whole Exchequer Judges ; but I have thought it unnecessary to take this course, being satisfied that the case is necessarily ruled by the decision of the majority of the Judges in that of Garioch, January 27. 1845, and still more clearly by their unanimous decision in that of the commissioners of the police of Edinburgh, January 22. 1850 ; both reported in the Session Cases, volume 12, page 447, *et seq.*

It cannot be maintained that the statute of the 8 and 9 Vict. c. 83, or any of the poor law statutes now in force, has either expressly or by clear intendment, imposed assessment for the poor “on occupation, use or possession for Her Majesty’s use, or on property of Her Majesty, or on property used for Her Majesty.” It was because no express enactment to that effect was contained

Jan. 19. 1852.
Advocate
General v.
Collector of
Poor-Rates
for the Abbey
Parish of
Paisley.

Jan. 19. 1852. in the Edinburgh Police Acts, that the assessment in respect of the Edinburgh post-office was quashed. The tax is strictly a personal tax. The judgment applies in terms, and the grounds of judgment as given by all the Judges in that case, lead necessarily to the exemption of the Crown. It were needless to repeat those here, as I refer to and adopt them. I have only to add, that I think these decisions, the last especially, necessarily overrule the cases of Bruce, November 28. 1810; the King's barracks, November 21. 1815; and the case of the Ordnance Officers, June 14. 1825, the last being decided by a majority only of the Division,—the Lord Justice-Clerk and Lord Glenlee voting in the minority. In so far as those cases relieved the Crown from liability in respect of the property as it stood improved, they are of authority for the exemption of the Crown, and considering the grounds upon which this Court has more recently placed the general exemption of the Crown; I think it impossible to maintain liability, even as limited in those earlier cases in the Court of Session. If the Crown be liable at all, it must be liable to the full extent of the property as improved, and, if not liable to the full extent, I see no principle for any restricted liability.

I have not, on the one hand, gone upon any specialty as to the tax being levied under the recent Act of Parliament, and not under the former state of the poor law, and on the other hand I think the counsel for the defendant failed entirely in shewing that there was any peculiarity in the case of assessment for the poor, whether considered as a public or a local tax, or that there was any analogy between this case and the case of teinds in which the Crown might be liable to the titular or to the minister.

The order made absolute.

*The Lord Advocate and Solicitor-General for the Crown.
Inglis for the defendant.*

William Waddell, W.S., Solicitor for the Board of Ordnance.

Robert Ainslie, W.S., Solicitor for the Defendants.

SECOND DIVISION.

No. 135. PETITION, GRAHAM OR YOUNG AND OTHERS, TUTORS-NOMINATE OF SAMUEL YOUNG.

Petition—Tutors-Nominate—Authority to make up Titles and Sell—Case in which the Court refused to grant authority to tutors-nominate to make up titles for the pupil to certain subjects, and to sell.

The petitioners, Mrs Young and others, were the tutors-nominate to Samuel Young, a pupil of four years old. The petition set forth, that the pupil has right to a seventh *pro indiviso* share of certain subjects, to which no title has been made up in the person of the pupil, and which were in a dilapidated condition and incapable, according to the report of skilled persons, to be repaired or to be made profitable except by sale, which the tutors had now a favourable opportunity to effect, in consequence of an offer made to them. This offer all the other proprietors were ready and anxious to accept, but "the only hindrance to their doing so is, that no title can be granted to a purchaser unless your Lordships' authority be first obtained to make up titles in name of the pupil, and then dispose of the properties on his behalf." They therefore prayed the Court, after intimation, to authorize the petitioners to serve the pupil heir to his deceased ancestor, and take all steps necessary to complete a title in his person to the subjects, and to sell and dispose of the subjects, and grant necessary titles.

N. C. Campbell appeared for the petitioner.

LORD JUSTICE-CLERK. The Court entertain a very strong objection to grant the powers here craved. Tutors-nominate are not officers of this Court, and besides the general objection to give such powers as those now craved to tutors-nominate, no such powers are necessary; half the titles in Scotland are made up by tutors whose wards are pupils. I have looked into the cases referred to in Mr Shand's book, and there is hardly any proper case yet in which the Court have granted such an application. He refers to the case of *Brown*, in 1846, where authority was given, and mentions some cases quoted off-hand in that case at the bar of the First Division. I have looked at all these cases. Two were extraordinary cases on the part of the *Earl of Buchan*, in which, as counsel, I persuaded the First Division to authorize tutors to enter on a speculative transaction to raise money on *post obit* bonds. We made a clamorous appeal on the ground of the pupil being starving, and it was granted as matter of mercy. Then a case occurred in this Division in 1839, in which two cases said to have occurred in the First Division were quoted, and the Lord Justice-Clerk (now Lord Justice-General) said, since the other Division grants such powers, there is no reason why the Second should not do the same. But on turning up the cases in the First Division referred to, I find they had been incorrectly

Jan. 21. 1852. quoted, because they were cases where authority had been given to factors *loco tutoris*. But factors *loco tutoris* stand in a very Petition, Grahame, &c. different position from tutors-nominate. These last are not officers of the Court. There is a distinction between their powers and those of factors; and we shall alter the whole law regulating the powers of tutors if we give powers of this description whenever they choose to ask them. By granting them, we might be granting authority to uplift money for which they give no caution. There is no difficulty as to their power to make up titles. They have such power, and they must just act on their own responsibility. Besides, in this case, the other proprietors may compel them to sell;—the pupil's is only a seventh share.

I do not say what might not be done in a case of great necessity, but in such a case as the present we must refuse the petition.

The COURT refused to interpose their authority as craved in the petition.

Alexander Nairne, S.S.C., Agent for Petitioner.

FIRST DIVISION.

No. 136.

PETITION,—WILLIAM MASON.

Petition—Curator bonis—Lunatic.

Jan. 22. 1852. This petition was presented for the purpose of having a *curator bonis* appointed to Sir James Sutherland Mackenzie, Bart. Petition, Mason.

Sir James had recently arrived in Edinburgh, and while resident in an hotel there, began to exhibit symptoms of violence, indicative of mental aberration or insanity. These symptoms having become gradually aggravated, the requisite steps were taken for getting his person secured. A petition was presented to the Sheriff, who, upon a certificate by two medical gentlemen, granted a warrant for Sir James's removal to an asylum, and he was accordingly removed to Inveresk, where he still remains.

The petitioner, who is the professional agent of Sir James in Edinburgh, having been informed of these proceedings, caused Sir James to be visited and examined by Professor Christison and Dr Burt, who, on the 13th December, "found him to be in a state of insanity, much excited, and with a tendency to violence," and they were of opinion, "that for some time, he has not been in a fit state of mind for taking care of his own affairs, and that this condition will continue for a long period."

The petitioner made enquiry as to the relations of Sir James, Jan. 22. 1852. with the view to an application being made in their names for the appointment of a *curator bonis*. He found that Sir James's near-^{Petition,} ~~Mason.~~ relations are two sisters, one of whom is resident in India, and the other generally in Edinburgh, or its vicinity. The latter, as appeared from letters produced with the petition, declined making the application, but approved of the measures adopted by the petitioner.

A statement of the situation of the property and funds belonging to Sir James, so far as could be ascertained, was given in the petition.

The petitioner fearing lest Sir James might give directions, which, if executed, would tend to the injury of his property, and dilapidation of his funds, was advised to make the application in his own name. But considering his peculiar position, he did not name any particular individual, but merely suggested that some professional person should be nominated as curator.

The petition was moved in the single bills immediately before the rising of the Court, for the Christmas recess. The Court on account of the urgency of the case, appointed Mr Samuel Raleigh, accountant in Edinburgh, as *curator bonis ad interim*, his appointment to continue till the fifth Sederunt day in January, and in the meantime ordered intimation.

On the petition being moved on the 16th curt.,

G. G. Bell for the petitioner, referred to the statement in the petition, and read to the Court certain letters and additional certificates. Reference was made to the case *Bryce v. Grahame*, 25th January 1828, 6. S. 425, affirmed 23d July 1828, 3. W. and S. 323, and *Russell*, June 1850, (unreported), where the application was made in name of the agent for the party. The petition was opposed by Russell's relatives. A brieve was taken out at the instance of his brother to have him cognosced as a furious person, but the jury refused to cognosce. On afterwards considering the petition, the Court thought it proper to appoint a *curator bonis*.

The Court appointed a minute applicable to the circumstances of the case, to be given in by the petitioner, and the additional certificates and documents referred to, to be printed therewith; and renewed the appointment of the curator for eight days.

These certificates and documents, and an additional certificate by Professor Christison and Dr Burt, dated 19th January curt.,

Jan. 21. 1852. in which they certify, that "no such change has yet occurred, as to entitle us to alter the opinion given in our last conjunct certificate, as to his state of mind," having been produced, and the petition being again moved to-day,

Petition,
Mason.

The LORD PRESIDENT was of opinion, that it was necessary to appoint a curator to Sir James, both for the safety of his funds and property, and for the protection of the lieges.

Mr Raleigh was accordingly appointed *curator bonis*, in terms of the prayer of the petition.

William Mason, S.S.C., Agent.

OUTER HOUSE.

No. 137. *Mrs A. M'ARTHUR v. JOHN CROALL AND OTHERS.*

A. J. M'ARTHUR AND OTHERS v. JOHN CROALL AND OTHERS.

Evidence—Assytement—Reckless Driving.—In an action of assytement and damages for reckless driving, where the defenders pleaded on record, and cross-examined the pursuers' witnesses to prove the driver's general character for careful driving; the pursuer was allowed to put in evidence convictions for reckless driving against the drivers, he having founded on these convictions on record.

Jan. 22. 1852. These were actions of assytement and damages. In July 1850, the late Mr M'Arthur, teacher of dancing in Edinburgh, *v. Croall, &c.* was killed in a collision between two stage-coaches belonging to the defenders, and driven by their servants. Two actions were thereupon raised—one by his widow and the other by his four children, for reparation of the damages they had suffered by his death. The cases went to trial to-day at the same time, before the same jury, under two issues, whether M'Arthur's death "was caused by the fault, negligence, or unskilfulness of the defenders, or any of them, or of another or others for whom they are responsible, to the loss, injury, and damage of the pursuers?"

In the course of the trial it was proved that the collision took place in open day, and on a broad and level road, and that it arose from the driver of one of the coaches not keeping his own side of the road. The pursuers' counsel maintained, that while that driver was chiefly to blame, the other driver was not altogether free from negligence, as he could have gone nearer his own side, and thereby avoided the collision. After the evidence upon the

facts connected with the collision had been led, the pursuers proposed to put in evidence extracts of two convictions against the driver last referred to for reckless driving, the one obtained before the Police Court and the other before the Sheriff of the county of Edinburgh.

Logan and *Patton*, for the defenders, objected. The question is, whether, on the 25th of July 1850, the drivers of the coaches in question drove them improperly. Convictions obtained many years ago against one of them, cannot aid the jury in coming to a right conclusion upon that question. The evidence tendered is still more objectionable, because it applies to the driver, who, according to the pursuers' own evidence, was not at all to blame.

Macfarlane (with whom was *W. G. Dickson*) maintained that the evidence was competent. The facts already proved shewed that the blame lay chiefly with one driver; but it also in some measure inculpated the other, to whom the convictions applied. The object in tendering them was not to prove the facts regarding the collision, but to meet the defenders' plea in law, that as they had supplied good horses, sufficient carriages, and experienced drivers, they were not responsible for the consequences of the collision, which was accidental. The evidence was competent on the farther ground that the defenders had cross-examined all the pursuer's witnesses on the general character of the drivers for steady careful driving, and might adduce evidence in chief on that point. The pursuers were entitled to put in the convictions to meet that course of defence.

LORD WOOD had no doubt the evidence was admissible upon both these grounds. But he thought it would be of little use to the pursuers, as the question really was, whether, on the occasion of the collision there was blame attachable to the drivers, or either of them?

Whereupon the pursuer's counsel stated that he would not put in the evidence tendered.

H. G. Dickson, W.S., Pursuers' Agents.
Walker and Melville, W.S., Defenders' Agents.

SECOND DIVISION.

No. 138.

MENNIE v. J. & W. A. BLAIR.

Trades' Unions.—Opinion expressed as to the illegality of Unions

amongst tradesmen for the regulation of wages, and for the purpose of preventing employment being taken except on terms fixed by them.

Sheriff-Court Procedure—Minutes of Debate.—Minutes of debate on re-claiming petition to Sheriff from judgment of Sheriff-Substitute are irregular, and ought not to be allowed.

Jan. 23. 1852. This was an advocation from the Sheriff-Court of Glasgow.

 Mennie v.
 Blair, &c.

In his summons, the pursuer, Mennie, averred that he had entered into a verbal agreement with the defenders, to serve them as a journeyman hatter for one year, from 12th January 1850, but that they dismissed him on 1st April; and concluded for his wages from that period till January 1851, and all loss and damage he had suffered. A proof having been taken in the Sheriff-Court, the Sheriff-Depute (Alison) reviewing the judgment of the Sheriff-Substitute (Skene) found for the defenders. The pursuer advocated, and the Lord Ordinary (Robertson) reported the case to the Court.

Inglis and H. Robertson were for the pursuer, and
Logan for the defenders.

The COURT unanimously found for the pursuer, and advocated the cause.

From the evidence in the case it appeared that there exists in Glasgow a union of journeymen hatters, which takes upon itself to regulate the amount of wages, and the terms on which its members may work; and it prohibits its members from making agreements for themselves with employers, or working for them, except on the terms fixed by the Union for the whole trade. It also decides how many apprentices shall be received into particular shops in town at a time. It does not permit its members to work in any shop unless the masters agree to abide by the society's rules; and it is one rule of the society that the members should not work in shops along with men who are not members. Of this union the pursuer, along with others in the employment of the defenders, had been a member; and in the beginning of January 1850, in consequence of the defenders proposing to employ more apprentices than the Union thought proper to allow, it was resolved by the Union that there should be a turn out of the workmen in their employment. This accordingly took place. But the pursuer, Mennie, and two other men, named Berry and Cargill, repenting of this step shortly after, left the Union, and were employed by the defenders on the agreement before mentioned. Sometime afterwards, the other workmen returned to work, but they refused to continue in the defenders' employment, unless

Mennie, Berry, and Cargill, either again joined the union, and Jan. 23. 1852.
paid a fine for having withdrawn from it, or were dismissed
from the defenders' employment. A deputation of the union ^{Mennie v.} Blair, &c.
waited on the defenders to enforce this demand. The defenders,
accordingly, requested Mennie, Berry, and Cargill, to join the
union, so that they might not be deprived of the services of
their other men, amounting in number to about thirty. The pur-
suer declined, and was accordingly dismissed.

It also appeared that in the Sheriff Court, minutes of debate
had been ordered and prepared after the case had been carried by
reclaiming petition from the Sheriff-substitute to the Sheriff-de-
pute.

In advising the case, the Court took occasion to refer to the
union, and to this practice in the Sheriff Court.

The LORD JUSTICE-CLERK. There is here not merely a failure
on the part of the defenders to fulfil an engagement entered into
with the pursuer, but a failure in circumstances which it is painful
to see. This Union comes to the defenders, and says to them,
“we will not work with the pursuer, and the other two, and you
shall not fulfil your engagement with them, otherwise we will not
work with you, and you shall not get anybody in Glasgow to work
for you.” The masters accordingly try to compel the pursuer to
to join the union, and because they cannot succeed they turn him
off. Whether what the deputation of the union to the masters
in this case do is intimidation or not is a question that may be
tried afterwards in another Court; or whether the act of the masters,
in endeavouring to induce their men to join the union, is intimidation
under the statute, is a point still more worthy of being investi-
gated elsewhere. But it is a case of clear intimidation, whether it
falls under the statute or not. The masters do dismiss Mennie
and the other two men, because they cannot concuss them into
joining the union, which they themselves at the same time confess
was an intolerable grievance to them.

It is all very right, if workmen do not think they are getting as
much wages as the profits of the trade ought to afford, that they
should demand more. But this mode of accomplishing their
wishes—by intimidation and the passing of these tyrannical rules
by such unions—will always in the end lead to their own disad-
vantage.

But important as this case is in reference to these unions, I
think it is still more important in reference to the form of process
in the Sheriff Court. After the judgment of the Sheriff-substitute

Jan. 23, 1852. a reclaiming petition is allowed against his judgment to the Sheriff-depute, I should wish to see that practice abolished. For why the Sheriff-depute should not consider a case in the state in which it went before the Sheriff-substitute, when he pronounced the judgment reclaimed against, I do not know. Then in the Sheriff Court of Glasgow, after this reclaiming petition, there are often notes and hints thrown out by the Sheriff, on points which are not embraced within the pleas of parties at all; and on these minutes of debate are ordered. I think these minutes of debate are most irregular. They multiply, to a most improper extent, the pleadings in that Court. They are inconsistent with the intention of the Act of Sederunt; and are unnecessary as the Act allows minutes of debate, when the case is before the Sheriff-substitute. The Sheriff, if more light is wanted by him, should hear parties *viva voce*.

LORD MEDWYN.—From my own experience, I know the difficulty of having matters regularly conducted in the Sheriff-Court. But it is not the first time that this irregularity in the Sheriff-Court of Glasgow has been very properly remarked on. We are all, however, satisfied that Mr Alison and his Substitutes shew the utmost anxiety to discharge their duty.

LORD COCKBURN. When the old laws against combination of workmen were abolished, their place was supplied by a wise statute, which declares it a crime, punishable by imprisonment, for any workman to obstruct, disturb, or intimidate, other men who are willing to remain in the employment of their masters. Now, here is a combination of men calling themselves a Union, and its importance arises from this, that if a master does not dismiss whomsoever they wish, they can compel all the rest of the men in the union to refuse to work for that master. If that is not intimidating, I do not know what it is. But still I keep my mind open as to the question of the criminality of these proceedings, should it ever come to be tried elsewhere. But how, with this audacious tyranny publicly proclaimed at Glasgow for a year, the Procurator-Fiscal or the Lord Advocate have allowed the union to go on and compel masters to part with their men, without interfering, I cannot understand.

As to the proceedings in the Sheriff-Court, I do not defend the proceedings; but that there is a Sheriff in Scotland more anxious to do his duty than the Sheriff-depute in Glasgow, I do not believe. Lord Medwyn has rightly noticed the difficulty of getting matters rightly conducted in the Sheriff-Courts. It is hard to make bricks without straw—and the straw sometimes furnished in the Sheriff-

Mennie v.
Blair, &c.

Court cannot be made into bricks without very great difficulty. Jan. 23. 1852.
 And sometimes it is not easy for a Sheriff to resist irregularities; ^{~~~~~}
 but still I do not think that is peculiar to Glasgow. It may be worse ^{Mennie v.} Blair, &c.
 in Glasgow, because there is more business there than in other
 places, and of course more cases to go right with and to go wrong
 with. It is easy for a Sheriff, with only a case a-month, to say
 "Now, I'll make this a model case." It is, however, difficult to
 do this when a Sheriff is overwhelmed with cases. But I lament
 the irregularity complained of, and wonder at it, whether it be
 found in the procedure of the Sheriff Court of Glasgow or in that
 of any other Court.

LORD MURRAY. As to the proceedings in the Inferior Court,
 I shall just make a general remark. It is a pity that a reclaiming
 petition is allowed, and if the judgment of the Sheriff-substitute
 is to be of any use, it should be reviewed on the grounds which
 were before him, and on no other. There may be explanations
 heard; but every species of appeal, from a substitute to a depute,
 or from one Court to another, cannot rest on a sound foundation
 unless the same materials are before the Judge reviewing as were
 before the Judge whose opinion is reviewed.

James Burness, S.S.C., Agent for Pursuer.

Lockhart, Morton, Whitehead and Greig, W.S., Agents for Defenders.

SECOND DIVISION.

No. 139.

**STARK DOUGAL'S TRUSTEES and OTHERS v. TAY FERRY TRUS-
 TES and OTHERS.**

[*The attention of the Reporters has been directed to the following
 matter as proper for the information of the Profession.*]]

Jury Trial—Opening.—In opening to the jury it is sufficient briefly to
 refer to the import of parole proof, but documents to be given in evidence
 should be fully opened upon.

In this case recently tried before the Lord Justice-Clerk and a Jan. 23. 1852.
 jury, when in the course of the trial the defender's counsel proceed-
 ed to open the case for the defender, and was referring to certain ^{~~~~~}
 documents proposed to be given in evidence, the Lord Justice-
 Clerk took an opportunity of stating that he wished these documents
 to be fully opened upon. His Lordship observed that in reference to
 parole proof proposed to be adduced, it was not necessary or proper
 that there should be any but a brief reference to its import in the
 opening for the defender; but that in reference to documents it
 was right that the pursuer should be put in possession of the in-

Dougal's Trus-
 tees, &c. v.
 Tay Ferry
 Trustees, &c.

Jan. 23. 1852. formation necessary to enable him to meet the effect of these documents in his reply, and that this gave a good opportunity for determining the admissibility of documents proposed to be adduced.

Dougal's Trustees, &c. v. Tay Ferry Trustees, &c.

The *Dean of Faculty* observed that it was desirable that the views of the Court upon that matter should be known. He was the more anxious to suggest this, as an impression had gone abroad that a different rule had been laid down at a recent trial before another judge.

The *Dean of Faculty, Putton, T. Mackenzie, Inglis, G. Young, and Berry* were for the different parties.

The agents were *Sir C. Gordon and Co., William Miller, S.S.C., and Graham and Webster, W.S.*

No. 140.

SECOND DIVISION.

BROWN v. M'KIE.

Summons—Damage—Relevancy—Responsibility of Law Agent.

Jan. 23. 1852. This case came before the Court on the question of the relevancy of a summons of damages. The summons set forth that the pursuer was a creditor of a person of the name of Wilson, who had instituted a process of *cessio bonorum*; but the *cessio* was refused, "under strong suspicion of fraud and concealment of funds." That thereafter, Wilson having been sequestrated, the pursuer employed the defender, who is a law agent, to prepare a state of his debt, and an affidavit thereto in terms of the Bankrupt Act. That this was done in August 1846, but was returned as incorrect. That another was prepared by the defender, and transmitted to Rose as the pursuer's mandatory, who lodged it with the trustee on the sequestrated estate, and who attended a meeting of the creditors, and voted against a composition. That Rose's vote was objected to on the ground that the affidavit did not comply with § 9 of the bankrupt statute, by setting forth that the pursuer held no other obligant bound for the debt. That the objection was sustained, and, in consequence of this rejection, the requisite consents were obtained to the debtor's discharge, whereas, had the affidavit been correct, the vote of Rose would have defeated the offer of composition, and have deprived the debtor of his discharge. That the pursuer instructed Rose to oppose the offer of composition and discharge, "from a conviction that Wilson was in possession of, and concealing, a large sum of money." That he has since gone to America; and that through the negligence or want of skill on the part

Brown v. M'Kie.

of the defender, "the pursuer lost the opportunity of concussing Jan. 23. 1852. Wilson to disclose his concealed means ;" and the summons con-
cludes against the defender for the amount of the debt, expenses ^{Brown v.} M'Kie. and damages.

The defender pleaded that the pursuer had not averred matter relevant, or sufficient in law, to support his conclusion for damages.

The Lord Ordinary Wood repelled this plea, and the defender reclaimed.

Hector and the *Dean of Faculty* for the defender. The pursuer avers that, by the vote being refused, sequestration was granted, and he was deprived of the opportunity of concussing Wilson to surrender his funds. He should have averred that Wilson *had* concealed funds. If the summons is held relevant, he will not be required to prove the possession of funds, but simply that he believed the bankrupt possessed them. That is not a relevant averment for damage. Again, after the vote was objected to, the pursuer should then have produced a proper affidavit and opposed the discharge—and have had the matter investigated before the Sheriff, whether Wilson had concealed funds.

Inglis for pursuer. The pursuer had it in his power to prevent a discharge owing to the amount of his debt. This advantage he lost through the fault of the defender, and he now claims damages. It is not necessary for the pursuer to prove fraud, or a well-founded conviction that there was concealed money. It may be important when we come before a Jury to prove there were concealed funds, but with regard to relevancy it is not essential to aver there were such. By the fault of the defender the pursuer has lost the opportunity of instituting inquiries as to whether there was a fund or not. This would have been given had the discharge been refused.

The COURT adhered with expenses.

James Bell, S.S.C., Respondent's Agent.

Jopp and Johnston, W.S., Defender's Agents.

FIRST DIVISION.

No. 141.

EWING v. THE EARL OF MAR.

Jury Trial—Expenses—Nominal damages.—Where, in a trial on an Jan. 24. 1852. action of damages, for an assault on the pursuer, the Jury returned a verdict in his favour, with one farthing of damages, the Court refused to allow expenses to either party. ^{Ewing v. Earl of Mar.}

Jan. 24. 1852. In this action, which was advocated from the Sheriff of Clackmananshire, and which was for damages for assault, by spitting at the pursuer, and attempting to ride him down, a trial was had during last Christmas sittings, before the Lord President and a Jury, when a verdict was returned for the pursuer, with one farthing of damages.

The case came to-day before the Court on two motions—one by the pursuer to apply the verdict, and for expenses; the other by the defender, in similar terms as to the verdict, but to find the defender entitled to expenses, in respect the pursuer had substantially failed in his action.

Crawfurd (with whom *Gifford*) for the pursuer's motion. It is quite true that the damages awarded were only one farthing; yet, still, it is a verdict for the pursuer on a question of assault. The effect of the verdict must be judged of by the terms of the issue. The real meaning is equivalent to a conviction of assault in the Justiciary Court, with a lenient punishment. Here there was no tender made—no apology offered. Besides this, an objection was taken by Lord Mar to the competency of the advocation from the Inferior Court, which the Lord Ordinary repelled, and his judgment was acquiesced in—the Lord Ordinary reserving the pursuer's claim for expenses; and therefore, as far as this point is concerned, Lord Mar is clearly in the wrong.

Inglis (with whom *Macfarlane*) for the defender. The case is far from being an important one: perhaps one of the most trifling actions ever in this Court. The question of expenses is important, just because of the proportion which they bear to the damage really sustained. Here no injury is alleged as affecting character; but the pursuer complains of what he calls assault. He gets nominal damages. This case is different from most ordinary cases. In *Gardner's* case, (Paisley Bell case,) 24th June 1846, where the damages were one farthing, the action was held to be one for vindication of character. The party was accused of theft, and the Jury, in effect, found that this was a false and malicious libel, and therefore expenses were given. In *Cowan v. Campbell*, 17th Dec. 1833—an action for false imprisonment—the liberty of the subject was held to have been infringed. Here nothing is asked, and nothing can be gained, under the verdict, but money, as reparation for an assault in law; and awarding expenses, as against the pursuer, is the best check to such actions.

LORD PRESIDENT. I am clearly of opinion that, in cases like

this, where the verdict is for the pursuer, but with damages of a Jan. 24 1852.
farthing, no expenses should be given to the pursuer, but I am Ewing v. Earl
equally clear that none should be awarded to the defender. of Mar. .

Crawfurd. Lord Mar moved the postponement of the trial,
and, by Act of Sederunt, we are entitled to expenses on this
ground.

Inglis had no notice of this point.

The COURT, therefore, superseded consideration of this latter
point at this stage of the case.

James Mason, S.S.C., Agent for Pursuer.

Lockhart, Morton, Whitehead & Greig, W.S., Agents for the Defender.

FIRST DIVISION.

No. 142.

GAVIN WALKER and SPOUSE v. HENRY BROCK and WILLIAM BLEAMYRE.

Proving of the Tenor.—Evidence which was held sufficient to prove
the tenor and *casus amissionis* of a disposition.

This was an action of proving the tenor of a disposition to a Jan. 24. 1852.
certain house property in Glasgow, granted by Brock as trustee on the sequestered estates of Bleamyre. These parties, who are Walker, &c. v. Brock, &c.
both alive, were called as defenders, but made no appearance. The miniciles libelled were the original draft or scroll from which the disposition was extended, the sasine following on the disposition, and the charter of confirmation granted by the superior of the subjects to the disponees. The *casus amissionis* was, that the deed had fallen aside while in the possession of the agents for the disponees.

The action was called before the Lord Ordinary (Dundrennan), who made great avizandum to the Court; and a proof was led before the Judge Ordinary.

J. Campbell, for the pursuers, now stated, that it was established by the articles of roup, under which the subjects were sold, that the disponees had made the purchase for £830. And the payment of the price was proved by the agents for the sellers and the purchasers, and by their business accounts. The scroll was identified by the agents for both parties, and by the writer of the deed, who was one of the instrumental witnesses. But the clause of registration, in the lost disposition, which was peculiar in its terms, and the testing clause, were left blank in the

Jan. 24. 1852. scroll. The former was in the same terms as the corresponding clause in the previous writs in the progress; and the seller's agent *v. Walker, &c.* who prepared the deed swore that it must have been in the same terms as the preceding titles. The notary who passed the infestation swore that the testing clause in the lost deed was literally transcribed in the sasine. The *casus amissionis*, as proved, was, that the deed was in the hands of the former till the end of 1846, or beginning of 1847; that in spite of the most anxious search it could not now be found; and that they did not know or suspect what had become of it, and could not account for its loss, unless it may have occurred when the agent removed from his writing chambers at Whitsunday 1847, or at Whitsunday 1850. *M'Leod*, 27th February 1835, 13 S. D. 581; 2 Shand, 833.

The COURT found that the *casus amissionis*, and the tenor of the deed as libelled, was sufficiently proven.

Campbell & Smith, S.S.C., Agents for Pursuers.

HIGH COURT OF JUSTICIARY.

No. 143. BEFORE THE LORD JUSTICE-CLERK, LORDS IVORY AND COWAN.
HER MAJESTY'S ADVOCATE v. PATRICK QUILLICHAN, *Panel*.

Indictment—Relevancy—Bigamy.—*Held*, that in an indictment charging bigamy, when the first marriage was performed in Ireland by a Roman Catholic clergyman, it is enough to set forth, that the parties were "lawfully married," and is not necessary to state, that the parties were both Roman Catholics, or to set forth any other circumstances necessary to constitute a lawful marriage as between Roman Catholics in that country.

Jan. 24. 1852. The charge in this indictment was bigamy. The minor proposition bore that the prisoner was guilty of that crime: "IN SO FAR AS you, the said Patrick Quillichan, being lawfully married to Catharine Duffy or Quillichan, a marriage ceremony having been performed between you several years ago, and, as the prosecutor believes, on or about the month of April in the year 1843, or in the year 1844, the prosecutor being unable to specify the time more particularly, by the Rev. Patrick Dorrian, then a Roman Catholic clergyman in Belfast, in Ireland, or by some other Roman Catholic clergyman to the prosecutor unknown, within the house then occupied by the Rev. Doctor Cornelius Denvir or Denvil, then a Roman Catholic Bishop in Belfast aforesaid, or at some other place in or near Belfast, to the prosecutor unknown; and

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you the said Patrick Quillichan did, on the 2d day of March 1851, Jan. 24. 1852. &c., your marriage with the said Catharine Duffy or Quillichan, being then subsisting as you well knew" within or near St Mary's Roman Catholic Church, &c., Edinburgh, wickedly and feloniously enter into a matrimonial connection," &c. &c. The indictment goes on to libel the second marriage.

J. Shaw, for the panel, objected to the relevancy. This is a marriage in Ireland by a Roman Catholic clergyman, and it is the law that such marriages are not legal, unless both parties are Catholics; Burns' Ecclesiastic Law, ed. 1842, pp. 423 and 466. Now, in dealing with a country where there is an established religion, the presumption is, that all belong to it. It should therefore have been set forth in the indictment that the parties were both Catholics. This case may seem at first to be ruled by the cases of *Brown*, 24th December 1846, Arkley's Reports, 205, and *Purves*, 20th November 1848, in which it would at first sight seem, that the words "lawfully married," inserted in the commencement of the indictment, were held to have made the indictment relevant. But these cases differ from the present in this respect, that in these the allegation of a lawful marriage was coupled with *species facti*, which your Lordships knew would constitute marriage by the law of Scotland.

G. Young, A. D., and Solicitor-General, were for the Crown.

LORD JUSTICE-CLERK. This indictment is relevantly framed. The objection runs counter to the broad principle on which the structure of an indictment, under the law of Scotland, is based, and by which relevancy is decided. Independently of critical objections to expressions, or to the omission of requisite words, and the like, objections as to relevancy generally are of two kinds:—
1. Objections to the major proposition, as not correctly setting forth the offence intended to be charged, or as charging that as an offence which is not in law a crime; and, 2. Objections to the minor proposition, or specifications of the facts, as not, if proved, setting forth the crime charged. But the specification in the minor is only intended, *first*, to apprise the panel of the facts to be proved against him; and, *secondly*, to set forth what is sufficient to entitle the prosecutor to prove all that the law *may* require, according to the turn which the case in proof may take.

Between the character of the objections competent against the major and minor propositions, there is a broad and marked distinction. The description, in the major, of that which is charged

Jan. 24. 1852. as a crime, must be *complete* in law. In many cases, that is accomplished unanswerably by certain legal terms which are established names for crimes—*voces signatae*—as theft, murder, bigamy—or by quoting the words of a statute constituting the offence, or defining it. In other cases, the terms to be selected may be of great nicety, and the description of the acts may be very difficult. In such cases, the proposition must exhaust the law—that is to say, if any fair construction of the words in one sense lets in a matter which is not criminal, or if a plain requisite of illegality is omitted, then something is set forth in the major of the indictment which, in fair construction, is not *necessarily* criminal, independently of any special defence in the particular case.

In stating *such* objections to the major proposition, every line of argument is open to the panel whether founded on statutes or common law. The public prosecutor, by his major proposition, propounds, as it were, a thesis for objection. He throws down in the legal arena, as the schoolmen of old into the arena of metaphysics, his proposition as a challenge, and must meet every view of his proposition which can be stated.

But, then, that proposition once sustained as being unassailable, his course in the minor is a much less ambitious and narrower one : he then comes to deal with a particular person against whom particular acts are averred, as bringing him within the offence in the general charge in the major.

In objecting to the minor, the panel's situation is at once reversed. He must object on the express condition, either that if the facts are *fully* and *legally* proved, they are not the offence charged, or that the statement is so framed, from defect or otherwise, as to omit what is essential, on the face of the indictment, to be averred, or to exclude the *right* to prove what, on the face of the indictment, is required :—Observe, *on the face of the indictment* essential for averment and necessary in proof. The panel cannot travel out of the indictment in discussing the minor. The major is the law for the case, and rules the argument. Law to be proved by statute, and facts which, if established one way, may raise a defence, are matters on the merits, and for the trial, and no state of facts which will prove a defence on the merits, is to be assumed as an objection to the minor. The prosecutor must prove the facts averred, in such a way as to exclude the defence. But, in relevancy, the question is solely, is he entitled to prove them? Now, these general views exclude the objection here stated.

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The indictment charges bigamy : That crime consists in an attempt to marry a second time after the party has been lawfully married, and knows that such marriage still subsists. Then the H. M. Advocate v. Quillman has only to state what is sufficient to entitle the prosecutor to prove the facts. It avers, time and place libelled, that the panel was lawfully married to a certain female in Ireland, by a Roman Catholic priest. *Lawfully* married. No specification of the rites, forms, or benediction of any marriage need be stated. It is distinctly said that they were *lawfully* married. This is enough to entitle the prosecutor to prove his case. But it is said, that by certain statutes, the marriage will be void if both parties were not Roman Catholics, and the indictment should have averred that they were both Roman Catholics. Now, if this particular marriage had required to be set forth in the major proposition,—or if this had been an indictment for celebrating the marriage illegally,—then it would have been necessary to make the major complete against all attacks, and an objection on statutes tending to shew, that in one state of facts, within the words of the major, the marriage was not valid, or the offence not committed, would have been quite competent against the major. But in the minor, the prosecutor is only required to aver what is sufficient to entitle him to prove his allegations. All that it is requisite for him to aver is, that the panel was *lawfully* married in a particular way —viz. by a Roman Catholic priest, to a certain female in Ireland,—for that entitles him to prove all that is necessary to be proved, whatever that may be. The panel, on the other hand, is not entitled to ask us now to inquire into what must be proved, or into what state of facts will make this first marriage bad. Now, how can it be said that the averment that they were *lawfully* married, is not sufficient to entitle the public prosecutor to enter on the proof of a lawful marriage of the kind which the facts may require, according to the law which may be *proved* to be applicable to these facts? Whether a Roman Catholic priest could not marry if both were not Catholics, is matter of fact to be inquired into at the trial—matter of Irish law, it may be; but still matter of fact to us. It will form the subject of investigation if necessary. But it is incompetent to travel out of the minor to find out by our guess at interpretation of Irish statutes, this matter of fact, which the indictment does not raise. Again, this objection is stated on the assumption that it may turn out that both were not Roman Catholics. That is to be inquired into as matter of fact. On the supposition of a possible state of facts which may not be proved,

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Jan. 24. 1852. we cannot say the indictment in the minor is wrong, when it is admitted that it will cover the opposite state of facts. If both must be Roman Catholics, how can it possibly be alleged that the prosecutor is not entitled to prove that fact under his averment that they were lawfully married, and to carry that out in proof? The objection, then, is quite incompetent. The form of the indictment, and the course which the case will take, is exactly what occurred in the remarkable case of *Benison*. True, no objection was taken to the relevancy; but when the fact was said to be proved—viz. that marriage in Ireland by a Presbyterian minister between a Presbyterian Dissenter and an Episcopalian was bad; and that the female was an Episcopalian, the Court did not direct the Jury, that if that fact was proved to their satisfaction, the minor of the indictment turned out to be defective, so as not to fit and cover the state of facts and law which had come out. On the contrary, holding this to be a proper defence on the merits under such an indictment as the present, that matter of fact was left to the jury, with the direction, that they would consider whether a mere entry, at the date of the marriage, that the woman was an Episcopalian, derived no one knew how, was such proof as would be sufficient to void the marriage,—and if not, with the direction that the marriage was proved. Here, it may be matter of fact, 1st, what is the law of Ireland; and, 2^d, whether both were required to be, and were in point of fact, Roman Catholics. That is for the trial. The objection anticipates incompetently what may or may not be matter of fact for investigation at the trial. The indictment entitles the prosecutor to prove his allegations, and he takes his risk, that he has sufficient knowledge of the facts which it may be *shewn* he must prove.

This opinion may appear to enter too fully on general principles; but it appeared the more right to do so, because the plausibility which the objection appeared to have, drops from it the instant we come to attend to the fact, that it is an objection to a minor proposition.

LORD IVORY. The system is not a good one. Marriages between Roman Catholics being lawful, it is enough for the prosecutor to say, the parties were "lawfully married." The public prosecutor must, of course, bring his proof up to the point of shewing the marriage had all the requisites of a legal marriage. But he has averred enough to entitle him to proof.

LORD COWAN. The view I take is this. This indictment sets forth that this marriage was a lawful marriage by a Catholic

clergyman in Ireland—that is, lawful by the law of Ireland. Hav-Jan. 24. 1852.
ing made that statement, it was not necessary for the prosecutor
to set forth *how* it was lawful. That remains to be shewn by the H. M. Adv
proof. *v. Quilligan.*

Objection to the relevancy repelled.

John Murray, jun., S.S.C., Panel's Agent.

HIGH COURT OF JUSTICIARY.

No. 144.

BEFORE LORD JUSTICE-CLERK, LORDS COCKBURN, WOOD,
IVORY, COLONSAY, and COWAN.

HER MAJESTY'S ADVOCATE *v. M'LEOD, BRIGGS AND FALKNER.*

Indictment—Relevancy—Robbery.—In an indictment charging robbery it is not competent to libel as an aggravation previous convictions of theft, or that the panel was habit and repute a thief.

The indictment in this case set forth “That ALBEIT by the laws Jan. 26. 1852. of this and every other well governed realm, ROBBERY, especially H. M. Adv when committed by a person who is habit and repute a thief, and *cate v. M'Leod* has been previously convicted of theft, is an heinous crime, and &c. severely punishable.—YET TRUE IT IS AND OF VERITY,” &c.

Scott for two of the panels, (with whom *Ogilvy* for the others,) objected to the indictment, so far as it charged the being habit and repute a thief, and “previous convictions of theft,” in aggravation of the charge of robbery. The uniform practice is, in this matter, not to charge these as aggravations. The principle is, that previous convictions can only be charged in aggravation of the same crime. It is not sufficient that the crimes should be merely similar or analogous. Robbery is a crime entirely distinct from theft, having a *nomen juris* peculiar to itself; and it has been decided that under an indictment for robbery a panel could not be convicted of theft. *Wallace and Others, Perth.* Hume I. 106. With respect to habit and repute, it has been decided that it could not be charged as an aggravation of the crime of housebreaking, with intent to steal, *Buckley*, July 12. 1822, Shaw 73, nor of reset of theft, *Mary Bentley v. Hariston Cathie*, p. 23. Shaw's cases, p. 93, January 27. 1823, and Mr Alison puts robbery in this respect on the same footing with these crimes. In the last quoted case it was also found that previous convictions of theft could not be charged in aggravation of reset of theft, though reset was a crime which in some cases was separated from theft by the slightest distinctions. No doubt Mr Alison states that two judges

Jan. 26. 1852. have given *dicta* to the effect that previous convictions of theft could be competently charged in aggravation of stouthrief; but if this H. M. Advo-
cate v. McLeod statement were correct, which could not be ascertained, as the case &c.

referred to by him was not reported, still the analogy does not hold, as stouthrief differs from robbery in this important respect, that it is not essential to it that violence should be applied to the person.

G. Young, A.D., and *Solicitor-General* were for the Crown.

LORD COCKBURN. The result I have come to is in favour of the objection. Had the question occurred before any practice I would be clear that in principle the prosecutor was right. Robbery is "just theft," with the aggravation of personal violence, and it stands exactly in the same situation with stouthrief, which, although a peculiar name for another species of theft, is just treated in law as theft. Therefore, holding as I do that in correct reasoning robbery is theft, I think you might in principle prove previous aggravations of theft in the case of robbery; and there is an absurdity in our practice against which my mind revolts, which is, that if a person commits a simple theft you can aggravate the charge by previous convictions; but if he commits robbery—a still worse theft, by joining with it personal violence—such aggravations cannot be proved. But it is our business to interpret the law, not to make it; and I cannot resist the practice, which has been invariable, not to charge theft as an aggravation of robbery. The origin of this practice was plainly this, that such aggravations were unnecessary, as the crime was capital without them. But whatever be the origin of the practice, this which is attempted, is undoubtedly a novelty—a great one—which the Court should not sanction. I therefore rest my opinion solely on the practice, although I lament it, and think it not reconciled to any sound principle. Perhaps the evil might be avoided by the prosecutor, where the facts which would come out in proof amounted to robbery, charging theft only, and I would invite him to do this. If that will not avail, recourse must be had to Parliament.

LORD WOOD. I concur. I have no doubt a good deal might be said to shew that robbery is just a theft by violence; but even assuming that, I should require a great deal of argument before coming to the conclusion that we should admit, as an aggravation of theft by violence, a previous conviction of theft. But no opinion is necessary just now upon that point. My opinion in support of the objection rests on the long and inveterate practice.

LORD IVORY. I am of the same opinion. I think it unne-

cessary to go into any other point than the practice. We are not Jan. 26. 1852.
 sitting here to make any law different from the invariable practice of the Court. The *nomina juris* of theft and robbery have H. M. Advocate v. McLeod
 always been used as essentially different. Robbery was a plea &c.
 of the Crown which could be tried only in this Court. Theft was triable in the Inferior Courts. As to the argument in favour of charging these aggravations derived from the difference of punishment which might follow, that may be a good ground for going to the legislature, but can have no weight with us. The change in the mildness of punishment has not altered in the least the character of robbery. It still can be tried only here, where it is tried not as an aggravated form of offence, but as a positive crime, having a distinct *nomen juris*.

LORD COLONSAY. I concur. It is not necessary to go into the very important question, whether there is or is not such a distinction between robbery and theft established by our mode of treating these offences as would warrant a setting-forth, in an indictment such as this, "that theft, especially when committed by violence to the person, is a crime," &c.: and then setting forth such circumstances as establish that. In like manner, we are not called on to give any opinion just now as to what would be the result if a simple charge of theft were stated in a libel, and the facts in proof disclosed robbery.

In regard to aggravations, as affecting the amount of punishment, our law rests almost entirely on the practice of the Court, and I think it would be wrong to depart from that practice, so long and inveterate. Previous conviction has been used as an aggravation only where a party is charged with the same offence of which he is previously convicted. He knows and understands he has been tried for that offence before; and when convicted of it he knows these convictions will rise up against him. In regard to habit and repute, our practice has been still more limited. There are few offences in regard to which we have allowed that aggravation. We have almost entirely limited it to theft, with some authority for the case of reset of theft. It is a peculiar aggravation resting on peculiar principles; and I should be unwilling to extend its use. We must adhere to the practice, and looking at it, we cannot sustain the aggravations as libelled.

LORD COWAN.—I concur in the views of Lord Cockburn, and in reference to what has fallen from Lord Colonsay, I would wish to reserve my opinion till such indictments are before the Court. I would just say, that my short experience in this Court has

Jan. 26. 1852. shewn me, that when the crime of robbery is charged, and where there is but a small addition of personal violence, and small amount of property taken, it is certainly desirable in administering such a case that it were competent for the Court to get at evidence in reference to previous character.

LORD JUSTICE-CLERK.—I cannot consider this merely as a question of principle. When any case arises in regard to whether a particular act is a crime we resort to principle, under the undoubted authority of the common law of Scotland. But the competency of the thing here attempted depends entirely on use. I hold previous convictions of any other crime than that charged is not competent in order to increase the punishment. We find it has been salutary practice in the law of Scotland from the earliest times, in regard to theft, which often is a trade, to consider habit and repute and previous conviction as aggravations warranting an increase of punishment. But in regard to robbery no such practice has been allowed. On that ground, therefore, and holding this not to be in reality a question of principle, but to be determined by practice alone, I think it is a novelty the Court cannot recognise.

Objection sustained.

J. Cay, W.S., Panel's Agent.

No. 145.

FIRST DIVISION.

CUMING'S TRUSTEES v. BOSWELL and OTHERS.—PART I.

Trust-estate—Destination—Heirs-female.—A. directed his trustees to lay out and use the residue of his estate for the use and behoof of B., till he should attain majority. They were then to denude in his favour; and, failing B., such residue was to pertain to his sisters equally among them. By subsequent codicil, it is declared that heirs-female shall succeed without division. B. succeeded to the estate, being major, but died intestate and without issue, and the trustees did not denude:—*Held*, that there was here a valid substitution in favour of the eldest sister of B., and that her right of succession was not conditional upon B.'s dying before attaining majority.

Jan. 27. 1852. This was a multiplepoinding and exoneration, at the instance of the trustees of the late William Cuming, against his legatees and others. Two questions were raised for decision; the one involving the right of succession to the general residue of Cuming's estate, the other regarding the right to the surplus proceeds of the estate, betwixt the date of the death of the testator and the ma-

*Cuming's
Trustees v.
Boswell.*

jority of the first heir to the estate, as also to certain bonuses ^{Jan. 27. 1852.} declared prior to Cuming's majority. The case thus resolved into ^{Cuming's} two branches. These were separately argued before the Court, ^{Trustees v.} ^{Boswell, &c.} and with a view to distinctness will now be separately reported.

The narrative is adapted to both branches.

The first question, therefore, was, whether on the failure of the heir called to the succession of the late William Cuming, the estate thereafter descended to the sisters of the heir successively, or fell to be divided equally amongst them?

The deceased William Cuming, banker in Edinburgh, by trust disposition and settlement, dated 19th March 1788, conveyed to certain trustees his whole property, heritable and moveable, 1st, for payment of his debts; 2d, for payment of £1000 to each of the children of his son Thomas Cuming, deceased, other than the heir-male of his body; and, lastly, that the trustees should "lay out and employ the residue of my said estate and effects for the use and behoof of George Cuming, my grandson," and the heirs of his body, "in such a way and manner as may seem most expedient to them till he or they may arrive at majority, when they are to denude thereof in his or their favours, with such conditions that they shall not dispose of the same, nor alter the succession thereof;" "and failing of the said George Cuming or his lawful issue, before either of their attaining to majority, then such residue is to pertain, under the conditionsforesaid, to any other heir-male" of the said Thomas Cuming, by Janet Chalmers; whom failing, "then such residue is to pertain to the daughters of the said Thomas Cuming," equally among them.

By subsequent codicil, he declared, "that failing heirs-male of my son's body, and the succession opening to heirs-female of his body, that then, in place of the said residue of my estate and effects pertaining to the daughters of the said Thomas Cuming, my son, equally among them, as provided by the foresaid disposition, the same shall solely pertain to the eldest heirs-female of the said Thomas Cuming and their issue, the eldest heir-female through the whole course of succession always succeeding without division, and secluding heirs-portioners, . . . and the before mentioned trustees are accordingly to denude upon such heir attaining to the age of majority."

By another codicil, Mr Cuming gave the following direction to his trustees:—"And failing my grandson George Cuming, and the heirs of his body, I hereby give to each of my grand-

Jan. 27. 1852. daughters (except the eldest at the time) who shall survive me, and the heirs of their bodies £4000 sterling, over and above the sum of £1000 sterling which I have appointed for them by my preceding deed; and which sum of £4000 sterling shall bear interest to each of them, from the failure of my said grandson and his said heirs."

Cuming's
Trustees v.
Boswell, &c.

Mr Cuming, the testator, died on 27th March 1790, predeceased by his son Thomas, who was his only child, and survived by several grandchildren,—among others by George Cuming, mentioned in the settlement. George Cuming attained majority on the 21st May 1799; but the trustees did not denude in his favour, and the annual proceeds of the estate which accrued during his minority, they dealt with as forming part of the residue of the estate. Such as accrued subsequent to his majority they dealt with as proper executry funds. A considerable portion of the trust-estate consisted of stock in the Bank of England and in the Bank of Scotland. In 1799, certain bonuses were declared by the Bank of England and Bank of Scotland upon their respective stocks. In March 1801, and September 1802, being subsequent to the majority of George Cuming, and previous to his death, further bonuses were declared by the Bank of England upon their stock.

George Cuming died unmarried and intestate on the 30th of April 1811. He was survived by five sisters, of whom the Honourable Mrs Leslie Cuming was the eldest; another married Sir Alexander Boswell of Auchinleck. By contract of marriage, Lady Boswell assigned to her husband all sums of money pertaining to her, or to which she was entitled, and the contract contained no exclusion of the *jus mariti*.

After George Cuming's death, the trustees, considering that the succession had opened to Mrs Leslie Cuming as the eldest heir-female, after paying the legacies, continued to hold the remainder of the trust-estate on her behalf. In 1830, they raised the present process of multiplepoinding for distribution and investment of the trust-funds, and in the course of the proceedings they, under the authority of the Court, invested £78,000 of the residue of the trust-funds in the purchase of the estate of Skeldon in Ayrshire, which has been settled under the fettters of a deed of entail, approved by the Court, upon Mrs Leslie Cuming, and certain other descendants of Thomas Cuming, in their order. That deed of entail contains clauses prohibiting alienation and alteration of the order of succession, all fenced

with proper irritant and resolutive clauses applicable thereto, Jan. 27. 1852.
but it contains no clause prohibiting the contraction of debt, or
burdening the lands with the same.

In this process of multiplepoinding, Lady Boswell—her husband having previously died—was called as a party; and disputes having arisen regarding her share of the estate, it was consigned in the bank for behoof of whomsoever should be found to have right to it. In virtue of the late Sir Alexander Boswell's vested interest in the estate, the executry funds in the estate accruing to Lady Boswell, as executor of her brother, were now claimed by Mrs Boswell, as executrix-nominate of her husband, who was executor-creditor of the late Sir Alexander Boswell. She claimed to be preferred over the fund *in medio*, either, *first*, to the extent of one-fifth share of the whole residue of the trust-estate, in the hands of the raisers at the death of George Cuming, in 1811—at least of such portion of the residue as was not heritable—and of one-fifth of the proceeds of what may have been heritable, with the accruing interest and accumulation thereof; or, *second*, and at all events, assuming the residue to have been destined to the eldest daughter of Thomas Cuming, to one-fifth of the annual profits and proceeds of the trust-estate, which had accrued during the whole period of George Cuming's life, including the period of his minority, as also of the bonuses on the bank stock, declared by the banks in 1799, as well as in 1801 and 1802, in so far as the same were not accounted for to George Cuming by the raisers.

To this claim, Cuming's trustees objected, maintaining that the whole residue of the property descended to Mrs Leslie Cuming; and that the executors were entitled to no share of the surplus profits of the estate or of the bonuses, except such as accrued subsequent to George Cuming's death.

A record having been made up with minutes of debate, the Lord Ordinary (Robertson) found, in terms of the second branch of Mrs Boswell's claim, but “Repels the first branch of her claim to a fifth share of the residue; and finds that the expenses hitherto incurred by both parties in this competition, must be paid out of the fund *in medio*.”

Against this interlocutor reclaiming notes were presented by James Ogilvy, accountant in Edinburgh, as Cuming's surviving trustee, in so far as regards the finding favourable in part to the claim of Mrs Boswell; and by Mrs Boswell, in so far as it repels the first branch of her claim.

Neaves and Dean of Faculty for Mrs Boswell. The residue

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Jan. 27. 1852. of the trust-estate vested absolutely in George Cuming, upon his
 attaining majority, and so descended to his legal representatives.
 Cuming's Trustees v. Boswell, &c. It was not destined to the eldest surviving sister, excepting in the event of George Cuming predeceasing majority without issue. The codicil is not a total revocation of the trust-deed, or of the previous destination. The question here regards the destination of an estate, consisting almost entirely of moveable or personal estate and funds. In such a case, the legal presumption is for conditional institution, and against substitution. To create a tailzied fee, clear directions must be given to that effect. Here, the tailzied substitution has not been clearly provided for, and therefore cannot be legally acted on. There is also a defect in respect of the absence of all direction or express power given to the trustees, to employ the trust-funds in the purchase of lands to be entailed; *Glasgow's Trustees v. Allan*, House of Lords, Sept. 1, 1835; *Ramsay v. Ramsay*, 23d Nov. 1838, 1 D. B. M. 83. Therefore, the deeds of settlement in this case are so expressed, that any intention of the truster as to substitution cannot be effectuated through defective direction.

Hector and Inglis for Cuming's trustee. This is entirely a question of *voluntas testatoris*. The residue was destined to the eldest daughter on the death of George Cuming without heirs. The truster does not say that it shall be a condition of the daughter's succession, that George Cuming shall die before majority. On extinction of that *stirps* the daughters come in—the intention of the truster being to send down his whole estate in one line of succession. The heirs of Thomas are to take as heirs of provision. The truster's intention has been clearly indicated; and this intention cannot be defeated on the pleas stated, or on the ground that the truster did not direct a strict entail in terms of the Act 1685. The claimant's views are opposed to the principles recognised in the case of *Ramsay v. Ramsay*, 1 D. B. M. 38.

The LORD PRESIDENT. The construction put upon the trust-deed by Mrs Boswell cannot be listened to. There are no words from which we can extract the meaning that the truster left the estate in fee-simple. No doubt, it is clear that, at first, he contemplated his grandson, George Cuming, as his heir, and had in view, in case of his failure, the division of the estate among his grand-daughters; but in the second deed he clearly declares what his settled purpose was, that having made provision for the descent of the estate, each of the females shall take it in their order, excluding heirs-portioners. This is the true and just construction of the deed.

LORD FULLERTON came to the same conclusion. Taking the ^{Jan. 27. 1852.} deeds together, there can be no doubt that the intention of the ^{Cumming's} ~~trustor~~ was to substitute the daughters, failing his grandson, ^{Trustees v.} ~~Boswell, &c.~~ George Cumming. But had the question arisen under the first deed, it would have been very puzzling. It is very clear that the trustor had two things in view,—the period at which the trustees were called on to denude, and the proper substitution in the deed. The trustees are called on to denude on the heir attaining majority, no doubt with such conditions as would not alter the succession. But in the trust-deed, there are words to warrant the conclusion that George Cumming was to have the estate in fee-simple. The destination, failing George Cumming, is to be read not as a substitution which goes first to George Cumming, and second to the daughters, but as a fee-simple destination; and the terms of the deed itself afford strong grounds for holding that it must be explained in this way. It is true that by the subsequent codicil, the trustor did not mean to make an alteration of his former settlement except only as regards the succession of the eldest daughter, because he had put a particular construction on the former deed, which he had already clearly expressed. But it is not made a condition of the eldest daughter's succession, that George Cumming should die in minority. We cannot, therefore, on a nice construction of words, go to another conclusion different from that which the testator has clearly expressed in his instructions to his trustees.

LORD CUNNINGHAME concurred that the succession to the general residue properly descended to the eldest daughter.

LORD IVORY had some hesitation in adopting the views of the other Judges. He was struck with the construction of the first deed, which seems to contain directions to the trustees to denude in three events—on George Cumming arriving at majority; whom failing, on any other heir-male arriving at majority; whom failing, then in favour of the trustor's grand-daughter. If the case had stood there, he would have had a strong impression that this was not a substitution in any sense; and the codicils do not clearly favour the argument in favour of substitution. But his difficulty on the subject was not such as he was prepared to urge against the views adopted by the Court.

On this point, therefore, the COURT adhered to the Lord Ordinary's interlocutor.

G. and G. Dunlop, W.S., Agents for Mrs Cumming.

Gibson and Hector, W.S., Agents for Cumming's Trustees.

John W. Mackenzie, W.S., Agent for Mrs Boswell.

FIRST DIVISION.

No. 146. CUMING'S TRUSTEES v. BOSWELL and OTHERS.—PART II.

A. directed his trustees to lay out and use the residue of his estate for the use and behoof of B. till he should attain majority, after which they should denude, with such conditions as should prevent the succession being altered. B. succeeded to the estate on his majority, but the trustees did not denude. He died intestate and without issue: *Held*, in accounting with B.'s executors, 1st, That in the absence of directions to accumulate, the accruing profits during B.'s minority vested in him, and, so far as not accounted for to him, descended to his executors. 2d, That bonuses declared on stock forming part of the trust estate was not capital, but likewise vested in B. *Observed*, that in a case of this kind the time when such bonuses are exigible is what the Court will take in view.

Jan. 27. 1852. Under this second branch of the multiplepoinding and exoneration, raised at the instance of Cuming's trustees against his legatees, (*ante*, p. 314) the questions which arose were, 1st, to whom belonged the right to the surplus profits of the estate accruing during the period between the death of the testator and the majority of the first heir called to the succession; and, 2d, Whether certain bonuses declared prior to the heir's majority vested in the heir, and so descended to his executors and representatives, or whether they merged in the general residue of the estate.

Mr James Ogilvy, the only surviving trustee, has in his hands a large sum of money, being the balance of the trust-estate. The Lord Ordinary (Robertson) having pronounced an interlocutor finding Mrs Boswell entitled to a fifth share of the surplus proceeds of the estate, including bonuses on bank stock, in terms of the second branches of her claim, a reclaiming note against this interlocutor was thereafter presented by Mrs Leslie Cuming, craving leave to make appearance in the process, and to be heard for her interest, and to find her entitled to the whole surplus proceeds of the estate, as institute of the entail under the deed of settlement. Her claim was founded on sec. 43 of the Entail Act, 11 and 12 Vict. c. 36, which, she pleaded, entitled her to receive and dispose of the balance of the funds, directed by the trust-deed to be invested in land, and settled on the heirs therein named, in respect of the defect in the prohibitions directed to be inserted in the entail appointed to be executed by the trustees. Any defect in the prohibitory clauses of the entail, the act provides renders the entail invalid as regards all prohibitions, "and where any money or other property, real or personal, has been or shall be

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Cuming's  
'Trustees v.  
Boswell, &c.

invested in trust for the purpose of purchasing lands to be entailed, such trust money or other property, . . . though still unentailed, may be dealt with under this act, in all respects as if entailed, in terms of such trust or directions." Jan. 27. 1852.  
Cumings  
Trustees v.  
Boswell, &c.

*Macfarlane and Inglis* (with whom *P. Fraser*) for Mrs Cumings.

1. The profits accruing during George Cumings minority fall to be dealt with as residue, and, as such, belong to Mrs Cumings, under the Act of Parliament, in the same manner as if there had been no prohibitions contained in the deed of trust. The question regarding their application is limited to this, whether they vested in him by virtue of the particular provisions of the deed. There was no direction or power given to the trustees to make an entail or conveyance to take effect in favour of George Cumings, nor to vest in him any right until he should attain majority. The estate was not to pertain to any heir, but to the trustees as such. Before majority, therefore, he is an heir expectant, but he may never get the estate. His attaining majority is his title to the succession. It is therefore impossible to say that, by virtue of the deed itself, he has right to the entire income of the estate. Between all previous cases and the present, there is this distinction, that in none of them had the testators fixed a postponed period—such as the majority of an heir—for the trustees denuding. Lord Jeffrey's opinion in *Howat*, 16 S., p. 627.

2. The point regarding the right to the bonuses accruing during George Cumings minority arises on the assumption that he was entitled to the income of the estate before majority. What was his position before majority? He was neither liferenter nor fier—he was merely entitled to the income of the estate. Therefore, is a bonus part of the income of the estate? It is not; *Rollo*, Dict. 8282. Besides, the stocks stood in the name of the trustees when the profits in question were realized. At the dates of declaring the dividends, it was uncertain in favour of whom, as institute, they might be called on to denude. George Cumming was not then, either actually or constructively, the holder of the bank-stock, and therefore neither ordinary nor extraordinary profits could have been claimed by him as the funds or profits of the stock; they belong to the residue.

*Neaves and Dean of Faculty* for Mrs Boswell. The proceeds of the estate, which accrued prior to George Cumings majority, did not form residue, but vested in him, and, in so far as not accounted for, now belong to his representatives. The trustees

Jan. 27. 1852. had power to invest such surplus temporarily, but always for the use and behoof of the beneficiary. It was not directed to be thrown into his estate for general investment; and without express directions to that effect it could not be accumulated and included within the trustee's instructions as to the permanent investment of the estate; *Lord Stair*, 2, W. and S. 614; *Cumming's Trustees v. Campbell*, May 17. 1836, 14 S. 770; *Howat's Trustees v. Howat*, Feb. 17. 1838, 16 S. 622; *Turnbull's Trustees*, June 13. 1845, 7 D. 872, House of Lords, 16th March 1848, Scottish Jurist, vol. xx. p. 346.

2. The bonuses on the bank stock, in like manner, belong in absolute right to George Cumming, and in so far as not accounted for to him, the same was *in bonis* of him at his death, and fall to his next of kin and executors. It is admitted that the bonuses payable after the date of his majority, vested in him, because he was then fair of the estate; but, during his minority, he was equally fair of the estate. As regards the nature of his beneficiary right, there was no real difference between the one period of his possession and the other. In 1811, Mrs Leslie Cumming was found entitled to a bonus then declared, not as *liferentrix*, but as fair; *Cumming's Trustees*, Feb. 26. 1824, F. C. and 2 S. 743; and the same principle now applies. Bonuses are of the nature of an extraordinary dividend; they do not form part of the capital stock of the estate. See also *Thomson v. Lyall*, 18th Nov. 1836, 15 S. 33. Therefore, the whole bonuses are to be regarded as having vested in George Cumming at his death, and now fall to be accounted for to his executors.

THE LORD PRESIDENT was of opinion that on both of these points the interlocutor of the Lord Ordinary sustaining Mrs Boswell's claim was well founded. Accumulation was not directed by this deed. It is impossible to draw a distinction between the case of *Turnbull* and that now before us. Again, the bonuses were not payable till a certain time within George Cumming's majority. They clearly vested in him, and so belong to his executors. The fixing of the bonus is nothing; it is the time they are payable we must look to.

THE LORD FULLERTON also adopted the same views on these points. It is quite clear that, holding the residue for George Cumming's use and behoof, the trustees were bound to apply the fruits and profits of the residue for his benefit. The case of *Turnbull*, shews that, without directions to that effect, there is no power of accumulation. Now, a strong part of this case is, that there is an express direction

to the trustees to hold the residue for the use and behoof of George Cuming. If George Cuming had demanded from these trustees an account of the sums which they derived from the revenue during his minority, he must have got it; nay, further, if he had had tutors and curators, they would have been entitled every year to demand an account from the trustees of the estate which they were holding for behoof of the pupil. The *residue*, therefore, of which the trustees were to denude did not comprehend accumulated profits.

Again, George Cuming cannot be held to be a liferenter of the estate. The bonuses must be held to have vested in George Cuming, and, therefore, the Lord Ordinary's interlocutor was well founded.

LORD CUNINGHAME was very clearly of opinion, that the interlocutor of the Lord Ordinary was well founded. The Lord Ordinary finds that the *bonuses* declared on certain valuable shares of bank stock, shortly before his majority, but not payable till after that event, belong to the execruty of George Cuming. This is the converse of the case of *Thomson* and *Lyall* in 1836, (15 Shaw, p. 32,) and necessarily follows from it. In that case, it was found that bonuses declared during the holder's life, but payable at a term after his death, never vested in the deceased, but transmitted to his successors in the stock. But here George Cuming survived, and was major before the term of payment; and he has the same right (as a limited heir) to draw the *bonuses*, which the Court found due to his sister, the claimer, in 1824, 2 Shaw, 743. That decision the Court cannot go back on.

LORD IVORY was of the same mind as the other Judges. In the absence of all directions as to accumulating profits they cannot be held as part of the residue; and with regard to the bonuses, the case of *Lyall* and *Thomson* was of the same kind as the present. The bonuses must therefore be held to have vested in George Cuming.

The COURT therefore refused the reclaiming notes, and remitted back to the Lord Ordinary to proceed further in the cause as may be just; and found that the additional expenses incurred by the parties in this competition must be paid out of the fund *in medio*, and remit to the Auditor, &c.

*Gibson & Hector, W.S., Agents for Cuming's Trustee.*

*J. W. Mackenzie, W.S., Agent for Mrs Boswell.*

*G. & G. Dunlop, W.S., Agents for the Hon. Mrs Leslie Cuming.*

## FIRST DIVISION.

## No. 147. GRAHAM and OTHERS v. CAMBUSLANG and MUIRKIRK ROAD TRUSTEES.

*Road trusts—Bonded creditors.*—Where two road trusts had existed under separate statutes and separate boards of trustees, but were afterwards consolidated by a subsequent statute and managed by one board:—*Held* that the creditors whose loans were secured over the roads authorised to be made by one of the statutes, were entitled to rank as creditors upon the funds arising from the united trust, and to rank *pari passu* with other creditors whose bonds were granted subsequent to the date of the said statute, and that the latter could have no preference. *Held*, also, that the former were entitled to resist the lowering of toll-duties, and the removal of toll-gates.

Jan. 27. 1852. In this case certain creditors upon the Muirkirk and Cambuslang roads sought to suspend and interdict a resolution of the trustees of the Cambuslang and Muirkirk roads, by which it was proposed to pay off certain debts due to the parties therein mentioned, viz. Mr Pollock and Lady Pulteney, secured over the tolls, in preference to the suspenders and others, as also to lower certain of the toll-duties, and remove certain of the toll-gates.

*Sandford* was for the suspenders. The *Solicitor-General* (with whom *T. Mackenzie*) for the respondents.

The nature of the case will be sufficiently seen from the following abridgment of the opinions of the Court.

The statute applicable to the Cambuslang road was passed in 1774, and that applicable to the Muirkirk road in 1789. But in 1791, it was thought advisable, in consequence of the intimate connection of the two lines of road, to apply for a new statute to unite them under one trust, and one system of management; and in that year, an Act was accordingly passed, under the authority and powers of which the roads have since been managed. It did not appear that there had been any disturbance of the proceedings of the trustees, or any objection to their acts, till 1845, when the resolution which was the subject of the present process, was adopted by them, on the recommendation of a committee of their number. That resolution involves two points. *First*, The payment at once of the debts due to Mr Pollock and Lady Pulteney, as the only debts affecting the tolls of the line of road called the Cambuslang Road; the third debt originally mentioned in the report, that to the city of Glasgow, not being now insisted on; and, *secondly*, The diminution or total removal of certain tolls

on that line of road, in the immediate neighbourhood of Glasgow, Jan. 27. 1852.  
and forming, if not the most valuable, at least a very valuable part of its proceeds; and both of those proposed measures rest on the assumption that the only debts affecting those tolls are the debts already referred to; while the suspenders are said to have an interest in the tolls on the Cambuslang line, and are confined to the returns from the line known by the name of the Muirkirk road.

Graham, &c:  
v. Cambuslang  
Road Trustees.

Prior to the passing of the Act 1791, the two roads, designed as those of Cambuslang and Muirkirk, had been managed under separate statutory trusts. That applicable to the Cambuslang road was passed in 1774, and the other applicable to the Muirkirk road in 1789. The first of these statutes contained various other lines not involved in the present discussion, with power to borrow money for these different lines, and the power of borrowing, in regard to the road from Gorbals to the Chapel of Cambuslang, was limited to L.300. The second statute, that of 1789, related to the road leading from the city of Glasgow by the Kirk Tower of Kilbride, &c. to Muirkirk, in the county of Ayr. For this road the trustees were empowered to borrow to the extent of L.6500, and to secure subscriptions, which subscriptions were "to be repaid out of the monies allowed to be borrowed by this Act, and out of the monies arising from the tolls and duties by this Act imposed;" and the subscription money so advanced was declared to be a preferable charge on the said tolls and duties.

It was said that the present case mainly depended on the 10th and 12th sections of the Act 1791, the respondents maintaining that these sections confer the preference and special appropriation assumed in the report sought to be suspended, while that construction was denied by the suspenders.

The 10th section provides, that the tolls to be levied on the road from the city of Glasgow by the Chapel of Cambuslang to Burnbank, shall not exceed those authorised by the Act of the 14th of Geo. III., being the Act 1774, which tolls so to be levied shall, in the first place, be applicable to the payment of the debts already contracted for the making and repairing the said road and branches thereof, and to the making of the road from the Chapel of Cambuslang to Burnbank, and likewise to the making and repairing certain side-roads, which do not affect the present discussion. And the concluding part of this section directs that the residue of the said tolls "shall be applied and appropriated as a

Jan. 27. 1852. fund for defraying the expense of making and repairing the afore-  
 ↙ said principal line of road from Rutherglen to Kilbride, Strath-  
 Graham, &c.  
 e. Cambuslang aven, and Muirkirk, being the line known in the discussion by the  
 Road Trustees. designation of the Muirkirk road."

The 12th section regards the increased amount of debt which the trustees were entitled to contract, and the security to be granted for such debt. In addition to the sums of £6500 and £300, which the trustees were empowered to borrow for the road leading from Glasgow to Muirkirk, "they are hereby authorised and empowered to borrow any sum or sums of money, not exceeding the sum of L.13,000, (including the said sums of L.6500 and L.300, allowed by the said former acts), at an interest not exceeding L.5 per centum per annum, and to assign over the tolls and duties arising by virtue of this present Act, or any part thereof, *as a security for repayment of the sum or sums to be borrowed*, and the interest thereof, to the person or persons advancing or lending the same, jointly with those who advanced money for making the said roads after the former Acts were passed; which money so to be borrowed shall be applied and disposed of in the same way as the tolls and duties are by the former Act, and this present Act, authorised to be levied and disposed of,—notice of the intention to borrow such money being always made in the terms prescribed by the said Act of the 29th of his present Majesty."

The sound construction of this section was held to be destructive of the case of the respondents, its effect being clearly to mass together the whole debts, whether contracted prior or posterior to the statute, and without regard to the line of road on which the money may have been expended, and to confer on those debts the security of the tolls on both the lines of road. The preference of the two bonds in question cannot be sustained, in virtue of the act 1791; and the respective rights of parties under that statute have not been in any degree altered by those subsequently passed. Even on the most unfavourable view for the suspenders, the creditors on the Muirkirk line certainly have an interest in the *residue* of the tolls, by the concluding passage of the 10th section of the Act. Even supposing that, by some very strained reading, this should be held to imply the *residue* after the debts contracted under the new statute were paid; the suspenders would still have a clear interest in the residue which is to be applied as a fund for defraying the expenses of making and repairing the Muirkirk line. But that interest is quite sufficient to entitle them

to oppose the removal of the very tolls from which that residue is Jan. 27. 1852.  
to be derived.

The Lord Ordinary (Ivory) found in favour of the suspenders,  
and the Court adhered.

Graham, &c.  
*v. Cambuslang Road Trustees.*

*Patrick Graham, W.S., Agent for the Suspenders.*

*M-Lean and Martin, W.S., Agents for the Respondents.*

## SECOND DIVISION.

CULLEN *v.* DYKES.

No. 148.

*Agent Disburser—Title to Pursue—Liability of Cautioner for Messenger.*—  
An agent disburser, in whose name decree has gone out for expenses in an action against a messenger who has done irregular diligence, and against the party at whose instance the diligence was done, is entitled to recover from the cautioner of the messenger.

The defender (Dykes) was cautioner for Lockhart Baird, a Jan. 27. 1852.  
messenger and Sheriff-officer. The bond of caution binds Dykes  
as cautioner and surety that Baird shall *truly and honestly exercise* Cullen v.  
the office of a Sheriff-officer to all and sundry his Majesty's lieges  
who might employ him in the said office; and if he fail therein,  
the cautioner binds and obliges himself to pay to *the person or persons wronged*, all skaith, damages, and expenses, which he or they  
may happen to sustain through the negligence, fraud, or informal  
executions of the said Lockhart Baird.

Robert Struthers, creditor in a bill for L.20, accepted by M'Cluskie, employed Baird to charge M'Cluskie, and thereafter to execute a poinding. Baird returned an execution that appears to have been correct; but, in the copy charge served upon M'Cluskie, there was the blunder that *James* Struthers, instead of *Robert* Struthers, was inserted as the creditor's name.

This gave rise to various judicial proceedings. In particular, M'Cluskie brought a suspension, and afterwards an action of reduction-improbation, and damages; in the latter of which he called, as defenders, Struthers and Baird, and concluded for reduction of the execution and of the diligence, and warrants thereof, and for damages. These actions were conjoined.

In 1837 Baird died; and the action having been transferred against his representatives, who denied representation, decree *cognitionis causa* was taken. The action proceeded, however, against Struthers; and an issue was adjusted, and sent to trial. The jury returned a verdict for the defender (Struthers), in oppo-

Jan. 27. 1852. fund for defraying the expense of making and repairing the afore-  
 ↙ said principal line of road from Rutherglen to Kilbride, Strath-  
 o. Cambuslang aven, and Muirkirk, being the line known in the discussion by the  
 Road Trustees. designation of the Muirkirk road."

The 12th section regards the increased amount of debt which the trustees were entitled to contract, and the security to be granted for such debt. In addition to the sums of £6500 and £300, which the trustees were empowered to borrow for the road leading from Glasgow to Muirkirk, "they are hereby authorised and empowered to borrow any sum or sums of money, not exceeding the sum of L.13,000, (including the said sums of L.6500 and L.300, allowed by the said former acts), at an interest not exceeding L.5 per centum per annum, and to assign over the tolls and duties arising by virtue of this present Act, or any part thereof, *as a security for repayment of the sum or sums to be borrowed*, and the interest thereof, to the person or persons advancing or lending the same, jointly with those who advanced money for making the said roads after the former Acts were passed; which money so to be borrowed shall be applied and disposed of in the same way as the tolls and duties are by the former Act, and this present Act, authorised to be levied and disposed of,—notice of the intention to borrow such money being always made in the terms prescribed by the said Act of the 29th of his present Majesty."

The sound construction of this section was held to be destructive of the case of the respondents, its effect being clearly to mass together the whole debts, whether contracted prior or posterior to the statute, and without regard to the line of road on which the money may have been expended, and to confer on those debts the security of the tolls on both the lines of road. The preference of the two bonds in question cannot be sustained, in virtue of the act 1791; and the respective rights of parties under that statute have not been in any degree altered by those subsequently passed. Even on the most unfavourable view for the suspenders, the creditors on the Muirkirk line certainly have an interest in the *residue* of the tolls, by the concluding passage of the 10th section of the Act. Even supposing that, by some very strained reading, this should be held to imply the *residue* after the debts contracted under the new statute were paid; the suspenders would still have a clear interest in the residue which is to be applied as a fund for defraying the expenses of making and repairing the Muirkirk line. But that interest is quite sufficient to entitle them

to oppose the removal of the very tolls from which that residue is Jan. 27. 1852.  
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The Lord Ordinary (Ivory) found in favour of the suspenders,  
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Graham, &c.  
v. Cambuslang  
Road Trustees.

*Patrick Graham, W.S., Agent for the Suspenders.*  
*M-Lean and Martin, W.S., Agents for the Respondents.*

## SECOND DIVISION.

CULLEN v. DYKES.

No. 148.

*Agent Disburser—Title to Purse—Liability of Cautioner for Messenger.—*  
An agent disburser, in whose name decree has gone out for expenses in an action against a messenger who has done irregular diligence, and against the party at whose instance the diligence was done, is entitled to recover from the cautioner of the messenger.

The defender (Dykes) was cautioner for Lockhart Baird, a Jan. 27. 1852.  
messenger and Sheriff-officer. The bond of caution binds Dykes  
as cautioner and surety that Baird shall *truly and honestly exercise* Cullen v.  
the office of a Sheriff-officer to all and sundry his Majesty's lieges  
who might employ him in the said office; and if he fail therein,  
the cautioner binds and obliges himself to pay to *the person or persons wronged*, all skaith, damages, and expenses, which he or they  
may happen to sustain through the negligence, fraud, or informal  
executions of the said Lockhart Baird.

Robert Struthers, creditor in a bill for L.20, accepted by M'Claskie, employed Baird to charge M'Claskie, and thereafter to execute a poinding. Baird returned an execution that appears to have been correct; but, in the copy charge served upon M'Claskie, there was the blunder that *James* Struthers, instead of *Robert* Struthers, was inserted as the creditor's name.

This gave rise to various judicial proceedings. In particular, M'Claskie brought a suspension, and afterwards an action of reduction-improbation, and damages; in the latter of which he called, as defenders, Struthers and Baird, and concluded for reduction of the execution and of the diligence, and warrants thereof, and for damages. These actions were conjoined.

In 1837 Baird died; and the action having been transferred against his representatives, who denied representation, decree *cognitionis causa* was taken. The action proceeded, however, against Struthers; and an issue was adjusted, and sent to trial. The jury returned a verdict for the defender (Struthers), in oppo-

Jan. 27. 1862. fund for defraying the expense of making and repairing the afore-  
~~~~~ said principal line of road from Rutherglen to Kilbride, Strath-  
Graham, &c. Cambuslang aven, and Muirkirk, being the line known in the discussion by the
Road Trustees. designation of the Muirkirk road."

The 12th section regards the increased amount of debt which the trustees were entitled to contract, and the security to be granted for such debt. In addition to the sums of £6500 and £300, which the trustees were empowered to borrow for the road leading from Glasgow to Muirkirk, "they are hereby authorised and empowered to borrow any sum or sums of money, not exceeding the sum of L.13,000, (including the said sums of L.6500 and L.300, allowed by the said former acts), at an interest not exceeding L.5 per centum per annum, and to assign over the tolls and duties arising by virtue of this present Act, or any part thereof, *as a security for repayment of the sum or sums to be borrowed*, and the interest thereof, to the person or persons advancing or lending the same, jointly with those who advanced money for making the said roads after the former Acts were passed; which money so to be borrowed shall be applied and disposed of in the same way as the tolls and duties are by the former Act, and this present Act, authorised to be levied and disposed of,—notice of the intention to borrow such money being always made in the terms prescribed by the said Act of the 29th of his present Majesty."

The sound construction of this section was held to be destructive of the case of the respondents, its effect being clearly to mass together the whole debts, whether contracted prior or posterior to the statute, and without regard to the line of road on which the money may have been expended, and to confer on those debts the security of the tolls on both the lines of road. The preference of the two bonds in question cannot be sustained, in virtue of the act 1791; and the respective rights of parties under that statute have not been in any degree altered by those subsequently passed. Even on the most unfavourable view for the suspenders, the creditors on the Muirkirk line certainly have an interest in the *residue* of the tolls, by the concluding passage of the 10th section of the Act. Even supposing that, by some very strained reading, this should be held to imply the *residue* after the debts contracted under the new statute were paid; the suspenders would still have a clear interest in the residue which is to be applied as a fund for defraying the expenses of making and repairing the Muirkirk line. But that interest is quite sufficient to entitle them

to oppose the removal of the very tolls from which that residue is Jan. 27. 1852.
to be derived.

The Lord Ordinary (Ivory) found in favour of the suspenders,
and the COURT adhered.

Patrick Graham, W.S., Agent for the Suspenders.

M·Lean and Martin, W.S., Agents for the Respondents.

Graham, &c.
v. Cambuslang
Road Trustees.

SECOND DIVISION.

CULLEN v. DYKES.

No. 148.

Agent Disburser—Title to Pursue—Liability of Cautioner for Messenger.—
An agent disburser, in whose name decree has gone out for expenses in an action against a messenger who has done irregular diligence, and against the party at whose instance the diligence was done, is entitled to recover from the cautioner of the messenger.

The defender (Dykes) was cautioner for Lockhart Baird, a Jan. 27. 1852.
messenger and Sheriff-officer. The bond of caution binds Dykes Cullen v.
as cautioner and surety that Baird shall *truly and honestly exercise* Dykes.
the office of a Sheriff-officer to all and sundry his Majesty's lieges who might employ him in the said office; and if he fail therein, the cautioner binds and obliges himself to pay to *the person or persons wronged*, all skaith, damages, and expenses, which he or they may happen to sustain through the negligence, fraud, or informal executions of the said Lockhart Baird.

Robert Struthers, creditor in a bill for L.20, accepted by M'Coskie, employed Baird to charge M'Coskie, and thereafter to execute a poinding. Baird returned an execution that appears to have been correct; but, in the copy charge served upon M'Coskie, there was the blunder that James Struthers, instead of Robert Struthers, was inserted as the creditor's name.

This gave rise to various judicial proceedings. In particular, M'Coskie brought a suspension, and afterwards an action of reduction-improbation, and damages; in the latter of which he called, as defenders, Struthers and Baird, and concluded for reduction of the execution and of the diligence, and warrants thereof, and for damages. These actions were conjoined.

In 1837 Baird died; and the action having been transferred against his representatives, who denied representation, decree *cognitionis causa* was taken. The action proceeded, however, against Struthers; and an issue was adjusted, and sent to trial. The jury returned a verdict for the defender (Struthers), in oppo-

Jan. 27. 1852. *cree* is for the expenses of a litigation to set aside the diligence of a messenger, for whose acts the claimer was cautioner, and that such expenses, not being open to inquiry as to amount when taxed, the right of the agent disburser for the amount of the same against the cautioner liable for the same as a fixed sum is, in regard to such plea of set off, to be taken as co-extensive with the claim under such a decree against the defender in the original cause, or as against a cautioner for the expenses of process. Therefore repel this claim of deduction as not competent against the right of the respondent, under the decree he has obtained in his own name and for his own behoof, to the said amount of expenses as agent disburser thereof; and with this finding remit to the Lord Ordinary to proceed farther under his Lordship's interlocutor.

John Cullen, W.S., Pursner's Agent.

Lockhart, Morton, Whitehead, and Greig, W.S., Agents for Defender.

OUTER-HOUSE.

BEFORE LORD COLONSAY.

No. 149. **HENDERSON, (Donatary of the Crown) v. THOMSON or BLACKWOOD and HUSBAND.**

Process—Statute 13 and 14 Vict. c. 36—New trial—Application of verdict—Power of Lord Ordinary.

Vide ante, p. 264.

Jan. 28. 1852. A verdict having been returned in favour of the pursuer, the defenders enrolled the case before Lord Colonsay for a rule upon *Henderson v. Thomson, &c.* the pursuer to shew cause why a new trial should not be granted.

LORD COLONSAY. This is quite a novel application so far as I know, being made to a Lord Ordinary. Certainly such matters invariably came before the Inner-House before the new statute, and the defenders will require to shew me that that statute confers power on a Lord Ordinary who tries a case to entertain and dispose of such a motion.

Ross for the defenders, stated that the new statute authorised the Lord Ordinary to try cases by jury, and he submitted that by implication, though not in express terms, their Lordships have all the powers necessary for bringing the case to a final conclusion.

Shand and Solicitor-General contra.

LORD COLONSAY. Formerly it is clear that a Lord Ordinary had no such power, and the statute is silent on the subject. I cannot entertain the motion. Jan. 28. 1852.
Henderson v.
Thomson, &c.

On a subsequent enrolment by the pursuer to have the verdict of the Jury applied, as the defenders had abandoned their intention of applying for a new trial, the Lord Ordinary applied the verdict as craved.

J. H. Burnett, W.S., Agent for Pursuer.

Patrick, M'Ewen and Carment, W. S., Agents for Defendants.

SECOND DIVISION.

WEATHERSTON *v.* ROBERTON.

No. 150.

Contract—Extra Work.—By written agreement A. contracted with B., for a certain sum, to form a new pond in his grounds, with an embankment, and mounding, and puddle-dyke, which were to be prepared from the materials excavated in making the pond; but these materials turning out insufficient for the purpose, additional materials and extra work were required. *Held*, in an action at the instance of A., the contractor, that he could make no claim beyond the contract-price, and that, therefore, he could not recover for the extra work.

This was a reduction of a decree of the Sheriff of Roxburgh Jan. 29. 1852.
shire. The facts were these:—The defender Roberton having occasion for an additional supply of water for his thrashing-machine, applied to Mr Andrew Scott, civil engineer, Maxwellheugh, who prepared plans and specifications for the formation of a new pond. For the execution of the work Scott suggested the employment of Weatherston, the pursuer, who addressed the following written offer to Roberton:—“Sir,—I hereby make offer to you to execute the work connected with the new pond at Harper-ton, conform to specifications drawn for the execution of the work by Andrew Scott, C.E., Maxwellheugh, for the sum of £23, 14s.” This offer was accepted by Roberton. The specification set forth the dimensions of the proposed pond, and, in particular, required the formation of an embankment, and mounding, and a puddle-dyke. Before the pursuer made his offer, the ground on which the pond was to be formed was staked out, and was examined and measured by him and Mr Scott, and the quantity of solid to be excavated, and the earth and puddle requisite for forming the embankment, and mounding and puddle-dyke, were calculated

Jan. 29. 1852. to sustain this claim for extra work. The correct note of the Sheriff-Depute disposes most satisfactorily of the whole case.
 Weatherston v. Robertson.

The other Judges concurred.

The Court pronounced an interlocutor, by which they "Find in point of law that the claim for extra work cannot be sustained. Of new repel the reasons of reduction, sustain the defences, assoilzie the defender, and decern: Find him entitled to expenses." &c.

James Somerville, S.S.C., Agent for Pursuer.
J. & W. R. Kermack, W. S., Agents for Defender.

OUTER HOUSE.

(Trial before LORD COWAN, without a Jury.)

[*The time for bringing the judgment in the following case under review (eight days) having elapsed, it is now reported as an illustration of a trial under the recent statute by a Lord Ordinary, of consent, without a Jury.]*

No. 151.

M' MILLAN v. LEES.

Trial of an issue by a Lord Ordinary without a Jury—13 and 14 Vict. c. 36, § 46—Form of the judgment.

Jan. 29. 1852. This was an action to recover the amount of an account incurred to a law-agent in Edinburgh, on the employment of a writer in Campbelton, in preparing the defence of a party charged with a criminal offence, for the expenses of which defence the defender had become guaranteee. Since the raising of the action, M' Millan, the original pursuer, had died, and the case was now prosecuted by his executors. The defender denied the employment of M' Millan, and pleaded that at all events the account sued on was exorbitant. One of the items objected to was the expense of a visit by M' Millan, to Ayrshire, with the view of raising money to meet the expenses of the criminal trial from a relation of the accused.

M' Millan v. Lees.

The Lord Ordinary (Cowan) appointed the cause to be tried on an issue, as directed by the 46th section of the 13 and 14 Vict., c. 36. A trial accordingly took place before his Lordship. No opening speeches were made by the junior counsel, but the evidence having been led as in the case of a Jury trial, the same was fully commented upon to the Lord Ordinary by the senior counsel on either side, when his Lordship took the case to avizandum, and within eight days thereafter, as provided by the statute, pronounced the following interlocutor:—

Edinburgh, 20th January 1852.—The Lord Ordinary having tried ^{Jan. 29. 1852.} the cause on Wednesday the 14th of January 1852, as appointed by the preceding interlocutor, and having considered the written evidence and depositions of the witnesses adduced for the pursuer and the defender respectively, and the argument of the counsel for the parties: Finds, in point of fact, that the defender in part directly, and in part by and through Kenneth Matheson, writer in Campbeltown, employed the deceased Edward M'Millan, S.S.C., to perform all the business charged for in the account No. 4 of process, with the exception of the visit to Ayrshire, included in the charges in the said account, under dates 5th, 6th, 9th, 10th, and 11th of April 1850, and finds that the defender is indebted and resting owing to the pursuer, as executor of the said Edward M'Millan, the amount of said account, excepting such part of the charges foresaid as are applicable to said visit to Ayrshire, according as the same shall be taxed by the Auditor of Court; and remits the account to the Auditor to tax and report accordingly.

Tytler and Crawford were for the pursuer.

W. Ivory and Neaves for the defender.

Cormack and M'Millan, W.S., Agents for Pursuer.
Murray and Beith, W.S., Agents for Defendants.

FIRST DIVISION.

BOSWELL v. BOSWELLS.

No. 152.

Deed of Entail—Prohibitory Clause—Erasure—Nullity—Act 11 and 12 Vict c. 36.—In the fencing clause of a deed of entail, part of the word irredeemably having been written on an erasure:—*Held* that the entail was radically defective, and, therefore, that under the Entail Amendment Act, the heir in possession was entitled to dispose of the estate as a fee simple proprietor.

This was an action of declarator brought at the instance of Sir James Boswell of Auchinleck, Baronet, to have it found and declared that the entail of Auchinleck is defective on the ground of erasure *in essentialibus*, as regards the prohibition against sales, and that he is entitled to sell the estates, and dispose of them in the same manner as a fee simple proprietor.

The action was founded upon sec. 43 of the Entail Amendment Act, 11 and 12 Vict. c. 36, which declares that where an entail is not valid and effectual in reference to one of the prohibitions, it

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Jan. 31. 1852. shall be invalid and ineffectual as regards them all. Accordingly the summons concludes that the prohibition against selling and alienation, being written upon an erasure, is defective, and the entail is therefore at an end ; and it also concludes that two contracts of excambion, which were entered into under the assumption that the entail was valid and binding, should also be found and declared to be ineffectual.

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The pursuer possesses the lands of Auchinleck and others on titles made up by him as heir of tailzie and provision, under a deed of entail executed by Lord Auchinleck, with consent of his son James Boswell, on the 7th of August 1776. This entail was duly recorded in the Register of Tailzies on 21st December 1776, and in the Books of Council and Session on the 5th of March 1777. On the 8th of March 1781, a Deed of Declaration and Alteration was executed by Lord Auchinleck and his son, referring in its narrative to the disposition of tailzie by its date, and the date of registration in both records, and enlarging the powers of the heirs of entail to grant leases. This supplementary deed was also recorded in the lifetime, and on the application of the granter, in the Register of Tailzies on the 10th of March, and in the Books of Council and Session the 9th July 1781. Lord Auchinleck, the entailer, died in 1783. Titles were completed in succession by the institute Mr James Boswell, by his son, the late Sir Alexander Boswell, and by the pursuer, in the years respectively 1784, 1799, and 1835. In the Register of Tailzies and in all the deeds of which this progress consists, the prohibitory, irritant, and resolutive clauses are correctly engrossed, and there is no error or defect in the prohibitory clause against sales or alienations of the estate.

To this summons of declarator defences were lodged by certain of the substitute heirs of entail ; and the record being closed on summons and defences, the Lord Ordinary (Wood), after debate, appointed parties to give in mutual cases, arguing the whole cause.

The alleged defect upon which the pursuer rested his case, was, that the letters " irred" of the word " irredeemably" in the prohibitory clause of the entail, were written on an erasure ; and that this, being *in essentialibus* of the deed, was a vitiation fatal to the validity of the entail. Other erasures were referred to ; but these were disregarded in the pleadings as immaterial. None of the erasures were mentioned in the testing clause. The pursuer pleaded that,

I. The erasure in the word " irredeemably," is one in an essen-

tial word. The clause prohibits the heirs from selling or alienating the estate either ——“eemably or under reversion,” and thus constitutes no effectual prohibition, in respect that there is no ^{Jan. 31. 1852.} ^{Boswell s.} ^{Boswells.} prohibition against *irredeemable* alienation. *Eglinton v. Montgomery*, Feb. 14. 1845; 4. D. B. M., 425; and in House of Lords. See also *Sharpe v. Sharpe*; 1 Sh. and M'L., 594. Lord Brougham's opinion. The only question is, whether or not there is any word that could be inserted in the blank space of such a character as would free the pursuer. The word may have originally stood “redeemably,” which would identify it with the above case of *Eglinton*. There must have been originally in the erased portion of this deed, words different from what exist there now. “Nobody erases for the mere pleasure of the thing.” *Forbes v. Gallie*, March 4. 1847; 9. D. B. M., p. 809.

II. The fact that such an erasure exists, and is not noticed in the testing clause, warrants two conclusions in point of law:—

1. That the erasure must have been made subsequent to the execution of the deed. Balfour's Practicks, p. 371; E. 3. 2. 20; *Reid v. Kedder*, June 24. 1834, 12 S. and D. 781, March 6. 1835; 13 S. and D., 619; Affirmed July 30. 1840, 1 Rob. 183. Lord Brougham's Judgment, p. 209. *Sheppard v. Grant*, Jan. 24. 1844, 6 D. B. M., 464; Affirmed 6 Bell's Ap., 153. The only remedy for marginal additions or erasures is to notice the same in the testing clause. They are thus authenticated and attested as part of the instrument which the granter had subscribed. *Smith v. Rankine*, 13th Feb. 1835; 13 S. and D., 461; Affirmed 30th July 1840; 1 Rob. 173; Stair, 4. 42. 19. *Kedder*, 1 Rob. Ap. p. 220. Lord Chancellor's Judgment.

2. That the invalidity thereby arising, cannot be removed by any extrinsic proof.

(1.) Lord Auchinleck cannot be supposed to have known of the erasure and superinduction, and to have adopted the deed in the terms in which it now stands. No doubt the deed of declaration executed in 1781 refers to the entail as recorded in both registers, but there is no evidence that Lord Auchinleck ever saw the records, or certiorated himself of the fact that it was recorded in the terms in which it there appears. It is enough that these erasures and superinductions are in the deed; and unless authenticated in the deed itself, the legal rule is,

(2.) That the deed must stand or fall by its own support, and that no aid whatever can be obtained from extraneous proof.

Jan. 31. 1852. The nature of a probative writ is inconsistent with the notion of allowing it to be set up by extraneous proof when challenged on the ground of erasure. Act 1540, cap. 117; Act 1579, cap. 8; Act 1583, cap. 175; Act 1681, cap. 5. See also in the case of *Kedder*, the Lord Chancellor's opinion upon this point, and in *Shepherd v. Grant*, Lord Wood's opinion; House of Lords, Bell's Ap., vol. vi., p. 171, Lord Lyndhurst's opinion. The proposition that extrinsic evidence may be allowed to set up an erased deed, receives no support from the case of the *Earl of Strathmore v. Strathmore's Trustees*, 1st February 1837, 15 S. and D. 449; affirmed 30th July 1840, 1 Rob. 189. Here the deed was executed in duplicate, and with certain trivial exceptions, none of the erasures in the one duplicate was to be found in the other. Each duplicate was made a part of the other by the testing clause, and the deed itself therefore proved itself. *Kedder*, 1 Rob. Ap. 210, 212, Lord Brougham's opinion.

III. No act of homologation or adoption, by any heir of entail, can render valid the erased prohibition against alienations in the Auchinleck entail. To form a complete entail the statute requires, *first*, a deed containing three prohibitions and certain fettering clauses; *secondly*, the registration of this deed in a public record; and, *thirdly*, that the conditions of the entail shall be inserted in the titles of each succeeding heir. But the registration, &c. is of no avail if the entail itself is so vitiated and blundered as to amount in law to a legal nullity. The pursuer is not barred by the terms of his own title from taking advantage of the flaw in the entail. *Montgomery v. Eglinton*. See also *Smith*, 13 S. and D. p. 464. The defect, being intrinsic, cannot be cured by homologation, *Macrae v. Macrae*, 22d Nov. 1836, 15 S. and D. 54; see also *Shepherd v. Grant*, 6 D. B. M., opinions of Lord Justice-Clerk and Lord Jeffrey; and, in the House of Lords, of Lord Lyndhurst. Generally, by the act 1685, an entail without a valid prohibition against sales is not effectual against purchasers buying from the heir in possession. And this entail being defective in one-prohibition, the Entail Amendment Act says that "such tailzie shall be deemed and taken to be invalid and ineffectual as regards all the prohibitions," and may be so declared. *Baillie v. Baillie*, 12 D. 1220.

The defenders maintained—

I. The pursuer's right to insist in this action is barred by the state of the title under which he possesses the estate. He cannot competently challenge the entail as being insufficient to strike

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against a sale of the lands, in respect his own title to the estate is Jan. 31. 1852. made up under a prescriptive investiture, embodying a valid and ^{~~~} effectual prohibition against sales, and all the requisite fettering ^{Boswell v.} Boswells. clauses. In most of the cases where actions of declarator of a similar nature have been brought, the objections were applicable not only to the clauses of the original entail, but also to the same clauses as embodied in the titles made up under the entail, *Eglington*, Feb. 14. 1845, 7 N. S. 425; affirmed July 8. 1847.

II. The erasure in part of the word "irredeemably" is immaterial, and cannot affect the validity of the entail. The erasure has evidently been made by the writer for the purpose of correcting a clerical error at the time the deed was engrossed, and before it was executed. It was evidently of a description which could not affect the sense, and must, therefore, be disregarded as immaterial, more especially where followed by a regular progress by charters and sasines, in which the clause is correctly engrossed, for a period of nearly seventy years, down to the present time. Erasures much more important have been disregarded even where there was no aid to be got from any collateral deed. *Wright v. McLeod*, 8th Feb. 1672, M. 11,440; *Lyon v. Earl of Abyne*, 21st Dec. 1709, M. 11,544, Stair, iv. 42, 19; *Gaywood v. McEand*, 19th June 1828, 6 S. and D. 991; *Cassillis v. Kennedy*, 2d June 1831, 9 S. and D. 663; *Morrison v. Cauvin's Trustees*, 30th June 1829, 7 S. and D. 810. At all events, where there is no room to suspect fraud, the Court will only hold *pro non scripto* what is written upon the erasure, even although it should occur in *substantialibus*; and if the remaining part of the clause shews with certainty what is the true meaning of the parties, the instrument will remain effectual. *Kemp*, 2d March 1805, M. 16,949; *Adam*, 12th June 1810, F. C.; *Howden v. Ferrier*, 10th July 1835, 13 S. and D. 1097. This clause, therefore, would prohibit the disposing of lands "either _____ or under reversion." This would operate as a valid prohibition against sales, &c. without any qualification; for it would be impossible to read it as permitting absolute sales, and merely prohibiting sales under reversion. *Morrison v. Cauvin's Trustees*, Lord Newton's dictum.

III. Even supposing the erasure in the prohibitory clause could be deemed material, the acts of Lord Auchinleck, the entailer, in his lifetime, and particularly the reference to the entail, as recorded in the deed of declaration of 1781, are sufficient to exclude the objection stated to the deed in respect of such erasure, and

Jan. 31. 1852. to support it as constituting, along with the deed of declaration, a valid and effectual entail of the lands and estate of Auchinleck. It is conceded that the word "irredeemably" must have stood in the deed as early as on the 21st December 1776, being the date when it was engrossed in the Register of Tailzies. The deed, as a *mortis causa* settlement, was liable to be revoked or altered by Lord Auchinleck at any time during his life, so that it could only take effect at his death. Under the reserved power competent to him, Lord Auchinleck executed the deed of declaration and alteration of the 8th March 1781. Both deeds are recorded in the Register of Entails, the second deed qualifying the first deed, but the first also forming part of this second deed, and being adopted by it, and the whole being intended to take effect only at the grantor's death; the deed of declaration must therefore be read as forming, along with the trust deed, one settlement of entail. Now, it is important that the entail of 1776, before it was registered in the Books of Council and Session, but after it was recorded in the Register of Tailzies, and after the words must have stood as they now appear, remained for some time in the hands of the grantor, before it was delivered by him to the keeper of the records for preservation. The legal presumption, therefore, is that Lord Auchinleck was fully aware of the terms of the prohibitory clause in the entail of 1776. It is not necessary to shew that the alteration or erasure was made in the entail of 1776 before it was executed. Even in the case of deeds *inter vivos*, if it can be shewn that an erasure or alteration has been made, with the knowledge and consent of the grantor, before delivery, no person is entitled to found upon the defect. *Henderson*, 20th Feb. 1802, M. 17,059; *Sutherland*, 1st July 1823, 2 S. and D. 394; *M'Lean*, 20th May 1834, 12 S. and D. 613; *Whitehead*, 19th Feb. 1836, 14 S. and D. 544. The deed of declaration is competent evidence that Lord Auchinleck knew and adopted the contents of the entail of 1776, as it stood upon the record. *Duff v. Earl of Fife*, 17th July 1823. The omission in the testing clause to notice erasures may be supplied by reference to another writing. *Earl of Strathmore v. Sir J. D. Paul and Others*, House of Lords, 30th July 1840; *Kedder*, 1 Rob. Ap., 210, Lord Brougham's opinion. This subsequent deed of declaration being in every respect unexceptionable, it is irrelevant to object improbativeness against the deed thus referred to, and set up by the grantor himself; *Inglis v. Harper*, 18th October 1831, 5 W. and S., 785.

IV. The pursuer is barred from challenging the validity of the

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entail by his own acts and the acts of all the successive heirs of Jan. 31. 1852. entail, whereby they adopted and recognised the entail in the terms in which it has been recorded; E. 3, 8, 99; E. 3, 3, 47. *Boswell v. Boswells.* This doctrine is not affected by the decision in the case of *Shepherd v. Grant*, there being here no attempt to reduce the entail, or declare it wholly invalid as a deed of conveyance, 6 *Bell's Rep.*, 173. The Lord Ordinary (Wood) repelled the defences, and declared in terms of the conclusions of the libel.

The defenders reclaimed, and the case was debated before the Judges of the whole Court in November 1851.

T. Mackenzie and the Solicitor-General appeared for the reclaimers. A deed is not improbatative, although words written on an erasure in an important part of the deed are not noticed in the testing clause; *Bank of Scotland v. Telfer*, M. 16,909. Where a vitiation occurs in an important part of the deed, if it does not go to nullify the deed, parole proof may be allowed in support of it; *Laird of May v. Ross*, 23d February 1667, M. 12,279; *Arrat*, February 1730, M. 12,285; and cases cited by Ersk., 3, 2, 20; Stair, 4, 42, 19, under head "3dly;" *Cumming v. Presbytery of Aberdour*, 18th April 1821, 2 Rob. Ap. 364; *Lockhart v. Hamilton*, 5th March 1706, M. 16,939. The negative prescription has been extended to all actions with regard to heritable rights, Bell's Pr. § 608; Stair, More's Notes, 265, summary of cases to which negative prescription applies; *Paul v. Reid*, 8th February 1814, F.C.; Ross's Leading Cases, 182.

Inglis and Dean of Faculty (with whom P. Fraser) for the respondent. The testing clause gives no information what the word was originally; therefore there is no statutory certainty that there is a prohibition against sales. The testing clause of the deed of declaration in 1781 does not apply to the subscription of the deed of entail executed in 1776. There is therefore no similarity between this case and the case of *Strathmore*. The Record is worth nothing, unless it prove that the maker of the deed read the register. It is quite incompetent to establish a deed by writ or oath. The testing clause is part of the deed, *Johnston v. Coldstream*, 30th June 1843, 5 D., 1297. Thus it is intrinsic proof of the deed, any other mode of proof is extrinsic.

The consulted Judges were of opinion that the erasure was fatal to the entail.

The LORD JUSTICE-CLERK, held that the case of Bourtreehill had fixed that if, in a deed of entail, the prohibitory clause, in-

Jan. 81. 1852. tended to be directed against sales, prohibited them either "redeemably" or under reversion, such prohibition was not directed against absolute alienations—and that, because the word "redeemably" occurred (plainly by a blunder) and not "irredeemably." In the present case, the first portion of the word now standing in the clause "irredeemably" was written on an erasure—"irred," being the very portion of the word which made it different from "redeemably," and which, if correctly written, would make the prohibition effectual. The clause would be effectual to exclude absolute alienations only if that portion of the word "irredeemably" was held to be part of the deed, which portion was written on the erasure. The erasure was then indubitably *in essentialibus*—for that very part alone could make the prohibition answer its purpose. If a deed of tailzie be a blundered deed, it is of no avail to say that the record and title are complete, and that no defect appears on them. There is no warrant in the tailzie for that which has been introduced into the title. And no length of possession under such titles will make the blundered deed of tailzie one whit more effectual than it was the day after the title was first made up. The case of *Kedder* fixes, in a very emphatic manner, that erasures, not authenticated in the testing clause, cannot be supported by even the most positive proof. The principle of the testing clause is, that all therein stated was said and done in presence of the grantee, and before subscription. It might be difficult to prove cases of tampering with deeds, after a lapse of time; that parties might erase the right word when correctly written, and then re-write it on an erasure in order to vitiate the deed; but because such things might be done, and might be difficult of detection, that would not surely warrant a legal and conclusive inference of fraud, in a case where fraud was not even suggested, so as to entitle the Court to sustain a deed which actually stood vitiated *in essentialibus*.

LORD COCKBURN considered this one of the clearest cases that had almost ever occurred in the law respecting erasures, in so much that, unless the practice and understanding of the country for nearly two centuries, explained and confirmed by direct and unshaken judgments, was to be now subverted, and a new system introduced, and this, by mere decision, he did not see how the interlocutor of the Lord Ordinary could be altered. The letters written on this erasure were not merely important; they were essential, all in all, to the prohibitory clause; because if the unerased word was to be read as "redeemably," it was fixed, by the

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case of *Bourtreeshill*, that this extinguished the prohibition against selling. This prohibition could not be effectual, unless the word be "irredeemably." The word could not be left out altogether; partly because some of it was there unobjectionably, and partly because, without it, there was nothing to which the antecedent "either" could apply. The four letters "irre," or the five letters "irred," therefore, constituted in effect the prohibition against selling. The plain and understood remedy for such errors as made erasure and re-writing convenient, was to mention them in the testing clause, or, in other words, to identify and attest them. Where they were known to the granter of the deed, it was absolutely certain that, unless there be forgetfulness, they would be mentioned in this clause; and forgetfulness was equivalent to their not being known at the moment of signing. Hence, where they were not mentioned, the legal presumption, and the reasonable conclusion was, that they were not known; and if they really were known, but were not attested, the granter, who thus declined to apply the legal remedy to a defect which he saw, could not blame the law for dealing with him and his successors on its own principles. Such a defect in a principal deed cannot be corrected incidentally by a separate instrument. It is doubtful whether it could be corrected even by a separate deed intended for the purpose. What we have here is only certain instruments or proceedings, from which it is inferred incidentally, that the flaw in the previous deed had been observed and adopted by the granter; but if there be no prohibition against sales in the entail, it is not easy to conceive how it can be put there, by its being inserted in the record or titles.

Lords COLONSAY, WOOD, ROBERTSON, COWAN, and MURRAY, concurred generally in holding the word "irredeemably" impracticable and unauthenticated, and the prohibition against sale therefore ineffectual.

Lords MEDWYN and RUTHERFURD were absent from indisposition when the case was debated.

To-day the case was advised.

The LORD PRESIDENT and LORD FULLERTON agreed with the Consulted Judges in holding the prohibition vitiated by the erasure.

LORD CUNINGHAME differed. He was not satisfied that there were legal grounds for sustaining this challenge. That the letters of the word specified on record are written on an erasure is unquestionable; but if that literal correction took place by

Jan. 31. 1852. authority of the grantor of the deed, before it was executed, or before it was *delivered* forth of his possession as a delivered and essential title, there is no legal ground for holding the deed as null and inoperative, especially as between the grantors and grantees and their heirs. Unquestionably, in many instances, consent of the grantors of a deed to *ex facie* alterations has been proved by noticing the erasure in the testing clause; but in no previous authority is it laid down so broadly as in the present deliberation, that a declaration in a testing clause is the *only way* of proving the authenticity of the correction of a word in a deed. On the contrary it has been held that oath or writ may be demonstrative of the grantor's consent; *Boswell*, 1708, Dict. p. 17,025: *Strathhern*, 1st Feb. 1837, 1 Rob. Ap. Cases, p. 189; *Beatie v. Lambie*, 26th Dec. 1695; Dict. 17,021. He found it difficult to reconcile these precedents with the reduction of the deed libelled on. His doubt, therefore, was whether there was not here sufficient evidence to prove the grantor's consent as clearly as if the fact had been set forth in the testing clause. In the first place, the word *redeemably* was the proper word to use, and there was no inference that any other word was used; and the hypothesis that the word first written might have been "*redeemable*" would only shew the more clearly that the erasure was to correct an accidental and manifest mistake, before the grantor parted with and delivered the deed. One rule must be applied to all written instruments, and a bill of exchange has been sustained, though altered in the term of payment, the alteration *appearing to have been made to correct a mistake*; *Henderson*, 7 C. 20th Feb. 1802. *Catton v. Simpson*, 8 Ad. and E. 136. Byles on Bills of Exchange, 6th ed. i. p. 255. He also considered the deed of declaration a clear demonstration of the intention of the grantors, and proving the authenticity of the previous deed of entail.

The present case differs from that of Bourtreehill, inasmuch as in that case a word of clear import was written without erasure, and rendered the clause nonsensical; but here the clause was consistent with the word "*irredeemably*"; in fact it was the only word that could have been used for that place consistently with the sense of the deed.

These views, therefore, induced him to abstain from voting for a judgment to the effect of reducing the entail.

LORD IVORY concurred with the majority of the Court, though not without considerable reluctance; and only because he felt it

impossible to resist the authorities. Had the question been open, Jan. 31. 1852 he would have entertained serious doubt how far the conclusion arrived at in these authorities had not been laid down somewhat Boswell . too absolutely, and without a due regard to some important considerations which, in a sound legal view, should have gone far to qualify, in a case like the present, the mere abstract doctrine. The result, accordingly, appears to be attended, in its practical application, with no small degree of danger. Strong presumptions arise as to the original authenticity of the deed. But it is too late for the Court to yield to considerations of this kind. We must give our obedience to the law of the question, as it has been settled by previous decisions. If there is to be a change, the remedy must lie with the Legislature. But he most assuredly agreed with an opinion expressed by Lord Cowan, that it is high time, that in order to obviate and remove a source of danger to title so pregnant, some such enactment as has already been passed with regard to erasures in instruments of sasine should be introduced in reference to written instruments generally.

The COURT, therefore, in conformity with the opinions of the Judges who heard the cause, refused the prayer of the reclaiming note, and adhered to the interlocutor of the Lord Ordinary re-claimed against.

Scott and Gillespie, W.S., Agents for Pursuer.

Rolland and Thomson, W.S., Agents for Defendants.

FIRST DIVISION.

Orr and Barber v. the UNION BANK OF SCOTLAND.

No. 153.

Letter of credit—Forged draft—Repetition—Liability—Scotch and English banks.—A., merchant in Glasgow, obtained a letter of credit from a bank in Glasgow upon a bank in England, in favour of B. and C., merchants in Liverpool. The bank in England paid away the contents of the letter of credit on a forged draft:—*Held* that an action at the instance of A. B., and C., for repetition of the amount, did not lie against the Scotch bank.

This was an action to obtain repetition from a bank of a sum of Jan. 31. 1852 money given for a letter of credit which had been cashed to a party who had absconded with the money.

Upon the 22d October 1844, the late Mr Gordon Campbell, merchant in Glasgow, with the view of making a remittance to the pursuers, Orr and Barber, at Liverpool, paid into the Union

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Jan. 31. 1852. Bank at Glasgow a sum of £460 : 9s., and received in return a letter of credit, addressed to the Manchester and Liverpool District Banking Company, in the following terms:—

Scotland.

UNION BANK OF SCOTLAND,
Glasgow, 22d October 1844.

No. 15,583, A, A.—Please to honour the drafts of Messrs Orr and Barber to the extent of £460 : 9s., which charge to the Bank.
—I am your very obedient servant,

(Signed) J. A. WATSON, *Cashier.*

£460 : 9s.—Entered, M. G. H.

To the Manchester and Liverpool District Bank, Liverpool.—
“Not transferable.”

On the same day Mr Campbell wrote with it to Messrs Orr and Barber; and the letter of advice, with the letter of credit itself, reached, in due course of post, the counting house of these parties. When the letter of credit reached Liverpool, Mr Orr, the only partner of the firm resident in this country, was absent in Ireland. During his absence their clerk, F. R. Smith, was left in charge of the office, and he advised Mr Campbell of the receipt of the letter of advice, and accompanying remittance. When Mr Orr returned, Smith had absconded, and in the meantime the letter of credit had been presented to the Manchester and Liverpool District Bank, along with a draft for the whole sum contained therein, bearing to be subscribed “Orr and Barber.” This draft was honoured by the Liverpool Bank, who retain it and the letter of credit as the evidence and voucher of payment; but Messrs Orr and Barber aver that that payment was made upon a forged draft, and as the Liverpool Bank refuse to make a second payment, the present action has been instituted for repetition of the sum paid into the hands of the defenders at Glasgow by Mr Campbell.

This action was raised at the instance of Orr and Barber, and also by Campbell, as executor and representative of his brother, “both parties suing as principals, and not one with the consent of the other.” The ground of action was based upon the averment, that the defenders failed to perform what they undertook to do, in consideration of the £460 : 9s., and did not effectually establish a credit with the Liverpool District Bank in favour of Orr and Barber; and that that bank did not accept or fulfil the mandate contained in the letter of credit, and did not honour the drafts of Orr and Barber to the extent therein mentioned, or to any extent.

The defenders (the Union Bank) lodged in process documentary evidence to prove that in the accounts between the banks, the Union

Bank, as on the 22d Oct. 1844, credited the Liverpool Bank with Jan. 31. 1852.
the payment, and that these accounts were at once settled accord-
ing to the invariable practice subsisting between the two banks. ^{Orr &c. v. the} Union Bank of

The Lord Ordinary having found for the defenders, the pur-
suers reclaimed. The process was debated last Session, and the
Court ordered cases to be prepared, and to be laid, along with
the whole cause, before the Judges of the whole Court, for their
opinion.

For the pursuers it was contended that a letter of credit is not a transference of debt. It is merely a mandate to the party addressed to supply the person named in the letter with a sum of money, and, upon doing so, to charge it to the writer of the letter. But no debt arises against the writer of the letter until the request in the letter is complied with. 1 Bell Com. 373; Lex Mercatoria, by Bearves, 1, p. 606; Molloy de Jure Marit. B. II. c. 10, § 36; Pothier Contrat de Change, Part II. Art. 3, § 3, No. 236. Payment upon a forgery is a nullity, and cannot be charged upon the party whose name is forged. Thomson on Bills, p. 258. See Note; *Borland v. the Thistle Bank*, Feb. 768; Mor. Dict. p. 877; Byles on Bills of Exchange, 6th Ed. p. 266; Chitty on Bills, 8th Ed. p. 425-26; Bayley on Bills, 5th Ed. pp. 318, 320-22, 369, and 371; Storie on Promissory Notes, p. 464; *Johnson v. Wadle*, Bingham's New Cases, 3, p. 225. See also Bell's Com. 1, p. 373; Starkie on Evidence, last Ed. p. 780; *Calder v. Aitchison*, 10th September 1831; House of Lords Rep. 5 M. and S. 410; Pothier Contrat de Change, p. 2, Art. 3, § 3; Bolt, 4 Bing. p. 473; *Main v. Bailey*, 10 Ad. and Ellis, p. 616; Thomson, p. 320. It was not necessary to give Orr and Barber a title to sue that they should themselves be contracting parties with the defenders, provided a stipulation was made or implied in their favour. Stair, 1, 10, 5, p. 95; Ersk. 3, 1, 8; *Marchington v. Vernon*; Bos. and Pul. Rep. 1, p. 101. See Note.

The defenders maintained that the obligation undertaken by them, by granting the letter of credit has been fully discharged and implemented. They deny that they became bound to guarantee Messrs Orr and Barber should actually receive into their hands the sum of L.460, 9s. They contend that the only obligation undertaken by them was to establish a credit with the Liverpool Bank in favour of Orr and Barber, and that as they granted a good and available letter of credit on the Liverpool Bank, being a solvent bank, no recourse can lie against the defenders at the instance either of Campbell's representatives, or Orr and Barber, unless they return

Jan. 31. 1852. to the defenders the letter of credit dishonoured and unpaid. They can only be liable to repeat to Campbell, if he could have no defence to an action at the instance of Orr and Barber for payment of the sum due by him to them. But by transmitting the letter of credit, Campbell has discharged his debt. *Warwick v. Noakes*, 21st June 1791. Peake's Cases, p. 67. The letter, therefore, *quoad* Campbell was a good document, and he has therefore no title to insist in this action. See also Bayley on Bills, p. 138. The Liverpool Bank having paid upon a forgery, the forged document is the property of Orr and Barber, who are entitled to receive it from that bank. But no action lies at their instance against the defender, who never contracted with them, *Johnson v. Wildlife*, Nov. 8. 1836. Bingham's New Cases, vol. iii., p. 225.

The case having been again called to-day,—

N. C. Campbell appeared for the pursuers.

Inglis and Wood for the defenders.

The LORD PRESIDENT announced that a majority of the consulted Judges were of opinion that the conclusions against the bank were not well-founded. His own previous opinion was thus confirmed. The duty of the Union Bank, after having received the money from Campbell was quite plain. It was to establish a credit in favour of Orr and Barber at Liverpool; and this duty was regularly performed by them. The credit was acted on, and the contents of the letter were handed over to the person left in charge of the place of business of Orr and Barber, and admittedly entitled to receive their letters. The clerk absconds, and the simple question now is,—Is this an action the conclusions of which can be sustained against the Union Bank in consequence of anything they may have done. It is impossible to find any grounds in law on which to found neglect of duty on their part, and there is nothing else which would render them liable. They established at Liverpool all that was required of them; and it is plain to demonstration, therefore, that it is not to the Union Bank that the pursuers must look for redress. As to English law, we have nothing to do with it. We are to administer our own law; and all we have to determine is, whether there is a good ground of action against the Union Bank of Glasgow, to compel them to pay the amount of this letter of credit, which has passed away from them entirely. He concurred in the opinions of the consulted Judges that there was not.

LORD FULLERTON. This case is one of great nicety, and certainly of great practical importance. Such a claim as that of the

pursuers requires to be very rigorously investigated ; and the effect Jan. 31. 1852. of such inquiry on me has been to create a very decided opinion that the action cannot be sustained. On the supposition that all the parties are subject to the jurisdiction of the Courts in this country, can there be a doubt that your Lordships would reject the claim as now made, and would oblige those pursuers to proceed against the bank who cashed the cheque, as the party truly in fault ? and this seems to rest on a very obvious principle. While the draft or cheque is the voucher against the receiver of the money of its payment, the letter of credit on which the bank pays is the voucher of that bank against the bank by which the letter was granted. When the persons, then, who have bought the letter of credit, and got it, choose, like the pursuers, to demand repayment of the price, it is clear that, in order to support that demand, they must produce and redeliver the letter of credit. No doubt, when admitted that it has not been acted on, its production is of no importance. It may, like any other mandate not acted on, be recalled. But when, on the other hand, the correspondent avers that the credit has been acted on, and payment made, and he retains the letter of credit as a voucher, it is indispensable for the parties claiming repayment of the money from the bank which received it, to recover the letter of credit, the voucher between the two banks, out of the hands of the bank retaining it, before they can advance one step in the action. Now, that is the case here ; and the conclusive answer, in these circumstances would have been, Take your steps against the bank which, as you aver, paid unduly ; you can have no claim against us till you restore to us the letter of credit which is retained by our correspondents as a voucher against us in accounting with us, the Union Bank. The circumstance of the correspondents, the Manchester and Liverpool District Bank, being subject to the law of England, really makes no difference in the case. That bank must either pay or redeliver the letter of credit ; and if they aver as the ground of their refusal that the money was paid, that will just raise the question with the proper parties in England which the pursuers now seek, most unreasonably, to press against the defenders here, whether or not it was a payment which is good against the pursuers. But to find the defenders liable to repay, while the pursuers cannot redeliver the letter of credit, given only in consideration of the advance, seems unsupported by every principle of law, or even of ordinary fair dealing. I think that the defenders ought to be assailed.

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Jan. 31. 1852. LORD CUNINGHAME also concurred. The case of *Warwick v. Orr &c. v. the Noakes*, 1 Peake's Cases, p. 67, shews that parties in England delivering a bill for value to an onerous purchaser, and which is despatched by post to a third party, in terms of his request, is not responsible for the contents of the bill if it is lost or embezzled; and the case of *Johnson v. Windle*, 3 Bing. N. Cases, p. 225, proves that there is no excuse for not bringing the action in England against the parties who committed the wrong (if any was committed) on the ground that a suit could not be maintained in England against the District Bank for want of the bill. Now, looking on the present as a case of mandate or obligation in mercantile business, I am of opinion that this is a case *juris gentium*, and depends on the law of trade generally, and not on any point peculiar to our municipal system. If so, it is believed to be the custom of the Supreme Courts both of England and Scotland, from the obvious policy of making the law of trade the same over the whole empire, to admit authoritative precedents in each country of intelligible and clear import, without seeking the aid of foreign counsel.

In these circumstances, he could not sustain the present action against the defenders, whose conduct had been altogether blameless and unexceptionable, when the parties alleged to have been chiefly in fault in paying on a forged receipt are not sued, though amenable in their own *forum*.

LORD IVORY concurred with the majority of the Court. He had no hesitation whatever about the case. As well might the assignee of a bond, where the assignation had been duly intimated and recognised by the debtor, attempt to fall back upon his cedent, when payment had been obtained to such assignee's prejudice, under forgery of his name, or as well might the indorsee of a bill duly accepted fall back upon the drawer where payment had on a similar forgery been obtained from the acceptor, as that the party in whose favour the letter of credit was here conceived, should be allowed to fall back upon the bank with whom that letter of credit originated. The pursuers have mistaken their remedy. That remedy lies, at all events, in the first instance, against the English bank, who have made payment on the faith of the forgery. As in a question with *them*, the forgery gives no title. And whatever may be the law of England on the subject, in reference to our own law, the document being now in the hands of a party who stands upon it as a valid voucher of payment, an action for payment does not lie here against the Union Bank. There is nothing in the

circumstances to warrant placing the defenders in the disadvantageous position of being compelled to pay twice, or, having already paid, to bear the burden of litigation in an action to which the English bank has not even been called as a party, and where no decree that can be pronounced will, of course, avail the defenders against that party.

The COURT, "in conformity with the opinions of a majority of the whole Judges, recall the interlocutor of the Lord Ordinary, sustain the defences, assoilzie the defenders, and decern; find the defenders entitled to their expenses, appoint an account thereof to be lodged, and remit to the Auditor to tax the same, and to report."

John Martin, W.S., Agent for Pursuers.

Andersons and Wood, W.S., Agents for Defenders.

SECOND DIVISION.

DIXON v. RANKEN.

No. 154.

Master and Servant—Liability of Master.—A master will be held liable in damages for injuries done to a workman in his service, in the course of his employment, by a fellow-workman, also in the master's service.

This was an advocation from the Sheriff-Court of Glasgow. Jan. 31. 1852. The action was brought by Mrs Ranken, the widow of a workman in Dixon's employment, against Dixon for damages, for the injury and loss sustained by her through the death of her husband, caused by the negligence of a fellow-workman, also in the employment of the defender, in working a coal-pit of the defender. The Sheriff-substitute (Skene) found the defender liable in damages, and to this judgment the Sheriff (Alison) adhered.

Dixon presented a note of advocation, but the Lord Ordinary (Colonsay) adhered, and Dixon reclaimed.

Patton (with whom *Inglis*) for advocator, argued, that from the facts brought out in evidence the pursuer had no claim for damages. But even supposing it proved that the death of her husband had been occasioned by the act of his fellow-workman, Dixon could not be held liable. *Hutchison*, 22d May 1850, 19 Law Journal; *Exchequer*, p. 296; *Wigmore*, 22d May 1850, 20 Law Journal, *Priestley v. Fowler*, 3 L. and W. p. 1.

Pattison (for respondent.) The liability of the master to his servant for injuries done by his fellow-servant, has never been disputed in Scotland, whatever may be the law in England. *Sword*

Jan. 31. 1852. v. *Cameron and Gellatly*, 13th Feb. 1839. There are not many cases which can be cited, just because the rule never has been disputed.

Dixon v.
Ranken.

At advising,

The LORD JUSTICE-CLERK, after going over the evidence, which he held to establish that the injuries had been caused by the negligence of the fellow-workman, said—It is said, entirely on the authority of certain decisions and opinions of the courts of England, that the master is not responsible—as I understand in any circumstances—to those employed by him for any injuries caused by the carelessness, inattention, and unskilfulness of other servants in his employment. That there are many cases in which the master will not be liable for injuries done by his servants, whether to a third party or to another servant acting at the time in his master's service is quite true; but such exceptions (for such they are in the law of Scotland), depend on the state of the facts and the nature of the misconduct in the particular case. These exceptions will cover some of the extreme cases put in the English opinions; while others of these cases seem to apply to the master's liability to third parties. I observe, so far as I can follow or understand the English cases, that the Judges lay down the doctrine that by the law of the Contract of Service as fixed in England, the servant runs all risks arising from the misconduct and unskilfulness of other servants of the same master, for the dangers from such are risks incident to the labour he undertakes in that particular service. If this is the law of England, then the decisions referred to follow necessarily. But this forms only another instance from which it appears how widely different in essential principles are some of the most common contracts of the law of Scotland and England.

The law of Scotland as to the contract of service in regard to such matters as are here raised is perfectly fixed. The master's primary obligation in every contract of service in which his workmen are employed in a hazardous and dangerous occupation, for his interest and profit, is to provide for and attend to the safety of the men. That is his first and leading obligation, paramount even to that of paying for their labour. This obligation includes the duty of furnishing good and sufficient machinery and apparatus, and of keeping the same in good condition—and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater his obligation to make

up for its defects by the attention necessary to prevent such Jan. 31. 1852.
injury. In his obligation is equally included, as he cannot do every thing himself, the duty to have all acts by others whom he employs, done properly and carefully, in order to avoid risk. This obligation is not less than the obligation to provide for the safety of the lives of his servants by fit machinery. The other servants are employed by him to do acts which, of course, he cannot do himself, but they are acting for him, and instead of himself, as his hands. For their careful and cautious attention to duty, and for their want of vigilance, and for their neglect of precaution by which danger to life may be caused, he is just as much responsible as he would be for such misconduct on his own part, if he were actually working or present. And this particularly holds as to the person he entrusts with the direction and control over any of his workmen, and who represents him in such a matter. The servant, then, in the contract of service in Scotland, undertakes no risk from the dangers caused by other workmen from want of care, attention, prudence, and skill, which the attention and presence of the master, or others acting for him, might have prevented. His master is bound to protect him from such dangers. There have been many cases in Scotland, at all periods, and during the last fifty years, a *very* large number, which proceeded on this as a fixed principle of the law as to the contract of service.

Of course there arise a number of cases in the varied trades of modern society, in which the acts of the servants may be of such a kind that, although not criminal, they yet do not involve the master in liability; and in such cases the law was clearly admitted on all hands, although its application was matter of nicety. The case of *Sword* is a case which eminently and very strongly brings out the doctrine of the law of Scotland. The injury there was caused by the culpable negligence or rashness of the other workmen employed by the tenant of the quarry, in precipitately firing off a blast, contrary to the plain precautions required for the safety of the men. The law, that the master is liable for injuries done by servants to one another, was not disputed. The sole question was, in truth, whether the pursuer was not to blame, and was not himself the sole cause of the injury he received. I refer to the full notes of Lord Cockburn, and to the detailed opinions of Lord Gillies, of the late Lord President and Lord M'Kenzie, to shew how perfectly settled and rooted is the doctrine of the law of Scotland as to the contract of service as to this point. It is in vain to attempt to disturb it in this

Jan. 31. 1852. Court ; and having heard what is now advanced, I have only to say, that I shall not regard the point as again open for argument.

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But then it is quite within this doctrine, as settled in our law, to contend that the fault of the man himself occasioned the injury, or that the other workmen were *versantes in illicito*, or that he and they were misconducting themselves.

No attention whatever can be paid to the plea in this case, that the workmen were told to hold on, and that they did not do so, and so violated the instructions given. The master is bound, in such a case, to have such control over the men as will ensure that being done which their safety requires. Every kind of neglect and carelessness, on the part of the workmen, is a violation of instructions, direct or implied ; and, therefore, to admit this plea, would, in truth, be to protect the master in almost every case from the consequences of the negligence and recklessness of his workmen.

LORD MEDWYN gave no opinion on the point of law, as he held the facts in evidence did not establish the case of the pursuer.

LORD COCKBURN concurred with the Lord Justice-Clerk as to the effect of the evidence. The plea that the master is not liable rests *solely* on the authority of two or three very recent decisions of English Courts. And these decisions certainly do seem to determine, that in England, where a person is injured by the culpable negligence of a servant, that servant's master is liable in reparation, provided the injured person was merely one of the public ; but that he is *not* so responsible, if the person injured happened to be a *fellow workman* of the delinquent servant. It is said, as an illustration of this, that if a coachman kills a stranger by improper driving, the employer of the coachman is liable ; but that he is not liable if the coachman only kills the footman. If this be the law of England, I speak of it with all due respect. But it most certainly is not the law of Scotland. I defy any industry to produce a single decision, or dictum, or institutional indication, or any trace of any authority to this effect, or of this tendency, from the whole range of our law. If such an idea exists in our system, it has as yet lurked undetected. It has never been directly condemned, because it has never been stated. The case of *Sword* gave the Court a fair opportunity of applying the principle if it existed,—for there it was a workman who had been hurt by the negligence of his fellow workers,—but the employer was found liable. Many similar cases have occurred, and they have all been disposed of without the in-

terference of this conception. The whole course of our practice Jan. 31. 1852. has proceeded on the *assumption* that the liability of an employer ^{Dixon v.} did not cease, merely because, besides employing the wrong-doer, ^{Dixon v.} Ranken. he also employed him to whom the wrong was done.

I am clear for adhering to our own rule, and to our own legal and practical habits. The new rule seemed to be recommended to us not only on account of the respect due to the foreign tribunal—the weight of which we all acknowledge—but also on account of its own inherent justice. This last recommendation fails with me, because I think that the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcileable to legal reason. I can conceive some reasons for exempting the employer from liability *altogether*, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation ;—because they incur danger on his account, and certainly are not understood, by our law, to come under any engagement to take these risks on themselves.

LORD MURRAY. I do not pretend to know, and have not examined the law of England on the present question. But one point I hold to be clear by the law of Scotland, that a master who carries on a manufacture of any kind in which the lives of those in his employment are exposed to danger, is bound to have all his machinery, &c. in a most sufficient state. Here the evidence shews it was not, and I therefore cannot hesitate to hold the master liable.

The COURT adhered.

Walker and Melville, W.S., Advocator's Agents.

John Rodgers, S.S.C., Respondent's Agent.

COURT OF EXCHEQUER.

BEFORE LORD RUTHERFURD.

No. 155.

HER MAJESTY'S ADVOCATE-GENERAL *v.* RATE.

*Excise—Unentered Apartment—Contravention of 7th and 8th Geo. IV.,
Sects. 32-53—Liability of distillers for acts of their servants.*

This was a prosecution to recover from the defendant, who is Feb. 2. 1852. a distiller in Haddingtonshire, the penalties incurred for depositing spirits in unentered places, and preventing excise officers gain- <sup>H. M. Advocate-General
v. Rate.</sup>

Feb. 2. 1852. ing entrance thereto. The information lodged against Mr Rate
H. M. Advo- consisted of four counts, and charged him—1st, with having taken
cate-General eight gallons of spirits from the still, not directly to the spirit re-
v. Rate. ceiver, but to a certain unentered room in the distiller's premises,
and destroyed it before an account of the strength and quantity of
the said spirits had been taken by the proper officer, in contraven-
tion of the 4th George IV., cap. 94, sec. 25—penalty, L.200; 2d,
with allowing the said eight gallons of spirits to be stored in an un-
entered apartment occupied by one of his employées, in contraven-
tion of the 37th clause of said statute—penalty, L.500; 3d, with
hindering, obstructing, and preventing officers of excise from enter-
ing the said apartment, in contravention of the 104th section of the
same act—penalty, L.200; and, 4th, with removing, depositing, or
concealing the said spirits, with intent to defraud the revenue, in
contravention of the 7th and 8th George IV., c. 53, sec. 32—pen-
alty, L.100.

A number of witnesses on both sides gave evidence, from which
it appeared that the spirits had been removed from the proper
place by a servant named Gibson, who had kept it in two stable
buckets in his own room, into which the excise officers, after being
refused admittance, forced an entrance; and in doing so, a slight
scuffle ensued, in the course of which part of the spirits was spilt
on the floor. There was no evidence that Mr Rate knew of the
illegal acts being committed.

The COURT having held that, by the construction of the clauses
to which the first and fourth counts applied, it would be necessary
to shew that the master directly participated in, countenanced, or
authorised the illegal acts of his servant, the Crown abandoned
these two charges.

Donaldson and the *Solicitor-General* were for the Crown.

Young and *Inglis* for the defendant.

LORD RUTHERFURD, in charging the jury, said that the only
question of the least difficulty was, could Gibson's apartment be
considered as a place wherein the storing of spirits was forbidden
by the statute? He was of opinion that it was, and he would
therefore propose to the jury that their verdict should be for
the Crown on the second count, on the understanding that the
verdict should be considered as one for the defendant, if, on the
notes of the evidence taken, this apartment should not be found
by the other Judges of the Court to fall within the 37th section of
the act recited. As to obstructing the officers in the execution of

their duty, charged in the third count, the distiller, his Lordship Feb. 2. 1852. held, was responsible for the acts of those in his employment, and ^{H. M. Advocate-General v.} was the person liable to the penalty, and not the parties offending ^{cite-General v.} Rate.

The Jury returned a verdict for the Crown on the second count, subject to the opinion of the Court, as proposed by the Judge. Penalty £500; and for the defendant on the third count.

The Solicitor of Inland Revenue for the Crown.

R. Ainslie, W.S., Solicitor for Defendant.

HIGH COURT OF JUSTICIARY.

BEFORE THE LORD JUSTICE-CLERK, LORDS COCKBURN AND WOOD.

HER MAJESTY'S ADVOCATE *v.* ELIZABETH
M'WALTER OR MURRAY.

No. 156.

*Indictment—Relevancy—Aggravation—Swindling, and Falsehood, Fraud
and Wilful Imposition.*

The indictment in this case set forth — That albeit, &c., Feb. 2. 1852. swindling, as also falsehood, fraud, and wilful imposition, especially ^{v.} when committed by a person who has been previously convicted ^{H. M. Advocate-General v.} of swindling and falsehood, fraud and wilful imposition, are crimes, M'Walter. &c.— Yet true it is, &c.

J. Shaw, for the panel, objected to the relevancy of the indictment, so far as regarded the aggravation charged. On turning to the former indictment under which the panel was convicted, it would be seen that, while in the major proposition two crimes were set forth, namely, swindling, and falsehood, fraud and wilful imposition, there was only one *species facti* set forth in the minor, to which the panel had pleaded guilty. The *species facti* constituted only one of the crimes charged, and the confession should have been recorded as a conviction of one only. It is incompetent to set forth the conviction as of both the crimes.

The COURT repelled the objection, remarking that swindling and falsehood, fraud and wilful imposition, were, in truth, the same offence, and that it was unnecessary for the prosecutor to set forth both in the major.

C. Stewart, S.S.C., Panel's Agent.

FIRST DIVISION.

No. 157.

FOTHERINGHAM v. SOMERVILLE.

Trust-estate—Count and Reckoning—Multiplepoinding and Exoneration—Expenses.—A trustee having raised a count and reckoning against his co-trustee, and afterwards an action of multiplepoinding and exoneration against the beneficiaries—*Held*, in a conjoined process of these two actions, that he was not entitled to his expenses in the first action, although properly raised by him, and although expenses had been awarded to him in the multiplepoinding, out of the trust-funds.

Feb. 3. 1852. This was a conjoined process of count and reckoning, and multiplepoinding and exoneration, relating to matters arising under the trust-deed of the deceased John Somerville, farmer at Inverleithen; and the question now before the Court was, whether the trustee at whose instance both actions were raised, was entitled to be reimbursed for his expenses out of the trust-estate. Under the trust-deed, Fotheringham, the pursuer, and Salton, one of the defenders, are appointed trustees and executors, and Margaret and John Somerville residuary legatees.

The trust-deed, *inter alia*, gave full powers to the trustees relative to the farm, and directed them, immediately after the trustee's death, or the expiration of the tack, whichever should happen first, to convert into cash, and divide his estate, share and share alike, between his sister and nephew, Margaret and John Somerville. The testator died in 1846, and, in 1847, the trustees thought it expedient to renounce the lease of the farm, and bring the stocking to sale—the proceeds of which form the bulk of the fund *in medio*. The defender Salton took the chief management of the estate and funds, but both trustees intromitted with the funds. The whole estate having been realised, and the debts due by the estate having been paid, the residuary legatees became anxious to get the affairs of the trust brought to a conclusion. With a view, therefore, to the estate being wound up, Fotheringham repeatedly asked his co-trustee, the defender, to render a state of his accounts with the estate, and to deposit the balance due by him in the joint names of both trustees; but he delayed to do so. A correspondence thereupon ensued, which resulted in an action of count and reckoning, at Fotheringham's instance, against Salton. The action was originally brought in name of Fotheringham, as one of the trustees and executors, with concurrence of Margaret Somerville, one of the residuary legatees. Under this count and reckoning, consignation, in the joint names of both

trustees, was made in obedience to the orders of the Court, by Feb. 3, 1852.
the defender, of the balance admitted to be in his hands. Subse-^{Fotheringham} quently, a minute was lodged by Miss Somerville, withdrawing^s Somerville. her concurrence and instance from the action; but at same time she, as well as the other beneficiary, intimated to Fotheringham their determination to hold him liable for their shares. Under these circumstances the pursuer brought a process of multiple-poinding and exoneration against the defender, and also against the residuary legatees of Mr Somerville, and this action—certain objections to its competency having been repelled—was conjoined with the previous action of count and reckoning.

A record having been made up, the Lord Ordinary (Dundrennan) found it unnecessary, in the process of count and reckoning, to pronounce any interlocutor on the merits, "in respect the pursuer has declined to insist farther therein: Finds no expenses due to either party in the said process, and decerns accordingly." And in the multiplepoinding and exoneration he appointed the sum lodged in bank, in the joint names of both trustees, to be uplifted, and reconsigned in the name of Mr Salton *qua* trustee; "exonerates and discharges the pursuer, Mr Fotheringham, of the office of trustee and executor, under the trust-disposition and settlement of the said deceased John Somerville. . . . Finds the pursuer, Mr Fotheringham, entitled to expenses out of the fund thus *in medio*," &c. His Lordship, in a note appended to his interlocutor, added, that, in the circumstances, "as both beneficiaries had intimated their determination to hold Mr Fotheringham liable, and as Mr Somerville was obviously anxious for an immediate winding up of the trust, it did not appear unreasonable that a process of multiplepoinding and exoneration for this purpose should have been raised."

Against this interlocutor Fotheringham reclaimed, in so far as it found him not entitled to his expenses in the process of count and reckoning.

Inglis and *Penney* for the claimer. The count and reckoning was clearly necessary for the security of the trust funds, for Salton is now bankrupt, and therefore had the funds not been lodged in security, they would have been lost to the estate. But Miss Somerville having withdrawn her concurrence to the action, the pursuer could not proceed with the action, as it would otherwise have been his duty to have done. It made no difference whether the action was against a co-trustee or a third party. The estate having been benefited by it, was properly liable for

Feb. 3. 1852. his expenses in raising it. The action was therefore not a nimious and premature proceeding, but a discreet and prudent act for the benefit of these beneficiaries; and therefore properly raised by Fotheringham in the discharge of his duty as trustee. He was therefore entitled to expenses.

G. Young and Pattison appeared for the respondents. The interlocutor reclaimed against is one pronounced in the action of count and reckoning; but that action is not now before the Court. The claimer declined to go on with it, and, therefore, Salton, against whom it was directed, is not here. Having so refused to go on with the action, he cannot now get the same judgment as if he had gone on with it. Neither Salton nor the trust estate can therefore be held liable for his expenses. It was not till long after the date of raising the action that Salton became bankrupt.

The LORD PRESIDENT. The question is, whether, in this process of count and reckoning between the trustees, we are to lay the expenses of this litigation on the common fund. He had no difficulty in finding that there are no grounds in law for doing so; and it would introduce a novel doctrine with regard to trusts, that where two trustees quarrel, they are to pay themselves out of the common fund. He would not be a party to any such rule. He was not satisfied that there was any thing wrong in bringing this action, for when we see how the defences are parried off, and the action resisted, he would have given expenses against Salton if he had been before us; but he is not, and therefore he would not give expenses against the trust funds.

LORD FULLERTON concurred. The only ground on which a party can go against the trust estate is, that he has been right in bringing the action, and got expenses in it which he cannot recover. But that is not the case here. There is great room for saying that the pursuer would have got his expenses against Salton; but he is not here. But because Salton is not liable, it does not follow that the expenses are to be given out of the trust funds.

LORD CUNINGHAME. On considering this record and productions, I am inclined to think that Mr Fotheringham, the claimer, has not been well used—that the expenses incurred by him were absolutely necessary for securing the trust funds—and that there had been excess of litigation after consignation, which was imputable to the respondents. That mass of litigation is incomprehensible; but if the Court think Mr Fotheringham at all in fault for it, the interlocutor under review would be well founded.

LORD IVORY agreed with the majority. Before the case could

have attained its present shape, there must have been faults on Feb. 8. 1852. both sides. We are here in a process of count and reckoning exclusively. The other process has been disposed of in favour of Fotheringham, and he has got all his expenses in the multiple-pointing. Now, this process has been treated as between Fotheringham and Salton exclusively, and not as affecting the beneficiaries at all. The count and reckoning is directed solely against Salton, and he is not now before the Court.

As to the merits, he agreed with the Lord President. Fotheringham has himself to blame for the dilemma in which he now is. He left everything to Salton, and was himself liable, because he had intromitted with the funds. It was necessary, therefore, to get the funds from Salton, which, perhaps, would not otherwise have been got but for this action of count and reckoning. But this was for his own security. The action, therefore, is between them alone, and therefore the interlocutor of the Lord Ordinary is well founded.

The COURT adhered to the interlocutor reclaimed against, with expenses.

Clason & Clark, W.S., Reclaimer's Agents.

John Bisset, S.S.C., Respondent's Agents.

SECOND DIVISION.

DICKSONS v. DICKSON.

No. 158.

Entail — Provisions to Younger Children — Clause — Construction.—A deed of entail contained a destination to A. and the heirs-male of his body; whom failing, to B. and the heirs-male of his body; whom failing to C., without any mention of heirs; whom failing, to various other persons. It empowered the heirs of entail, upon their succeeding to the estate, to grant bonds to "their younger children, other than the heir in the said lands and estate," for payment of provisions. C. having succeeded, granted a bond of provision in favour of his only son and daughter. The Court held last Session in regard to the son, and now in regard to the daughter, that they could not be considered as "younger children other than the heir," and that the provisions were therefore invalid.

This action was brought to enforce payment of a bond of provision by the late Major Archibald Dickson of Chatto, in favour of his son, and the trustees of his daughter, who are the pursuers in this action.

Walter Dickson, by deed of entail, granted his estate of Chatto,

Fotheringham,
Somerville.

Dicksons
v. Dickson.

Feb. 3. 1852.
Dicksons v.
Dickson.

first to his nephew, Archibald Dickson, as institute, and the heirs-male of his body; whom failing, to George Dickson, his nephew, and the heirs-male of his body; whom failing, to another nephew, Andrew Dickson, and the heirs-male of his body; "whom failing, to Captain Archibald Dickson, also my nephew, second son of Archibald Dickson, Esq. of Housebyres;" whom failing, to various other persons—omitting, in the case of Captain Archibald Dickson, any mention of heirs.

The deed of entail contained a general clause, empowering the heirs of entail, upon their succeeding to the estate, to grant bonds to "*their younger children other than the heir in the said lands and estate,*" for payment of competent provisions to them, which, in the case of one child other than the heir, was to be two years' rent; and if there shall be two children other than the heir, three years' rent; and in case there shall be three or more children other than the heir, four years' rent.

In consequence of the failure of the institute, and other previous heirs of entail, Captain, afterwards Major Archibald Dickson, succeeded to the estate of Chatto, and he executed the bond of provision, which is the foundation of the present action, in favour of Archibald William Dickson and Harriet Isabella Dickson, his only son and daughter, for the full amount of such sums of money as shall correspond with three years' rent of the entailed lands.

The pursuers pleaded, that their father was empowered, under the entail, to grant the provision, in respect that they were, in the circumstances, to be considered as younger children other than the heir in the estate.

The Lord Ordinary (Murray) sustained the defence, so far as regarded the claim of the son Archibald, and appointed the case to be further heard with regard to the claim of the daughter.

The son reclaimed last session, and was allowed to amend his summons in the Inner House, so as to enable him to plead further that, in virtue of the statute 5 Geo. IV., c. 87, his father was not restricted, by the conditions of the entail, from granting the bond to the extent of two years' rent of the estate.

The COURT repelled his pleas, and adhered, being of opinion in regard to the *first*, that before the heir in possession can provide, under the entail, he must have an heir capable of succeeding under it, and younger children besides; and in regard to the *second*, that the provisions were expressly granted in virtue of the power under the entail, and that, under the terms of the 5th Geo. IV. c. 87, no such case could occur, as the only son of the substitute being provided for as a younger child.

The claim of the daughter now came under the notice of the Feb. 3. 1852.
Court.

Marshall (with whom *Macfarlane*) for Miss Dickson. The deed entitles all heirs of entail, without exception, to make provisions in favour of their younger children other than the heir. Now, suppose any of the heirs had died leaving a family of daughters only : It cannot be disputed a bond of provision in favour of them would have been quite effectual; and that being the case, there is nothing in the faculty, contained in the present deed of entail, debarring Major Dickson, being an heir of entail, and having a daughter, a younger child not taking as heir of entail, making such a provision in favour of that daughter.

Dicksons v.
Dickson.

Duff and *Neaves* were for the defender.

At advising,

THE LORD JUSTICE-CLERK. I am unable to find any ground which can draw the case of Miss Dickson out of the principle of the judgment which we have pronounced on the reclaiming note for her brother. Younger child, other than the heir in the lands, she is not, for there is no elder child, no child at all of her father who is to succeed.

I do not feel myself at all hampered in the construction of this particular deed by the general rule adopted universally, as to the true meaning of all entails expressed in the general clauses for provisions for younger children. It is fixed that this enables an heir, having no son to succeed, to provide for daughters—as well as for daughters older than the son. Whether this will hold in this particular entail, containing an unusual phraseology, in such a case, is not the point which arises now, and on which I reserve my opinion. I have only to interpret the clause in question, in a case in which all the children of the deceased are especially, and of design, omitted in the destination.

LORDS COCKBURN and **MURRAY** concurred.

LORD MEDWYN was absent.

The COURT refused the claim.

Alexander Cassels, W.S., Agent for Pursuers.

John Walker, W.S., Agent for Defender.

SECOND DIVISION.

No. 159.

REID and OTHERS, v. MAXWELL and OTHERS.*Trust—Actings of Trustees.*

Feb. 3. 1852.
 Reid, &c. v.
 Maxwell, &c.

This was a note of suspension and interdict, at the instance of Reid and Others, trustees of the deceased Mrs Isobel Bethune Morison, of Naughton, against the other trustees, from carrying into effect a resolution adopted at a meeting of the trustees, purporting to accept of a resignation of one of their number; and another resolution, adopting, as additional trustees, two members of a family who were said to be interested in the administration of the trust. The suspenders averred that unfair means had been employed by one of the respondents' number to accomplish this object; and that the parties objected to were unfitted for the office, from their interest in the actings of the trustees, in whom was vested a power to entail, or not, an estate, in the disposal of which the family to which they belonged was immediately concerned.

The COURT were equally divided in opinion, but passed the note with the view of having the facts more fully investigated. The Judges expressed strong disapproval of the act complained of, and declared it to be the duty and intention of the Court to interfere in the management of trusts whenever there could be shewn to be a departure from the fairest dealing on the part of those in the management.

Baxter and M'Dougall, W.S., Agents for Suspenders.

Robert Haldane, W.S., Agent for Respondents.

No. 160.

SECOND DIVISION.

STEWART and Co. v. GORDON.

Railway—Carriage of Goods—Liability of Carrier.—Circumstances in which a carrier who received goods at a railway station, with a direction which turned out to be imperfect, and the goods accordingly went amiss, and were not delivered to the party for whom they were intended, was held to have thereby incurred no liability, and action against him dismissed.

Feb. 4. 1852.
 Stewart & Co.
 v. Gordon.

This was an advocation from the Sheriff-court of Glasgow. The record in the Inferior Court set forth, that on or about the 11th day of September 1846, the pursuers, John Stewart and Company, founders at Irvine, forwarded from the Irvine station of the Glasgow, Kilmarnock, and Ayr Railway Company, forty waggon cast-iron wheels, addressed to Messrs Keay and Rattray,

iron and copper merchants, Dundee, and to be forwarded by the Feb. 4. 1852.
defender, Gordon, who was a carrier in Glasgow, to the Dundee ^{Stewart & Co.} trader. It was averred by the pursuers, that the defender took ^{r.} Gordon. delivery of the wheels ; but instead of forwarding them to Dundee, as directed, he placed them on board a vessel bound to Kirkaldy ; and in consequence the wheels were not delivered to the parties for whom they were intended, and to whom they were directed. The pursuers were therefore obliged to manufacture and forward to Keay and Rattray other forty waggon cast-iron wheels, which were duly received by them. After enquiry, the pursuers ascertained that the wheels first forwarded by them, and shipped by the defender for Kirkaldy, had got into the possession of a Mr M'Donald, a railway contractor, in that neighbourhood, a circumstance of which the pursuers gave intimation to the defender ; and at the same time required from the defender payment of the price of the wheels, amounting to L.34 : 14 : 9, and also the sum of L.1, 13s., as the expenses incurred by the pursuers in tracing them out after they had gone amissing.

The pursuers therefore pleaded the edict *nautæ caupones stabularii*, and also that the defender having taken the wheels in question from the railway station, was bound to have delivered them at the Dundee trader according to the address, and having failed to do so, and having wrongously and improperly sent them in another direction, is liable in the whole consequences of such failure.

The defender denied that the wheels were directed to Dundee, and averred that he delivered them at Port Dundas, Glasgow, in good order and condition to Richard Dull, the person in charge of a vessel lying there bound for Kirkaldy, to be forwarded with all due despatch to Keay and Rattray, Kirkaldy, to whom they were addressed, and that Dull granted a receipt in these terms :— “ 1846, September 12.—Keay and Rattray, 40 waggon wheels.” (Signed) “ RICHARD DULL.” The defender pleaded that on the facts founded on by him he had acquitted himself of his undertaking ; and further that, assuming that the pursuers had properly directed the wheels, the same were at the risk of the buyers.

Parties were allowed a proof of their averments, on advising which the Sheriff-substitute pronounced an interlocutor assailing the defender ; but this interlocutor was altered by the Sheriff-depute, who decerned against the defender in terms of the conclusions of the libel.

Feb. 4. 1852. The defender advocated.

Stewart & Co. v. Gordon. Moir was for the advocator (defender). Boyle for the respondents (pursuers).

The COURT were clearly of opinion that the interlocutor of the Sheriff-substitute was right, and that the pursuers had wholly failed in proving their case, and pronounced the following interlocutor, in which the material parts of the case are set forth:—
“The Lords having advised the record and proof in this cause, and heard counsel for the parties, advocate the cause, after the interlocutors complained of; find that the forty wagon cast-iron wheels, for the value of which this action was instituted in the Sheriff Court of Glasgow, were sent by the respondents to the station of the Glasgow and South Western Railway Company at Irvine, to be forwarded by them to Glasgow, in order to be from thence transmitted to Dundee to Keay and Rattray, to whom they were to be furnished; find that the said forty wagon wheels are entered in the book of said Company at Irvine, as sent by the pursuers to Keay and Rattray at *Dundee*, which place is entered in said book in the column headed ‘residence’ as the residence of the said Keay and Rattray, whose names are in the column headed ‘consignees’; find that in the said book, Glasgow is entered in the column under the head of ‘station to be delivered at;’ find that the way-bill of the train by which the said wheels were forwarded to Glasgow has not been produced, and that there is no direct evidence as to the entry in the said way-bill applicable to the said wheels; find that there is no proof as to the delivery to any one at Glasgow of the original address sent along with the goods to the Irvine station, or that such address was taken on by the guard at Glasgow; find that there is no proof that any address with the destination ‘Dundee’ was given by the Railway Company to the defender or any of his clerks or carters; find that the Glasgow inwards book, which is made up at Glasgow the morning after goods arrive from the way-bill, contains under the column for the residence of the consignee the name ‘Glasgow,’ and that ‘Dundee’ is not in that book; find that in the delivery book, made up by the Railway Company at Glasgow for the wheels which they sent out with the defender’s carts, there is no address or destination entered opposite to the names of Keay and Rattray, the consignees, nor does the book contain after the signature of Richard Dull who signs such receipt, any statement to prove for what party or for what port

the said Richard Dull took delivery ; find that the said wheels were Feb. 4. 1852. taken to the wharf at Port Dundas, where vessels for Kirkaldy lay, ^{Feb. 4. 1852.} Stewart & Co. and were received by Dull, who signs said receipt as for a Kirk-^a Gordon. aldy vessel ; find, that although received by him as for Keay and Rattray, they were entered in the ship's manifest as for one Alexander M'Donald at Kirkaldy, and were in whole or part delivered to him ; find it not proved that the error of sending them to the Kirkaldy wharf, and without any destination in the delivery book signed by Dull arose from any mistake on the part of the defender or those for whom he is responsible, or that he or his men ever received any address with the destination of 'Dundee' for the said wheels ; therefore sustain the reasons of advocation, asoilzie the defender, and decern ; and find him entitled to the expenses incurred in this Court and in the Inferior Court ; allow accounts hereof to be given in, and remit to the Auditor to tax the same, and to report."

*Gibson-Craigs, Dalziel and Brodie, W.S., Agents for the Advocator,
(Defender).*

John Rogers, S.S.C., Agent for Respondents (Pursuers).

In deciding this case, the Judges took occasion to complain of the excessive length to which the reclaiming petition and subsequent minute of debate, allowed by the Sheriff, extended. These papers had been already remarked upon ; they were not required at all ; and their Lordships had no difficulty in adopting the views of the Sheriff-substitute, who had decided the case without the aid of such written pleadings. The Lord Justice-Clerk remarked that, as the Act of Sederunt of February 1851 requires the Sheriffs to pronounce articulate findings on the material facts on which they rest their judgment, he could not see why, in cases of proof, the Court should not, by another Act of Sederunt, prevent a reclaiming petition, and require the Depute to review on the materials on which his Substitute's judgment was founded, especially as the review in the Court of Session is now so easily obtained.

SECOND DIVISION.

CALEDONIAN RAILWAY Co. v. CAMPBELL.

Process—Advocation—Sheriff-Court—Interlocutor.

No. 161.

Feb. 5. 1852.

THIS was an advocation from the Sheriff-Court of Glasgow. The Caledonian Railway Co. original action was brought against the Caledonian Railway Com-^a. Campbell.

Feb. 5. 1852. Caledonian Railway Co. v. Campbell. pany by Campbell, for the recovery of the value of a portmanteau lost at the Carstairs Junction. A proof was led in the Sheriff-Court. The Sheriff, reversing the decision of the Sheriff-Substitute, decided against the Railway Company. His interlocutor contained no findings in regard to the facts.

The Railway Company advocated, and the case was reported by the Lord Ordinary, under the late statute, to the Inner House.

The case was called to-day in the Single Bills.

Baillie was for the Advocators, and T. Mackenzie for the Respondent.

The COURT remitted the case back to the Sheriff, "with instructions to draw up special pleadings in point of fact, on which his interlocutor is founded, and to report the same *quam primum* to the Court, these findings being required by the Act of Sederunt 15th February 1851.

Hope, Oliphant and Mackay, W.S., Advocators' Agents.

John Ross, S.S.C., Respondent's Agent.

SECOND DIVISION.

No. 162.

JAFFRAY v. DUNCAN.

Process—Bill-Chamber—Jurisdiction.

Feb. 5. 1852. Jaffray v. Duncan. This case came before the Court on a report by the Lord Ordinary on the Bills (Cowan.) It appeared that the furniture of the suspenders (Jaffray) had been poinded, and a warrant for sale obtained. When the furniture came to be sold it was discovered that it had been removed and other furniture of an inferior description substituted in its place. The respondent (Duncan) with the concurrence of the Procurator Fiscal, presented a petition and complaint to the Sheriff-substitute against the suspender, in terms of the 1 and 2 Vic. 114, § 30, which is as follows:—" If any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable, on summary complaint to the Sheriff of the county where the effects were poinded, or where he is domiciled, to be imprisoned until he restore the effects, or pay double the appraised value." After proof led before the Sheriff, the suspender was found guilty, and ordained to be imprisoned until he restored the goods, or paid double the appraised value.

The present note of suspension and liberation was presented on the ground of certain informalities in the procedure before the Sheriff. The respondent pleaded that the suspension was not

competent in this Court, and should have been presented to the ^{Feb. 5. 1852.} Court of Justiciary.

The Lord Ordinary on the Bills (Cowan) reported the point to Duncan. ^{Jaffray v.}

The COURT repelled the plea, and sustained the competency of the application.

Ogilvy appeared for the suspender, and the *Solicitor-General* for the respondent.

John Walls, S.S.C., Suspender's Agent.

Tait and Crichton, W.S., Respondent's Agents.

SECOND DIVISION.

CUTHBERTSON and OTHERS v. YOUNG.

No. 163.

Right of Way—Obstruction—Acquiescence and Homologation.

This case (see *ante*, pp. 226 and 286) now came before the ^{Feb. 5. 1852.} Court, on a motion by the defender to sustain a plea set forth in ^{Cuthbertson,} his defences, that the pursuers were now barred, by acquiescence &c. v. Young. and homologation, from disturbing certain obstructions erected on the road in question by the defender.

E. Gordon (with whom *Dean of Faculty*) for the defender. The defences set forth, that, in the year 1827, a wall was erected which had the effect of shutting up any road the public might have. The defences state that "these operations were carried on openly, and were well known to all the inhabitants of Burntisland, Kirkton, Starleyburn, and Aberdour, and no objection or challenge was made by any person;" and the plea founded on this statement is, "that the defender and his predecessors having, without challenge or dispute, been allowed to erect the sea wall above mentioned, nearly thirty years ago, and to incur the great expense of those erections, the public and all persons concerned are now barred by acquiescence and homologation, from disturbing the same."

A. Rodgers, 10th July 1827; F. C. 3 W. and S. 260; *Marg. of Abercorn*, 20th May 1820, Bell's Princ. § 946; *Lord Melville*, 29th May 1830. No distinction can be drawn between the acquiescence necessary in the case of a private individual and the public. It is not necessary that any active acquiescence should have been given by the pursuers. It is sufficient they have seen an expensive obstruction going on without interference.

LORD JUSTICE-CLERK. There is no sufficient averment on record to support the present plea. The cases referred to, and the

Feb. 5. 1852. observations of Mr Bell, apply where parties have consented to an
 Cuthbertson,
 &c. v. Young.

The COURT found "that the record does not contain averment sufficient to support the above plea, and to this extent repel the defences, with the expenses, of the discussion."

Wotherspoon and Mack, W.S., Pursuers' Agents.
Alex. Hutchison, S.S.C., Defender's Agent.

SECOND DIVISION.

No. 164.

KILGOUR v. BROWN and SHAND.

Process—Interlocutor.

Feb. 5. 1852. This was an advocation from the Sheriff Court of Fife. The action was raised by Kilgour to recover damages, on account of injuries done to his sheep by the dogs of the defenders. The Sheriff found for the defenders, and dismissed the action. Kilgour advocated.

The Lord Ordinary (Colonsay) by his interlocutor "repels the reasons of advocation, and remits the cause *simpliciter* to the Sheriff," but his interlocutor contained no findings of facts.

On the case being called to-day, the COURT remitted to the Lord Ordinary to pronounce special findings, in terms of the 40 § of 6 Geo. IV., c. 120; the case to be thereafter transmitted to the Court to be advised upon the reclaiming note, and

The LORD JUSTICE-CLERK observed that it was not only necessary there should be findings of the facts *proved* by the pursuer in evidence; but that, when he had failed in his proof, findings should be given, stating what had not been proved.

James Souter, W.S., Agent for Pursuer.
T. & R. Landale, S.S.C., Agents for Defenders.

OUTER HOUSE.

BEFORE LORD RUTHERFURD.

No. 165.

ANDERSON and MANDATORY v. LAING.

Process—Statute 13 and 14 Vict. c. 36—Date of Summons.

Feb. 5. 1852. In this case *no process*, was pleaded by the defender, on two grounds, (1.) that the date following the words at the close of the
 Anderson, &c.
 v. Laing.

will—"Given under our signet at Edinburgh," appeared to be in Feb. 5. 1852.
 the handwriting of the clerk who had written the summons, and Anderson, &c
 had not been filled up as it ought to have been by the proper off-^e. Laing.
 cer when the signet was adhibited at the Signet Office; (2.) that
 the date, in any view, had no authentication whatever, except it
 was inserted by the clerk who prepared the summons; here, im-
 mediately *after* the date, a docquet followed, certifying that what
 preceded was "written by A. B., Clerk to C. D., on this and
 the preceding pages."

Shand, in support of the objection, referred to § 18 of the Act
 13 and 14 Vict. c. 36, and to Schedule A.

Young, Contra. The date, in point of fact, was not filled in by
 the clerk who wrote the summons, but by the proper party at the
 Signet Office; and with reference to the second objection, a note
 had been issued from the Signet Office, some time ago, for the
 guidance of practitioners, directing a blank to be left for the date
 at the end of the will—just as had been done in this case.

On this explanation, the defender argued that the objections
 should be disposed of on the footing that the date was inserted by
 the signet officer.

LORD RUTHERFURD. It being now conceded that the first ob-
 jection does not exist in point of fact, I have to deal with the se-
 cond alone. It is, I think, one of a description too nice and criti-
 cal. I have half a dozen summonses now lying before me, and
 they are all in much the same form. In the practice following on
 the statute, no such strictness has been observed, and, I think,
 very properly. The contrary rule of construction would be much
 too rigid. I must therefore repel the objection.

Gibson-Craigs and Dalziel, W.S., Agents for Pursuers.
James A. Robertson, S.S.C., Agent for Defender.

OUTER-HOUSE.

BEFORE LORD RUTHERFURD.

MACNEE v. LAING AND SONS.

No. 166.

Process—Amendment of Libel—Title to sue—Mandate—Stamp.—1st, Feb. 5. 1852.
 Circumstances in which a pursuer, suing on an account alleged to be due by the defenders, was allowed to amend the summons, by inserting a more specific reference to the account. 2d, Terms of a mandate or authority for recovery of an account, which was held not to fall under the provisions of the Stamp Acts.

Macnee v.
 Laings.

Feb. 5. 1852. Macnee v. Laings. In this action the pursuer, "as in right of the late firm of Russell, Macnee and Company, coach and harness makers in Edinburgh," concluded for payment of "the sum of L.32 : 4 : 6 sterling, being the amount of an account for furnishings by that firm to the defenders, commencing the 26th day of February, and ending the 28th day of December 1850." No farther reference was made, in the summons, to the account as being produced with the summons, and held to be part of it *brevitatis causa*, as is usually done in similar cases. It was lodged with the summons at the calling. Annexed to the account so produced was a writing in these terms—"We hereby authorise Mr James Macnee, coach and harness maker, Edinburgh, to uplift, pursue for, and discharge the preceding account due to us by Messrs John Laing and Sons, and interest thereon from 31st December last." (Signed) "RUSSELL, MACNEE & Co."

On behalf of the defenders it was pleaded, 1st, That the summons was irregular and irrelevant, in respect it did not set forth "the nature, extent, and grounds of the complaint or cause of action," in terms of the Judicature Act; and, 2d, That the alleged authority in favour of the pursuer being improbatative and unstamped, and the right admittedly remaining in Russell, Macnee and Company, the pursuer could not competently insist in the action in his own name.

Shand, in support of the 1st objection, referred to *Hutchison v. Ferrier*, 18th July 1846, and cases therein quoted. On the 2d objection he quoted *Sutherland v. Monro*, 13th Nov. 1847; *Creighton v. Rankin*, 26th May 1840, H. L., i. Rob. 100.

Irvine, in reply, relied on *Lawrie v. Ogilvie*, Feb. 6. 1810, F.C.; *Taylor v. Scott*, 16th July 1847.

The Lord Ordinary (Rutherford) pronounced an interlocutor, allowing the pursuer to amend his summons, on payment of two guineas of expenses, with reference to the 1st objection, by inserting a more specific reference to the account libelled on; and with respect to the 2d plea, sustaining the pursuer's title to sue, and repelling the objection of want of stamp.

Macritchie, Bayley and Henderson, W.S., Pursuer's Agents.

James A. Robertson, S.S.C., Defenders' Agent.

SECOND DIVISION.

Bill—Oncross holder.—A suspension of a charge on a decree for the

contents of a bill, on the ground that it was partly accepted for the accommodation of the holders, at the request of their traveller, refused, as this could only be established by writ or oath of the holders. Feb. 6. 1852.
Cargill v.
Gould, &c.

Cargill, the suspender, was in the habit of buying goods from Gould and Company of Glasgow, through their traveller Rankine, who carried stock about with him, and disposed of it to purchasers upon the spot. The goods bought were paid for by bills drawn by Rankine, *per* procuration of his employers, upon Cargill, and accepted by him. In July 1847, he called upon Cargill, who made no purchases from him then; but the time had come for settling by bill, as usual, and by a bill, bearing date the 21st of that month, drawn by Rankine, as above set forth, Gould and Company ordered Cargill, five months after date, to pay to their order £48 : 6 : 8 sterling, for value received, and he accepted the same. At this period, the whole amount owing by Cargill for goods received was £29 : 6 : 8. The bill was discounted with the bank by Rankine, who subsequently absconded, after having committed various acts of fraud upon his employers and their customers. The bill was retired by Gould and Company, who, on 12th January 1848, claimed its full amount from the acceptor, but were refused payment, except to the extent of £29 : 16 : 6—the sum due to them by him at its date.

An action was therefore raised by Gould and Company against Cargill, in the Sheriff-court of Aberdeen, and the Sheriff, adhering to the judgment of the Sheriff-substitute, pronounced decree, finding the pursuers entitled to the full contents of the bill; but as Cargill had, in October 1847, been sequestrated, and afterwards obtained a settlement by composition, at the rate of 7s. 6d. *per* pound, under 2 and 3 Vict. c. 41, the sum decreed for was restricted to £18 : 3 : 2, being the amount of composition due on the sum of £48 : 8 : 6. Gould and Company thereupon charged Cargill, who brought the present suspension of the decree and charge.

The Lord Ordinary (Colonsay) on the first calling of the cause, reported it *simpliciter* to the Second Division, in terms of the recent statute.

Broun (with whom *Neaves*) for the suspender, contended, that he was not liable in the whole amount of the bill, having accepted it only in part for value, and partly for the accommodation of the chargers—it being admitted by themselves that they only gave value to him to the extent of £29 : 16 : 6. Rankine drew for a larger sum than that due, expressly for the chargers' accommoda-

Feb. 6. 1852. Cargill v. Gould. tion, and upon that footing alone the complainer was induced to accept. The chargers were bound by the actings of Rankine, their traveller, who obtained the accommodation, and discounted the bill for their behoof, although he fraudulently failed to account to them for the proceeds, and they must bear the consequences of their own agent's fraud.

T. M'Kenzie and Buchanan were for the respondents, but

The LORD JUSTICE-CLERK, without calling on them, intimated the unanimous opinion of the Court, that the suspension of the decree and charge must be refused. Cargill was *ex facie* debtor in the bill, and liable to the onerous holders in its whole contents, unless he could prove either *scripto vel juramento* of the chargers, that it was partly accepted for their special accommodation.

In this case suspension was also sought of a decree of the Sheriff for £71 : 2 : 9, on account of goods furnished by Gould and Co., to the complainer in August 1847. The receipt of these goods was denied by him, and the question turned entirely on the construction of a proof led in the Inferior Court.

Suspension refused.

Tawse & Bonar, W.S., Suspender's Agents.
John Cullen, W.S., Respondent's Agent.

FIRST DIVISION.

No. 168.

PETITION, SIR THOMAS ERSKINE.

Act 11. and 12. Vict. c. 86—Citation—Tutors and Curators—Personal Debts—Real Burdens.—In an application to sell entailed lands for payment, *inter alia*, of personal debts of the entailor, *Held*, 1st, That where one of the three heirs called as parties is a minor, edictal citation is not necessary in addition to personal citation of his tutors and curators. 2d, That the Court will not grant such application until the personal debts are made real burdens on the estate.

Feb. 6. 1852. Pet. Erskine. This was an application under § 25 of the Entail Amendment Act, 11 and 12 Vict. 136, for authority to sell portions of an entailed estate for provisions and debts, with which it was alleged the entailed estate might be competently charged, or stands validly charged, in the sense of the statutory provision.

Appearance had been made for the tutor *ad litem* of one of three heirs called as parties, Ffolliott Williams Erskine, who is in pupillarity. There were certain points for the consideration of the Court, with regard to which the Lord Ordinary, having heard

counsel for the petitioner and complearer, reported the whole cause Feb. 6. 1852:
to the Lords of the First Division.

Pet. Erskine.

1. The first question related to the service of the petition. By the Act of Sederunt of 23d December 1848, § 3, the petition, "besides being served in the usual form," is appointed to be served on the father of the minor, or on *one* at least of his tutors, curators, or other guardians. The usual form of serving on a minor, even where the minor has a father, or other legal guardians, is to serve on the minor personally, and on his tutors and curators edictally, in terms of the Act 13 and 14 Vict. c. 36. In the present case the petition was served *personally* on the pupil and on Sir R. A. Anstruther and Colonel Lindesay as his tutors nominate; but there was no service on his tutors at the office of edictal citation. The difficulty, therefore, now was, whether the Act of Sederunt did not recognise the necessity of edictal citation of tutors and curators, in addition to personal citation, whether of one or of all the pupil's guardians. The Lord Ordinary, in reporting the case, "inclined to think that the intention could not have been to enforce edictal citation, where, by the *personal* citation of *all* the tutors or curators, service edictally was rendered unnecessary in other judicial proceedings." The petitioner's counsel, in support of the doctrine, that if the father be cited specially, it is unnecessary to cite tutors and curators edictally, referred to the cases of *L. Lie v. Porteous*, 17th July 1630, M. 2182; *Cairnoussie*, 17th Dec. 1629, M. 2181; *Buchanan v. Gray*, 20th January 1801, D. Adjud. App. No. 12.

2. The second point related to the construction of sec. 25 of the statute. To the extent of £60,472, 16s. of the sums set forth in the petition, the debts are in the situation of being merely *personal*; and the question was, whether the authority sought by the petitioner could be granted, according to the sound construction of the § 25 of the Act, while the debts have not been made *real* charges upon the estate by adjudication or by infeftment.

The statutory provision embraces (1.) debts with which, under the Act, it is competent for the heir in possession to grant bonds and dispositions over the estate; (2.) debts as to which such charge, (*i.e.*, by granting bonds and dispositions over the estate,) is made competent by any Act of Parliament not containing a power of sale; and (3.) "all cases in which the fee of an entailed estate is *validly charged* with debt." The debts in question do not fall under either of the first two classes; but, being all of them debts of the entaller, they are alleged by the petitioner to consti-

Feb. 6. 1852. tute "valid charges" on the estate, although not made *real charges* by infestment or adjudication.

Pet. Erskine. In reporting this point, the Lord Ordinary signified his opinion that the expressions employed in the statute indicated that the authority to sell was intended to be confined to the payment of debts, with which, by previous statutory provision, or by judicial proceedings or diligence, or by infestment, it was fixed that the estate stood legally burdened, and for which it admitted of no dispute that the estate, under the one or the other, might be attached and really burdened, if not sold. On the other hand, however, it might be considered that the estate, being liable for the debts of the entainer, the statutory words permit of being read in a sense so comprehensive as to embrace those debts, even though merely personal—such debts being in a popular, if not in a strictly legal, sense, charges affecting the entailed succession.

Marshall in support of the petition. The expression, "validly charged," here used by the Legislature, is not a technical expression in the law of Scotland. It is therefore fairly open to construction. Now, for these debts the estate is adjudgeable under the Act 1672, and also under the ordinary process of ranking and sale, and also under the Rosebery Act. But, under all these acts, the proceedings are very expensive and troublesome. The object of the present Act was to dispense with all these, and yet to obtain the same end. What purpose, therefore, could be served by making the creditors go through the form of leading an adjudication—and all of them must do it separately, at an enormous expense—before the heir in possession can have this remedy; and if they do not choose to do it of their own accord, the heir cannot have this remedy at all. He submitted, therefore, that it was impossible that the legislature should have limited this remedy to cases where the debts are real burdens on the estate.

The *Dean of Faculty*, for the tutor, *ad litem*, agreed that the term used is not a technical phrase in the law of Scotland. But what is meant by the debt being made a valid charge against the estate, is not that the proprietor has contracted debt, but that the estate belonging to him has been made the subject of diligence or security. The personal debt of an ordinary fee-simple proprietor is not, while it remains personal, a charge against the fee of the estate. These being entainer's debts, the estate may be validly charged with them by adjudication, or otherwise; but unless it can be said that, at this present moment, they form a valid charge upon the estate, the petitioner has no case.

LORD IVORY was satisfied that, looking to the manner in which Feb. 6. 1852.
the word "charged" is used throughout the statute, the Court Pet. Erskine.
could not entertain this application, in so far as it asked for authority to sell any portion of the entailed estate for personal debts of the entailor. This construction was warranted, both on grounds of expediency, and in point of principle.

The LORD PRESIDENT. This is the wise course to adopt. The debts must be charged against the estate.

The other Judges concurred.

As to the first point brought under the notice of the Court, their Lordships unanimously found that the tutors and curators of Ffolliott Williams Erskine had been duly cited; but "Find that under the statute, it is not competent to authorise the sale of any portion of the said lands" for payment of the debts, "so long as the same remain only personal debts of the entailor, and have not been made a valid charge on the estate or any part thereof," and in regard to these debts, "sist this process until proper steps shall have been taken in that respect; and, with these findings, remit the case back to the Lord Ordinary," &c.

*James Dalgleish, W.S., Petitioner's Agent.
Webster and Renny, W.S., Agents for Tutor ad litem.*

FIRST DIVISION.

STEWART v. CAMPBELL.

No. 169

Bond—Joint obligants—Heir of provision—Heir of line—Supersedere of payment—Liability.—A., and his second son C., bound themselves conjunctly and severally for a sum of money borrowed by them. Circumstances in which *Held* that the sum in the bond was a proper debt of C.,—that as such it formed a burden on an estate to which his son succeeded as heir of provision to his grandfather A. (by whom the estate had been burdened with C.'s just and lawful debts),—that C.'s son was thus liable for the debt, and, as heir of provision of his grandfather A., was not liberated by a *supersedere* of payment granted by the creditor in the bond to A.'s heir of line as primary debtor under the bond.

This action was raised to enforce payment of the balance of a Feb. 6. 1852. personal bond for £2000, granted on 24th February 1814, by the ^{Stewart v.} defender's grandfather, Walter Campbell of Shawfield, and his ^{Campbell.} father, Robert Campbell of Skipness, now both deceased.

The bond was originally granted to Mr John Donaldson, W.S., and in this bond the obligants "bind and oblige ourselves, con-

Feb. 6. 1852. junctly and severally, and our heirs, executors, and successors,
renouncing the benefit of discussion, to content and repay," &c.

Stewart v.
Campbell.

The estate of Skipness, in respect of his taking which the defendant is now sought to be made liable for the debt in question, belonged to the defender's grandfather, Walter Campbell of Shawfield, as well as the other estates of Shawfield, Islay, and Woodhall. This estate of Skipness was destined by Campbell of Shawfield to form a provision for his second son, the defender's father, Robert Campbell, and his family; and a disposition of the estate was executed on 25th April 1779. This disposition was "to and in favour of myself during my life, and, after my death, to and in favour of the said Robert Campbell, my second son, and the heirs male of his body; whom failing, to the other heirs mentioned in the deed," &c.

Robert Campbell predeceased his father, Campbell of Shawfield, and died in 1814. In 1816 Shawfield executed a codicil or additional settlement, which, after reciting the original disposition and prior codicils, sets forth,—“that by the predecease of the said Robert Campbell, my second son, the said lands and estate of Skipness will, in virtue of said disposition (if not revoked) descend at my death to Walter Campbell, his eldest son (the present defender), and the heirs-male of his body. . . . I do further hereby burden the said disposition and lands, and others thereby dispossed, and the heirs who shall succeed to me in virtue thereof, with payment of all the just and lawful debts contracted by the said Robert Campbell, my son, and resting owing at the time of his death, in so far as those debts shall not be extinguished during my life.”

Shawfield died in the same year, 1816. In the following year Walter Campbell, the present defender, completed titles to the estate of Skipness, as heir of provision under his grandfather's disposition and deed of settlement. He also completed titles in 1845 to Skipness, as heir-male and heir of provision in general to his father, Robert Campbell; and both series of titles bore special reference to the provisions in the disposition and settlement, and the codicil of 1816. In the same year, 1845, he sold the estate.

The estates of Shawfield, Islay, and Woodhall, stood upon other investitures than the estate of Skipness, and were intended by Campbell of Shawfield to descend to his eldest son John. But John predeceased his father, and therefore on Shawfield's death the estates descended to John's son, Walter Frederick Campbell, who completed his title to these estates as heir of entail. The debt in

the original bond was assigned by Donaldson to Scott, and again Feb. 6. 1852. by him to Mrs Freer and her husband, Dr Robert Freer. In 1821 Walter Frederick Campbell, then of Shawfield, granted to ^{Stewart v.} _{Campbell} Mrs Freer and husband a bond of corroboration for the debt in question, which bond of corroboration bears that "seeing that the said principal sum of £2000 sterling contained in the said bond are still resting and unpaid, and that the said Mrs Margaret Thomson or Freer, and the said Dr Robert Freer, are willing to supersede payment thereof to the term of payment after mentioned, in consideration of my granting these presents in manner under written; therefore I, the said Walter Frederick Campbell, have become bound and obliged, as I hereby, in corroboration of theforesaid bond, and of the said assignations thereof, and without hurt or prejudice thereto, *sed accumulando jura juribus*, and specially without prejudice to any claim competent against the representatives of the said Robert Campbell of Skipness, under the said bond, bind and oblige myself," &c.

Walter Frederick Campbell, granter of this bond of corroboration, paid £400 to account of the bond in 1842, thus reducing the debt to £1600 of principal. The interest on the bond was also regularly paid by him. The balance of the debt and the bond have been transferred to the pursuer, Mr Stewart, who holds the debt in trust for certain parties. Walter Frederick Campbell of Islay, Shawfield's heir of line, and the granter of the bond of corroboration, is now bankrupt, and the present action has been instituted against the defender, Walter Campbell, for the balance on the bond.

The grounds upon which the pursuer maintained Campbell's liability were threefold:—(1.) As representing his father, Robert Campbell, one of the obligants in the bond; (2.) As representing his grandfather, also one of the obligants in the bond; (3.) By his having taken up the lands of Skipness under the special burden of paying this debt.

The defender pleaded non-liability as representing his father, in respect the service was merely expedite for completion of title, the defender having acquired no estate from his father; (2.) That as heir of provision of his grandfather, all claim against him, the defender, was lost, in respect of the creditor in the bond having given time to Walter Frederick Campbell of Islay, who had become the primary debtor, *qua* heir of line of Shawfield; (3.) That the declaration in the codicil of 1816 does not import any liability for the debt in question.

Feb. 6. 1852. A record having been made up on summons and defences, the Lord Ordinary (Ivory), ordered cases in such terms as that the parties, if so advised, might argue the whole cause; but specially directing attention to these points, 1st, the effect of the codicil, 27th March 1816, in so far as it burdens the defender with *his father's debts*; And, 2^d, the effect of the bond of corroboration taken from Islay in 1821, in so far as it infers an undertaking on the part of the creditor accepting it, "to supersede payment" for a certain specific term, and thereby operate a positive giving of time to the primary debtor; the liability of the defender being, as regards this question, to be considered as a liability attaching to him *subsidiarie*, and as a successor *titulo lucrativo* of the first Shawfield.

The pursuer argued,—

1. That, *prima facie*, the ground of the defender's liability, as representing his father, was well founded, inasmuch as every general service imports in law a liability for the debts of the defunct; and if as heir-at-law, or heir-male,—the defender's character,—absolute liability. The defender sold Skipness in virtue of his double title of heir, not only of Shawfield, but also as heir of his father.

2. The codicil of 1816 embraces the whole of Robert Campbell's debts of whatever kind, or however contracted. No exception or limitation is made, either expressly or inferentially. The ground of the pursuer's title is, that Shawfield gave to the defender his estate of Skipness; but only under the express burden and condition that he should pay the whole debts which had been contracted by his deceased father. The defender is a mere donee or legatee of his grandfather in Skipness, only entitled to the estate according to the tenor of the title by virtue of which it was bestowed upon him.

3. The plea founded upon the bond of corroboration, rests upon the doctrine of discharge of cautioners, by the creditor giving time to the principal debtor,—a doctrine which has no application to the case of heirs. An heir represents his ancestor, not only in his rights, but in his debts and burdens. Stair, iii. 5, §§ 13, 14, 16, 17; Ersk. iii. 8, §§ 50 and 52. The ground of the liability of heirs is simply that they have taken up the succession. The liability is liability *in solidum*, all being conjunctly and severally bound and liable, as co-obligants or principals to the creditors. It is imposed for onerous considerations; and although, where the succession comes to be distributed among different heirs, it is in-

*Stewart v.
Campbell.*

cumbent on the creditor to sue those heirs in a certain order, the Feb. 6. 1852.
right of the creditor is not liable to any other condition or limita-
tion whatever. In all essentials, the contract of cautionry con-
trasts with the liability of heirs for the ancestor's debts. A pro-
per cautioner is not bound as a co-obligant, or *in solidum* with the
principal debtor; and his liability arises from spontaneous and
gratuitous engagement, &c. Stair, i. 17, § 3. Hence equity has
imposed upon the creditor in suretyship debts, certain implied
obligations or duties introduced for the protection of the surety.
In particular, the creditor cannot alter the contract between him
and the principal debtor, so as in any way to affect or injure the
rights and remedies of the cautioner. If he does this, the cau-
tioner is held to be released from his obligation. But this principle
of release of the cautioner is alone applicable to cases of proper
suretyship. *Samuel v. Howarth*, 1817, 3 Merivale's Reports,
277, Lord Chancellor Eldon's opinion; *Idem in Bank of Ireland
v. Beresford*, 1818, 6 Dow, 238. See also *Ashbie v. Peduck*,
1836; 1 Meason and Wellsly, 564; *Hollier v. Eyre*, 1842; ix.
Clark and Finelly, p. 43; Lord Chancellor Cottenham's opinion.
As to the application of the rule to Bills of Exchange, see *Raggett*,
iv. Taunton, 730; *Kerrison*, iii. Campbell, 362, contraverting
Laxton v. Peat, ii. Campbell, p. 185; *Bailly on Bills*, pp. 167
and 271. The rule, therefore, is only available to proper sureties
or cautioners, and cannot be applied to a case like the present.
A surety's liability may remain, notwithstanding an arrangement
between the principal and creditor to give the former time. Pit-
man on Principal and Surety, p. 181, and the English cases there
cited. See also, Scotch case of *Ogilvie v. Smith*, 22d November
1821.

The defender argued—

1. He does not represent his father. Having made up his title
as heir in general to his grandfather, he thus obtained right to the
precept contained in the disposition of 1779, under which precept
he was infest. But no right to the estate was ever in his father's
person, and no such right was therefore ever taken up by the de-
fender. On selling the lands of Skipness, his service as heir to
his father in these lands under the deed of 1779, except as evi-
dence of propinquity, was wholly inept.

2. By the codicil of 1816, the disponee to Skipness is unques-
tionably burdened with Robert Campbell's debts, but by these
can only be meant Robert Campbell's own proper debts, not any
debts of Shawfield's own, in which Robert might be only cau-

Feb. 6. 1852. titioner, and of which Shawfield was bound to relieve him. It is averred that the debt now sued for was a debt of this description. The original disposition to Skipness bound and obliged the granter and his heirs-male, of tailzie and provision, as well as heirs-general and of line, to relieve the disponees of all incumbrances which, at Shawfield's death, should or might affect the lands of Skipness, except a provision of L.4000 subsequently revoked. It also contained a clause of warrandice "from all debts contracted or to be contracted by us, or either of us." A subsequent codicil altered the arrangement, so far as to burden the estate with all *heritable* debts secured over it at the time of Shawfield's death. There is no declaration, therefore, and it cannot be assumed, that Shawfield, intended to lay any of his own debts on the disponee to Skipness. Hence, the pursuer cannot enforce a greater demand under the codicil of 1816, than Shawfield himself, upon whose contract he sues, could have enforced. Against Shawfield, or Shawfield's heir of line, pursuing for relief under the obligation in the codicil, it would be an insuperable defence that the debt was Shawfield's own, to which the obligation in the codicil did not apply; at all events, that it was Shawfield's own to the extent of one-half, and that only the remaining half was a debt of Robert Campbell, which the defender, under the codicil, was bound to pay. Against the pursuer this defence must be equally effectual.

3. As heir of provision of his grandfather, the defender would be liable to the extent of the value of the estate taken up by him; but he has been liberated from all responsibility by the transaction between the creditor and the representative of the primary debtor. The heir of line holds the position of primary obligant: the heir of provision that of secondary or subsidiary obligant, entitled to full relief against the other, and not liable till that other is discussed; Ersk. iii. sec. 52, 53 : Stair, iii. 5, sec. 16 ; Bankton, iii. 5, secs. 68, 69 ; Bell's Prin. 4th ed. p. 701, sec. 1935. Therefore, the effect of a creditor giving time to the primary obligant is at once and entirely to liberate the subsidiary obligant; for the position of the subsidiary obligant is thereby materially changed, and possibly to his prejudice. Before the postponed period of payment has arrived, the primary obligant may be bankrupt. The subsidiary obligant's right of recourse against him for relief is therefore materially affected, and the creditor who is bound to put the secondary obligant in a position, on payment, to operate his relief by an assignment to the debt immedi-

ately available, has, by his own act, incapacitated himself from Feb. 6. 1852. doing so. Hence, it becomes the clearest equity that a creditor ^{Stewart v.} should not be entitled so to affect the position of the subsidiary ^{Campbell.} obligant without his consent; and that, if he does so, he should be held as having discharged his claim against that obligant. Whenever there is a primary and subsidiary obligant, the principle is equally applicable; Pitman on Principal and Surety, p. 170. The heir of line must be discussed before the heir of provision can be called upon; and the mere circumstance of the parties being bound jointly and severally to the creditor, is not sufficient to exclude the operation of the rule, if, in reality, one of them stands in the position of cautioner or subsidiary obligant, and is known to be so to the creditor; *Mackenzie v. Macartney*, 23d September 1831, 5 W. and S. 504. As betwixt the heir of line and heir of provision, the bond taken from Islay leaves everything to be regulated by the ordinary provisions of the law; and therefore, the giving of time to the heir of line, without the consent of the heir of provision, must be clearly held to liberate the latter, by application of a general principle applicable to every case of primary and secondary obligants.

The Lord Ordinary, "1^{mo}, In respect that, by the original bond, libelled, Walter Campbell, Esq. of Shawfield, and Robert Campbell, Esq. of Skipness, bind and oblige ourselves conjunctly and severally, and our heirs, executors, and successors, renouncing the benefit of discussion;" and that the bond of corroboration founded on by the defenders, and executed by Walter Frederick Campbell, Esq., son of the said Walter Campbell, is expressly declared to be "in corroboration of the foresaid bond and of the assignations thereof, and without hurt or prejudice thereto, *sed accumulando jura juribus*, and specially without prejudice to any claim competent against the representatives of the said Robert Campbell of Skipness under the said bond; repels the defence pleaded for the said defender in respect of the *supercedere* of payment granted by the creditors in said original bond to the said Walter Frederick Campbell," in consideration "of my granting these presents," i.e., the foresaid bond of corroboration; and finds that the defender, as heir of provision to the said Walter Campbell, is still liable in the same measure of joint and several liability for the debt in said bond, which was therein originally undertaken and become bound for by the said Walter Campbell; 2^{do}, *et separatis*, In respect that the defender, by the express condition of the title under which he succeeded to the said Walter Campbell in

Feb. 6. 1852. the lands and estate of Skipness, is burdened with payment of
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*Stewart v. Campbell.* "all the just and lawful debts contracted by the said Robert Campbell, my (i.e. Walter Campbell's) son, and resting owing at the time of his death, in so far as these debts shall not be extinguished during my (i.e. Walter Campbell's) life," and that the debt libelled was contracted by the said Robert Campbell, and is still resting owing and unextinguished, as said is; and also in respect of the special terms of the foresaid bond of corroboration, whereby the full force of the original bond is, notwithstanding the temporary *supersedere* of payment, reserved entire against all and sundry other parties bound thereby, and specially as against the representatives of Robert Campbell, finds the defendant liable in the same measure of joint and several liability for the debt in the bond, which was therein originally undertaken and become bound for by his father, Robert Campbell. He therefore, on the whole matter, decerned in terms of the libel.

Against this interlocutor Campbell reclaimed.

*Penney and Neaves* for the claimer.

*G. Graham Bell and Dean of Faculty* for the respondent.

The LORD PRESIDENT. I am clearly of opinion, that the first branch of the Lord Ordinary's interlocutor was well founded. The case of *Mackenzie* does not establish any new principles at all: the bond in that case was made out to be a bond of caution. I cannot look to the bond in this case as in that position. Here the parties are bound conjunctly and severally, and each binds himself for the whole debt. Now, has anything been done by the mere operation of the creditor giving a certain degree of time for payment, and the whole interest being paid by Islay previous to the date of his bankruptcy, to alter the nature of the obligation? This bond of corroboration is so framed as to leave everything as they were previous to granting it; therefore I see no ground for differing from the Lord Ordinary on the first branch of the interlocutor.

But as to the second branch, I am not so clear, because when I look to the clause of the codicil, I think it raises the question whether one half of the money was not for the son and the other half for the father. If this were so, it would not be fair to say that because the lands were burdened with payment of the just and lawful debts of Robert Campbell, that this was evidence of his liability for the whole sum under the original bond.

LORD FULLERTON. I am rather of opinion that the interlocu-

tor of the Lord Ordinary is well founded on both points. The Feb. 6. 1852.  
first point arises from the circumstance of the present defender <sup>Stewart v.</sup> being heir of provision of his grandfather. I cannot see any reason that considering the nature of this bond and the relation between heirs of line and heirs of provision, we have any authority whatever for applying to this case that extremely rigid rule which has been applied to cautionary obligations. There may be cases in which a creditor may deal in such a way with regard to heirs of entail whom he has bound, as to enable them to plead that they have been set free by his having materially damaged their right of relief, but how can it be said that any injury has been done here? The time of payment was postponed from the month of June to the term of Martinmas following. It is impossible to say that any injury was thereby sustained. I see no authority for applying such a general rule in regard to heirs of provision as is here contended for.

Again, this party takes the estate under the burden of his father's just and lawful debts. Now, is not this debt to the full extent a just and lawful debt? What may have been Robert Campbell's claim of relief against his father is another question, but *quoad* his creditors, is not the debt a just and lawful debt? If Robert Campbell had succeeded to the estate, so that his son would have taken from him, he, the defender, would have represented Robert Campbell, and there could be no doubt that in that case he would have been liable. But Robert Campbell dies, and consequently there can be no representation of him. Accordingly Shawfield just burdens the estate in the same way as if Robert Campbell had succeeded to it. We cannot apply to this case a different rule from the one in regard to creditors in general. We must hold that it is a debt contracted and due by Robert Campbell. I therefore adhere to the Lord Ordinary's interlocutor.

LORD CUNINGHAME concurred.

LORD IVORY saw no reason to differ from the interlocutor pronounced by him as Lord Ordinary. We must look to the deed itself for the law of the case, and it would not be safe to do other than ask, was this a debt of Robert Campbell's? This codicil was executed just for the purpose of putting the creditors in the same position as they would have been in had Robert Campbell succeeded to the estate. Shawfield is giving away his estate gratuitously, and he provides that the successor of his son, Robert Camp-

Feb. 6. 1852. *bell, in the estate, shall pay all the debts that were good against Robert Campbell.*

*Stewart v. Campbell.* The COURT, therefore, adhered to the Lord Ordinary's interlocutor, and refused the reclaiming note, but found no expenses due.

*Walter Horsburgh, W.S., Pursuer's Agent.*

*Alexander Hamilton, W.S., Defender's Agent.*

### FIRST DIVISION.

No. 170. **Mrs HELEN HOWDEN or REID and Others v. CAMPBELL and Others.**

*Personal Obligation—Representative Liability—Heir of Line—Heir of Provision—Supersedere of Payment.*

Feb. 6. 1852. *The question raised in this case was the same as in the previous case of Stewart v. the defender Campbell, (ante, p. 379.) The action was laid upon a personal bond for L.1000, granted in the year 1814 by Walter Campbell of Shawfield, and his second son, Robert Campbell, designed of Skipness—both now deceased—in favour of Andrew Pringle, farmer in Ballancrieff Mains, in right of whom the pursuers now stand. The granters are bound by the deed conjunctly and severally. The defender is sued as alleged representative of both obligants, Campbell of Shawfield being his grandfather, and Robert Campbell his father.*

The defender obtained right to the estate of Skipness by virtue of a disposition executed by his grandfather, in whose person that estate was vested, as well as the other estates of Shawfield, Islay, and Woodhall. This disposition was executed in 1779, in favour of the granter himself, during his lifetime, and, after his death, his second son, the before mentioned Robert Campbell, and the heirs-male of his body, whom failing, a series of substitutes. Robert Campbell predeceased his father, having died in 1814, whilst his father survived for two years subsequently. On the death of Mr Campbell of Shawfield in 1816, the defender took up the estate of Skipness, under his grandfather's disposition, by service as heir of provision to his grandfather. He therefore maintained that his father having died before the succession to Skipness opened, the right to that estate flowed to the defender directly from his grandfather. He did not therefore represent his father; he made up a formal title to his father, in order to facilitate the completion of a sale of the lands of Skipness; but he took nothing from his father through this or any other title.

He argued that this was a proper debt of Shawfield's. The interest on the bond was regularly paid by the heir of line and general representative of Shawfield—his grandson, Walter Frederick Campbell of Islay—down to 1847. Not only so, but in 1832 the creditor transacted with the heir to give him time for payment of the bond, on his granting a bond of corroboration. This was done in the knowledge that the debt was Shawfield's own; for in a letter produced and addressed by the agent of Campbell of Islay to the then creditors in the bond, it is expressly said—"This is the proper debt of Mr Campbell of Shawfield, and he will grant a corroboration."

He therefore pleaded, *inter alia*, that, as cautioner in the debt sued for, he was liberated by the creditors transacting with, and giving time to, the heir of the principal debtor; that he does not represent his father, and only represents Campbell of Shawfield, as special donee or heir in the estate of Skipness; but in this capacity he was only a subsidiary obligant, the primary obligant being Shawfield's heir of line and general representative; and therefore that the pursuers had lost all claim against the defendant, by transacting with, and giving time to, the heir of line, the party primarily liable.

The Lord Ordinary, (Colonsay,) "in respect of the depending questions between the defender and Mr Stewart, and between the defender and Mrs Pryce or Morrison, makes avizandum with the cause to their Lordships of the First Division," &c.

*Patton* for the pursuer.

*Penney* for the defender.

The COURT, in respect of the decision "pronounced by them in the action at the instance of Stewart against the same defender, decern against the defender in terms of the conclusion of the libel, except as to expenses. Find no expenses due, and decern."

• *Henry Tod*, W. S., Pursuers' Agent.

*Alexander Hamilton*, W.S., Defenders' Agent.

### FIRST DIVISION.

PRYCE or MORRISON and HUSBAND v. CAMPBELL and OTHERS. No. 171.

Personal Bond—Representative Liability—Heir of Line—Heir of Provision.

The question raised here was the same as in the two previous cases. The action was laid on a personal bond for L.1000, granted in the year 1811 by the late Walter Campbell of Shawfield, and

Feb. 6. 1852.

Pryce or Mor-

rison, &c. v.

Campbell, &c.

Feb. 6. 1852. payment of which, with interest from Whitsunday 1847, was now sought to be forced against the defender, as Shawfield's representative.  
*Pryce or Morrison, &c. v. Campbell, &c.*

The estate of Skipness, in respect of his taking which the defender's liability as Shawfield's representative is fixed upon him, was destined by Shawfield to his second son, Robert, the defender's father, and his heirs-male. Robert predeceased his father. The defender obtained right to the estate as heir of provision to his grandfather. Shawfield's heir-general and of line, and general representative, is Walter Frederick Campbell of Islay, who, as such, succeeded in room of Shawfield's eldest son, John Campbell, his father, to the grantor's estates of Shawfield, Islay, and Woodhall. He is now bankrupt. In 1846 the present pursuer, as creditor in the bond, took a bond of corroboration from Islay, by which, *inter alia*, she postponed and superseded payment to the then succeeding Martinmas.

The defender therefore pleaded, that his liability was only the subsidiary and secondary liability of heir of provision in a special subject, the primary debtor being the heir of line and general representative of the grantor; and that all claim against him is discharged, in respect of the deceased grantor having left sufficient estate for payment of the bond, and in respect of the creditor, in place of enforcing payment, having transacted with and given time to the primary debtor. He also pleaded, that the date of the bond was written on an erasure, and that this being *in essentialibus*, rendered the bond null as a document of debt.

The Lord Ordinary (Ivory) repelled the defence on the erasure; "and *quoad ultra*, in respect of the depending question between the defender and Mr Stewart, makes avizandum with the cause to their Lordships of the First Division."

*F. Russell* for the pursuer.

*Penney* for the defender.

The COURT decerned "against the defender, in terms of the conclusions of the summons. Find neither party entitled to expenses."

*Graham & Webster, W.S., Pursuers' Agents.*

*Alexander Hamilton, W.S., Defenders' Agent.*

## FIRST DIVISION.

GILMOUR v. GILMOUR'S TRUSTEES.

No. 172.

*Trust-Settlement—Resignation of Trustee—Reduction—Defence.*—Held, in a reduction of a trust-settlement, that trustees, one of whom had never accepted the office, and the other had resigned after the action was instituted, in virtue of a power in the deed, and both of whom had been called as defenders in the action, were entitled to be assoilzied.

*Fraud, &c.—Issue.*—Terms of issue in reduction of trust-settlement on the ground of fraud, circumvention, and undue contrivance.

This was a reduction of the trust-settlement of the late Allan Feb. 7. 1852. Gilmour, Esq. of Eaglesham, on the ground that it was obtained through fraud, circumvention, and undue contrivance, by certain parties interested in the succession. The case was now moved in for the adjustment of issues, and the immediate question was, who were to be parties to these issues. The action is directed against the trustees under the settlement,—and defences were lodged for the trustees, and separately for Arthur Mather and for John Graham, who were both called as parties to the action in the character of trustees. Mather pleaded that he had never accepted the appointment of trustee, and therefore, not being a trustee under the deed in question, he ought not to be a party to this action. Graham pleaded, that although, in the first instance, he had accepted the appointment, he had afterwards resigned his office, in virtue of the powers contained in the trust-deed, which provides, that “it shall be in the power of any one or more of my said trustees to resign and denude of the office of trustee and executor at any time during the continuance of this trust, notwithstanding he may have accepted thereof, and acted therein;” and that, therefore, not now being a trustee, he cannot be called on to defend the action. At same time, in case it should be necessary for him to make any further statement, he referred to and adopted the defences for the remaining trustees.

The Lord Ordinary (Cowan) allowed the pursuer “to lodge in process the issues he proposes to be tried in this case, reserving for future consideration the mode of disposing of the special defences stated for the defenders, Arthur Mather and John Graham;” and the issues being lodged, the Lord Ordinary, “in respect the parties do not agree in adjusting and settling the issues, reports the cause to the Lords of the First Division of the Court, in terms of the 38th section of the Act 13th and 14th Vict., c. 36, &c.”

Feb. 7. 1852.

Gilmour v.  
Gilmour's  
Trustees.

*Neaves and Dean of Faculty* (with whom *Hector*), for the defenders. The only object of this action being to try the validity of this deed, it is only in the character of trustees that these parties can be called at all. Therefore, Graham cannot be held a party to an action as to a deed under which he is no longer a trustee; and Mather never having been a trustee, both parties ought to be assoilzied. It is not an unusual proceeding for the Court to relieve parties similarly situated. *Sheriff v. Brodie*, 18th June 1836; *Mansfield v. Stewart*, 26th June 1841, 3 D. 1103.

*Inglis* (with whom *Pattison* and *G. Young*), for the pursuers. Graham is in a different position from Mather. The ground of action is facility and circumvention, and various parties are supposed to be implicated in it. Mr Graham was an acting trustee at the date of raising the action. Therefore, it will not now do for him to withdraw. Farther, he says, if he is to be a defender, he adopts the defence of the other trustees. We are therefore entitled to keep him as one of the defenders. There is here a *penuria testium*. The circumstances under which Graham divests himself of the character of a trustee are suspicious. It is obviously with a view to favour the defence in this action.

**The LORD PRESIDENT.** Mr Graham resigned in virtue of an express power given him to that effect in the trust-deed; and although at first he accepted the office, yet, at the time he gave in defences, he was called into Court, and was obliged to do so. But now he says, I want to resign; yet, if I am compelled to remain in the action, I adopt the defences of the other trustees. Is it to be supposed that every person introduced into the trust-deed is to be considered a material witness? He ought to be assoilzied.

**LORD FULLERTON** was of the same opinion. This person is called as a trustee, and in no other character. The trust-deed gives him power to resign: he does so, and is no longer a trustee. How can he be kept in the action? If the party could shew that, from the conduct of the case, this had taken place from improper motives, that would be another question; but, in the circumstances, there is no reason for objecting to his being assoilzied.

**LORD CUNINGHAME.** There can be no difference of opinion about the case. Graham is concluded against solely as trustee, and he cannot be precluded resigning in terms of the power contained in the trust-deed.

**LORD IVORY** was also of same opinion. We are called on to defeat the trust-deed by this motion to have Graham retained as

a defender. There are no personal conclusions against him in the summons, and he may resign his office of trustee whenever he pleases, unless there be something improper proved against him. If he shall ever come to be called as a witness, then the parties have all their objections against him.

The COURT therefore assizled both the defenders, and approved of the following issue to try the question in dispute between the parties:—

“ It being admitted that the pursuer is heir of conquest of the deceased Allan Gilmour, Esq. of Eaglesham; that the said Allan Gilmour died on 4th March 1849, and that he executed a trust-disposition, of date 31st December 1833, under which the pursuer was called to the succession of his whole estate in the first instance— Whether at the date of the trust-disposition and settlement, (of which No. 5 of process is an abstract,) bearing to be executed on 8th December 1848, the said deceased Allan Gilmour of Eaglesham was weak and facile in mind, and easily imposed upon? and Whether the defenders, or any of them, by themselves or others taking advantage of his said weakness and facility, did, by fraud or circumvention, obtain or procure the said trust-disposition and settlement to the lesion of the said deceased Allan Gilmour ? ”

*Patrick Graham, W.S., Pursuer's Agent.*

*Alexander Hamilton, W.S., Defenders' Agent.*

### FIRST DIVISION.

GILCHRIST OR WILSON v. WHICKER.

No. 173.

*Process—Reduction—Adjustment of Issues—General Service—Legitimacy.*

This was an action of reduction of a general service expedited by the defender, as heir-at-law of the deceased Dr Gilchrist, some time banker in Edinburgh. The case now came before the Court for the adjustment of issues.

The action was raised by the pursuer, as Gilchrist's daughter, by a marriage alleged to have been contracted by him with the daughter of a native merchant of the kingdom of Oude, and celebrated according to the form recognised by the Mussulman creed, which Gilchrist had adopted. The defence was, that the pursuer had not established that she is the lawful daughter of Dr Gilchrist, and therefore could not reduce the service in favour of the defender.

Feb. 7. 1852.

The case was reported by the Lord Ordinary (Colonsay).

Gilchrist or  
Wilson v.  
Whicker.

*Inglis* for the pursuer. There can be no inquiry into the propinquity of the pursuer, for she has expedited a general service to Dr Gilchrist, and her title is unchallenged. Now the defender's title is under reduction. Therefore the pursuer has a sufficient title and status to reduce the defender's service.

*T. Mackenzie* and the *Solicitor-General* were for the defender.

**The LORD PRESIDENT.** The parties must come to close quarters sooner or later. The proper course, therefore, is to allow the defender to repeat a reduction, and remit the case back to the Lord Ordinary to adjust the issues.

*John Cullen, W.S., Pursuer's Agent.*

*Gibson-Craigs, Dalziel and Brodie, W.S., Defender's Agents.*

### FIRST DIVISION.

No. 174.

**LOCKHART v. CUMMING.**

*Issues—Slander—Privilege—Specification of time and place.*—Terms of issues in an action of damages for slander at the instance of an assistant clergyman against his principal.

Feb. 7. 1852.  
Lockhart v.  
Cumming.

This was an action of damages at the instance of the Rev. Dr John Lockhart, assistant and successor to the Rev. John Cumming, minister of the parish of Fraserburgh, against Mr Cumming; and the case now came before the Court for the adjustment of issues. The pursuer proposed to take an issue in the following terms:—“Whether the defender, in the months of September, October, and November 1846, wrote and transmitted, or caused to be written and transmitted, to John Cumming, then residing in Glasgow, now deceased, the letters” therein specified? “And whether the defender did, by said letters, falsely and calumniously state, or hold forth that the pursuer was a person of bad character, or that he had obtained his situation by false pretences, or that he was a person of bad credit and unable to pay his debts, or that he intended, or was capable of absconding, in order to defraud his creditors, to the loss, injury, and damage of the pursuer?”

*Macfarlane* and *Pyper* for the defender. The word “maliciously” must be inserted. The question is, did the defender step out of his way to calumniate the character of the pursuer? Looking to the relative position of the parties, the defender being the clergyman of the parish, the pursuer his assistant and suc-

cessor, the defender was not only entitled, but it was his duty <sup>Feb. 7. 1852.</sup> to investigate every matter relating to the character of his assistant. These letters were written to the defender's nephew, and <sup>Lockhart v.</sup> Cumming. obviously for the purpose of ascertaining the truth of certain reports regarding his assistant. The statement of the defender was therefore protected by privilege. The pursuer must prove that these statements were written and made from malicious motives. The general principle applicable to such a case is enunciated in the case of *Toogood, v. Spyring*, 1834, 1 Crompton; Meeson and Roscoe's Reports, vol. i., p. 193. This has been recognised as a ruling case both in England and Scotland; *Stewart v. Swinton*, 26th May 1825, F. C.

**THE LORD PRESIDENT.** As to the situation in which the writer of the letters in question was to the pursuer, that is certainly material. But giving the letters the greatest latitude, there can be no doubt they are injurious. The defender becomes dissatisfied with his assistant, and wishes to get rid of him. He does not say there is a process going on against Lockhart in which it is necessary to get information; but he is merely paving the way for information against him. The defender is in the situation of any other person, and the same measure of justice must be allotted to this case as to every other. There must be an issue as to these letters, but the defender is not protected by privilege, and therefore the word "maliciously" ought not to be inserted.

**LORD FULLERTON** was of same opinion. It comes to this, that whenever a man writes an abusive letter, if he says that he does not wish it to be circulated, there will be no ground for an action of damages.

**LORD CUNNINGHAME** has some doubt whether, considering that the defender was interested in the morals of his parish, an issue of malice should not be given.

**LORD IVORY** concurred with the majority. There was not here a shadow of privilege.

Issue approved of.

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The pursuer proposed to take other issues of the general tenor, "whether on various occasions," during certain specified months, "September, October, and November, &c.," "within the shop of James Cardno, merchant in Fraserburgh, and in the street near the shop," "and in other places within the town of Fraserburgh," the defender did calumniate the pursuer.

*Macfarlane and Pyper*, for the defender, objected that the ex-

Feb. 7. 1852. *Lockhart v. Cumming.* *pressions in such issues were not in the usual style. They are too vague, containing no proper specification of time or place; Mason v. Tait, Jurist, 4th July 1851, p. 667.*

*Inglis* (with whom *Gifford*) for the pursuer. The slander complained of occurred on various occasions. It is impossible to state the precise dates on which this occurred, but it is not uncommon with reference to cases of such a description as this, to take an averment of repeated acts within a specified time. The slander was continuous. It was made with regard to a particular individual, and was repeated over a long period of time. The defender has no interest to demand any particular specification.

THE COURT repelled the objections to the issues, and held that they were properly prefaced by the expression, "That on various occasions," &c., and that a more particular specification of time and place was unnecessary.

*James Bell, S.S.C., Pursuer's Agent.*

*Lockhart, Morton & Co., W.S., Defender's Agents.*

### FIRST DIVISION.

No. 175.

DONALD MACPHERSON v. KENNETH MACKENZIE.

*Process—Conclusions of Summons of Damages—Issue.* — The different grounds of damage for not putting premises let to a tenant, in proper repair, and for alleged unwarrantable sequestration for rent, ought not to be slumped together in the summons, but should be separately and specifically stated.

Feb. 7. 1852. *Macpherson v. Mackenzie.* This was an action of damages by the tenant of the Caledonian hotel in Dingwall, against the proprietor, on the ground, (1.) That the defender had failed, in terms of the lease, to put the subjects into complete and tenantable repair, as at the pursuer's entry; and (2.) That he had unwarrantably used sequestration against the pursuer for payment of certain sums of rent. In the conclusion of the summons, the lump sum of L.600 was demanded as damages, for outlay of repairs, injury, and deterioration to the pursuer's property and effects in the hotel; for loss of custom and good-will in business; and *solutum* for injuries, in consequence of the sequestration, to the pursuer's credit, feelings, and patrimonial interests.

In defence, the pursuer's statements were generally denied by the defender, who farther pleaded, (1.) That by certain arrangements which had been entered into between the parties, outwith the present action, the pursuer was excluded from insisting in his

present claims; and, (2.) That the summons, in slumping all the grounds of damages together, and craving one random sum for everything, was altogether irregular and incompetent.

Feb. 7. 1852.  
*Macpherson v. Mackenzie.*

The Lord Ordinary (Wood) reported the case to the Inner-House, parties not being at one as to the form of the issues, and the defender contending that, in the circumstances, the pursuer had foreclosed himself from insisting in a claim of damages.

*Shand*, (with whom the *Dean of Faculty*). The defender's construction of what had taken place between the parties, out of the process, was incorrect. Nothing had been done by the pursuer to foreclose his claim of damages. (The details on this part of the case were altogether of a special nature, and raised no point of principle.) As to the second objection, regarding the form of the summons, perhaps it would have been better if the different items of damage had been more specifically stated; but there is no absolute rule of pleading in such matters, and the defender had no objection to separate the claims in the schedule appended to the issues.

*Buchanan* and *Solicitor-General, contra*. The pursuer's summons was most irregular and loosely drawn, even the alleged claim of outlay for repairs was not specifically stated, though, as a matter of course, the pursuer must have known if he actually disbursed any thing in this head, and what was the precise amount. It is now too late to specify particulars.

**LORD PRESIDENT.** This point deserves attention. I cannot approve of this loose and general way in drawing such a summons, but I think a specific separation of the alleged claims of damage in the issue may yet be made, which will cure the objection.

The other judges concurred, and the issue ultimately was approved of in this form:—

It being admitted that, as set forth in the Notarial Copy Tack, No. 16 of process, dated the 9th and 12th September 1846, executed between the pursuer and cautioner, and the defender, the pursuer became tenant of the Caledonian Hotel and pertinents, in the town of Dingwall, the property of the defender, for a lease of seven years, from and after Whitsunday 1846, the date of entry, at the yearly rent of £80,—

1. Whether the defender, in violation of the conditions of the lease, failed to put the subjects let into complete and tenantable repair, as at the entry of the pursuer, to the loss, injury, and damage of the pursuer?

Feb. 7. 1852. 2. Whether on or about the 1st of December 1847, and on or  
 Macpherson v. about the 1st of August 1848, or on or about one or other of these  
 Mackenzie. dates, the defender wrongfully sequestered the effects of the pur-  
 suer, in and about the said hotel and premises, to the loss, injury  
 and damage of the pursuer?

Schedule of damages claimed:—

Under 1st issue.—For outlay for repairs, £50.

For other damages, £300.

Under 2d issue, £250.

*L. Mackintosh, S.S.C., Pursuer's Agent.*

*Sang and Adam, S.S.C., Defender's Agents.*

## SECOND DIVISION.

No. 176. RAINSFORD and SPOUSE v. MAXWELL and OTHERS, HANNAY'S TRUSTEES.

*Trust-Deed—Clause—Construction—Legacy—Vesting.*—A party, by his trust-deed, appointed his trustee to convey his estate, first in liferent to A., next to B. in liferent, or till he succeeded to a certain estate; next, either on the death of B., or his succeeding to the estate, to pay over the residue to C., “and her heirs and assignees.” A. having died, and B. being willing to discharge his whole rights and interests in the rents and proceeds of the revenue: *Held*—the trustees were bound to pay over the proceeds to C.

Feb. 7. 1852. By his trust-disposition and settlement, executed at Vienna,  
 Rainsford, &c. the late Sir Samuel Hannay of Mochrum and Kirkdale, Baronet,  
 v. Maxwell, &c. after directing his trustees to pay over the annual free produce of  
 the residue, first to the Baroness-Dowager Schaffalitsky, in life-  
 rent, and upon her death to the testator's nephew, Lieutenant  
 Frederick Rainsford, during his life, or till he succeeds to the  
 entailed estate of Kirkdale, disposes of the residue itself in the  
 following terms:—“*Quarto*, Upon the death of the said Dow-  
 ager-Baroness Schaffalitzky and the said Frederick Rainsford, or  
 upon his succession to the said entailed estate of Kirkdale, I ap-  
 point and direct my said trustees to pay, make over, and convey,  
 the whole residue of my trust-estate, liferented as aforesaid, to  
 and in favour of my niece, Frances Sophia Rainsford or M'Lellan,  
 wife of the said William Hannay M'Lellan, and her heirs and  
 assignees.”

Since the testator's death the Dowager-Baroness has died,—  
 Mr Rainsford is now willing to discharge his whole right and in-

terest in the rents and proceeds of the revenue ; and in these circumstances the pursuer, Frances Sophia Rainsford or M'Lellan, <sup>Rainsford, &c.</sup> requires the trustees to pay over the residue to her ; and she <sup>v. Maxwell,</sup> &c. pleads that the residue is fully vested in her and her husband, subject to the liferent of Frederick Rainsford, who is also a pursuer, and that, upon his liferent being discharged, the defenders are bound to make over and convey the residue to them ; and that, even though the bequest of the residue has not vested yet in the liferenter discharging his liferent, the trustees are bound to convey the residue to Mrs M'Lellan.

The trustees pleaded in defence, that Mrs M'Lellan had no vested interest which would enable her to uplift and discharge the residue, and that the trust-deed should be construed according to the law of Germany, where Sir Samuel Hannay was resident at the date of its execution.

The Lord Ordinary (Rutherford) " finds that the deed of Sir Samuel Hannay must be construed according to the law of Scotland ; and, in respect that the Dowager Baroness Schaffalitzky is now dead, and that Mr Frederick Rainsford proposes to discharge all his right and interest in the rents and proceeds of the residue, and to discharge the trustees accordingly, finds that, upon his doing so, the trustees are entitled and bound to denude of and pay over the residue to the pursuers, Mrs Rainsford or M'Lellan and her husband."

The Lord Ordinary in his note says, that he has had no hesitation in disallowing the plea in law for the defenders, to the effect that the deed must be construed by the law of Germany. " The grantor of the deed describes himself as resident in Vienna, and appears to have resided in Germany for many years before his death. But he was possessed of a landed estate in Scotland ; and what is of more importance, besides the deed, being drawn by a Scotch conveyancer, is executed according to the Scotch form ; its language is strictly technical according the law of Scotland ; the trustees appointed are all resident in Scotland ; and the trust, especially in the disposition of the residue, is to receive effect there.

The *regula regulans* in all such cases as the present is to give effect to the will of the testator, construing his deed, however, by such rules of construction as may have been sanctioned by the Court in similar cases."

In regard to Mrs M'Lellan's claim " the Lord Ordinary has no doubt that she is entitled to make, and that the trustees are bound to comply with, this requisition. She is clearly the direct object

Feb. 7. 1852. of the testator's regards; no one is called after her specially or by name; her heirs, indeed, are called generally, but although they *v. Maxwell, &c.* might, in the event of her decease, be entitled to take as conditional institutes, they are evidently not called with a view to postponement of the vesting of her interest in the residue, but at the utmost to prevent a case of intestacy. This is clear enough from the whole expression—*her heirs and assignees*; for if her assignees could take against the heirs, a case of actual vesting was plainly implied. There are no such specialties here as in the case of Brotherton, decided in this court, June 18. 1847, and in the House of Lords, August 14. 1850; in which the claimant, the liferenter upon whose death the residue was directed to be paid over, sought himself to take the fee by renouncing the life-rent, but the gift of the residue was directly to a class or individual by a description which could not be ascertained till some future time or event. No similar specialties occur here—the pursuer, Mrs Rainforth or M'Lellan, is the object mainly and directly contemplated; and although the estate is in the meantime held under trust, the directions really amount to this—that the trustees shall hold for the liferenters successively in liferent, and for Mrs Rainsford or M'Lellan in fee. The case of Annandale, June 9. 1847, is in many respects much stronger than the present. The Lord Ordinary thinks it unnecessary to attempt any analysis of the numerous decisions upon the import of similar bequests of residue. He is not aware of any authority which interferes with what he ventures to think the plain ground upon which this decision rests, as giving effect to the testator's clear intention.

The parties reclaimed.

*Maitland* was for the pursuer, and *Marshall* for the defenders.

The COURT adhered.

*David Welsh*, W.S., Pursuer's Agent.

*Hunter Blair*, and *Cowan*, W.S., Defenders' Agents.

## SECOND DIVISION

### No. 177. APPEAL, WRIGHT, IN E. ANDERSON & CO.'S SEQUESTRATION.

*Process—Sequestration—1 and 2 Vict. c. 41.—Examination of Bankrupt.*  
—Circumstances in which an objection to a question put, on examination, by a creditor to a bankrupt, bearing on the fact as to whether a partnership existed between the bankrupt and a creditor, the constitution of the alleged copartnery being the subject of a process in the Sheriff-court, was repelled.

This case came before the Court, by appeal from the Sheriff <sup>Feb. 7. 1852.</sup>  
(Alison) of Glasgow.

App. Wright.

In the course of the examination of E. Anderson, the bankrupt, the following question was put by some of the creditors—"Did you put into Mr Wright's bank-account the moneys which you drew, after leaving Mr Main, and previous to your opening the bank-account in 1845, in your own name?"

To which question it was objected for Wink, the trustee, as follows—"There is in dependence an action of count and reckoning, at the instance of Mr Wright, against the bankrupt, said to arise out of a pretended partnership between them in the years 1844 and 1845. This action it may be for the interest of the estate for the trustee to oppose. The question now objected to, and the line of examination proposed, has reference to the transactions between the parties, which are said to constitute a partnership; and as it is the subject involved in the depending process, it is incompetent to put such questions to the bankrupt here."

Answered for certain of the creditors.—(1.) "That they have nothing to do with Mr Wright, but wish to ascertain the whole facts connected with the bankrupt's affairs. If it turns out that the bankrupt had or has partners, such as Mr Wright, instead of an injury, it will be a benefit to the bankrupt estate. (2.) Nothing that the bankrupt says can affect his creditors' rights. The trustee cannot found on the bankrupt's statements in any process, neither can they be founded on as against the trustee; and it was answered for Mr Wright, that he not only advanced the same reasons as those above stated, but farther (1.) That in the action supposed to be alluded to in the objection, not only had the record been long since closed, but all the proofs long since concluded. Even were he inclined, or were it competent to make use, in that process, of what may be elicited from the bankrupt here, Mr Wright could not do so; but, farther (2.) he binds himself, by subscribing these answers, that he shall not quote from, or even make an allusion to what may be here elicited in the said process.

And for various creditors it was farther answered, that the interrogatories arise out of the examination by the trustee, who has explicitly asked the bankrupt about both action and his partnership."

The Sheriff pronounced an interlocutor, by which "in respect it is admitted that the question now put has reference to the matters which are at issue between the parties in the process referred to; and in respect, although the record is stated to have

Feb. 7. 1852. been closed, and the proofs concluded in that process, yet it may prejudice the bankrupt or the estate, by enabling the pursuer thereof to produce this examination as a *res noviter veniens*, or give him, the pursuer, the benefit of a precognition upon oath, in making a reference of the cause to the bankrupt's oath, from which advantages he cannot be excluded by the disclaimation now put on record: Finds the question incompetent, and sustains the objection.

Against this judgment Wright now appealed.

*Pyper* for appellant—Any question tending to throw light on the state of the bankrupt is competent. Bell's Sup. Com. § 68 of Act, p. 163.

*Moir* (with whom the *Solicitor-General*) for the trustee. Wright is pursuer of an action of count and reckoning in the Sheriff-Court, founded on an allegation of copartnership between him and the bankrupt, and concluding for payment of a balance of £500, as the result of the transactions between them during the time the partnership lasted. The particular question here put may not on its face raise any question of partnership between the two; but it is put introductory to a line of inquiry whose object is to establish the partnership. Now such being the object of inquiry, it should not be allowed. The true object of the examination of a bankrupt is to obtain all information favourable to the creditors by increasing the amount of his funds, not which may diminish them by rearing up claims at the instance of creditors; and neither trustee nor creditor can put questions tending to diminish the bankrupt estate; Bell, ii. 396, *Barstow*, 21st February 1849.

**LORD JUSTICE-CLERK.** I see from the examination that other questions had been put, previously to this one, also bearing on that question of partnership, and on the action, which it very naturally follows. And therefore, on this special ground, without deciding, generally, anything as to the competency of such questions, I think the objections, in the present instance, came somewhat too late.

The COURT therefore sustained the appeal.

*Alexander Hamilton, W.S.*, Agent for Appellant.  
*Robert Oliphant, S.S.C.*, Agent for Respondent.

## FIRST DIVISION.

LIVINGSTONE v. MATTHEW.

No. 178.

*13 and 14 Vict. c. 36, § 49—Reporting by Lord Ordinary—Enumerated causes in 6 Geo. IV. c. 120.*—Where, in the Outer House, it is proposed that proof by commission be allowed in a case falling under the last clause of the 49th section of the New Court of Session Act, the proper course for the Lord Ordinary to adopt is to report the matter to the Court. Circumstances in which, in one of the enumerated cases in the 6 Geo. IV., c. 120, for trial by jury, the Court allowed a proof on commission.

This case was reported by the Lord Ordinary (Colonsay.) By <sup>Feb. 10. 1852.</sup> *§ 49 of the Court of Session Act, 13 and 14 Vict., c. 36,* it is enacted, “That in any cause before the Court not falling within <sup>Livingstone v. Matthew.</sup> the causes specially enumerated in the 6th Geo. IV. (c. 120) as appropriate to be tried by jury, it shall be competent to the Lord Ordinary, before whom such case depends, with the consent of both parties, or upon the motion of one party, with the leave of the Inner House, obtained upon the report of the Lord Ordinary, or to the Court when the cause comes in to the Inner House, to appoint the evidence in such case, or any portion of such evidence, to be taken by commission: provided always that it shall be competent for the Court to allow proof on commission in any of such enumerated causes where the action is not an action for libel or for nuisance on property, and in substance an action of damages.” The present action is raised on the ground of facility and lesion, and refers to certain subjects situated in Dundee. Both parties concur that this is a case in which the interest is not large, and the number of witnesses great, and the expenses likely to be great in proportion to the value of the matter in dispute, by bringing the witnesses for examination from Dundee to Edinburgh. But it being one of the enumerated cases, it was out of the Lord Ordinary’s power to appoint the evidence to be taken on commission. Therefore, the only question for him to consider was, whether with reference to the last clause of the section of the new statute referred to, which says, “that it shall be competent for the *Court* to allow proof in commission in any of such enumerated causes,” &c., it was a case for him to report. It did not appear to him that there was any other mode in which the parties could come before the Court. The record has been made up, and the issues adjusted; and in that stage, therefore, there was no other form in which the

Feb. 10. 1852. parties could obtain the opinion of the Court on the matter, unless reported to the Court.

*Livingstone v. Matthew.*

The LORD PRESIDENT. I think when we read this section from beginning to end, the course adopted by the Lord Ordinary is proper. For the purpose of ascertaining the proper procedure, the opinion of the Court is to be obtained, and that on the report of the Lord Ordinary. I think it is expedient in this case to allow a proof on commission.

LORD FULLERTON. The only point which the Lord Ordinary could consider was, whether he could report the case. He has properly done so; and we have now to consider whether the case is one for allowing proof on commission. I agree as to the propriety of doing so. Both parties are agreed that the case depends on the value of subjects in Dundee.

LORD CUNINGHAME and LORD IVORY both concurred as to the propriety of the course adopted.

"The Lords, on the report of Lord Colonsay, Ordinary, in respect of the circumstances of this case, as explained in the statement made to the Court by the Lord Ordinary, and assented to by the counsel for both parties, appoint the evidence in this case to be taken by commission, and remit to the Lord Ordinary to proceed accordingly."

The Lord Ordinary pronounced the following interlocutor:—  
In respect of the remit by the Lords of the First Division contained in the preceding interlocutor, grants commission to James Ogilvie, writer, Dundee, to take the evidence in reference to the issue, No. 20 of process, and grants warrant at the instance of both or either of the parties for citing witnesses and havers to compear before, and be examined by, the said commissioners, and to produce their exhibits, and appoints said proof to be reported within three weeks, &c.

*Patton* was for the pursuer.

*Macfarlane* for the defender.

*Isaac Anderson*, S.S.C., Pursuer's Agent.

*John Henderson*, S.S.C., Defender's Agent.

## SECOND DIVISION.

No. 179. MARCHIONESS OF HASTINGS *v.* THE EXECUTORS and OTHERS of the deceased MARQUESS OF HASTINGS.

*Confirmation as Executor Dative.—Title to obtain Confirmation.*—Held that a party who had expedited letters of administration in England, as

next of kin, by the law of that country, to a person who had died *intestate*. Feb. 10. 1852. was entitled to apply for and obtain confirmation as executor-dative to the deceased's personal estate in Scotland, although not nearest of kin by the law of Scotland.

Marchioness  
of Hastings  
*v.* Executors  
of Marquis  
of Hastings.

This was an advocation from the Commissary of Edinburgh.

The late Marquis of Hastings died *intestate* on 17th January 1851. He was a domiciled Englishman. He was survived by his mother, by a brother, who is the present Marquis, and by four sisters. According to the law of England, the mother and four sisters take the moveable succession in equal shares. But the four sisters are all in minority. In these circumstances, letters of administration have been expedited in the proper Court in England in favour of the mother, who, by the law of England, was the proper party to administer; and she now administers these for her own behoof as one of the beneficiaries, and of her four daughters. Part of the execracy is in Scotland; and to enable her to recover the portion of the execracy in Scotland, she raised an edict before the Commissary of Edinburgh for confirmation as executor-dative. No appearance was made. The Commissary, adhering to the interlocutor of the Commissary-depute, refused to decern and confirm, on the ground that such a proceeding was unauthorised by the law of Scotland.

The Marchioness of Hastings advocated.

The Lord Ordinary (Cowan) ordered inquiries to be made as to the practice in the Commissary Court. The following is the memorandum lodged in regard to these inquiries:—

“ When a party domiciled in England dies *testate*, and his executors-nominate prove the will in the proper Court there, the Commissary Court here, should an active title *quoad* personal estate in Scotland be required, grant confirmation at once as a matter of course on production of the *probate*, and without any inquiry as to the validity of the deed.

“ But when such a party dies *intestate*, and his next of kin obtain *letters of administration*, the same effect was not given to these. It is then necessary, in making up a title here, to take out an edict, and obtain a decerniture as executors-dative, *qua* nearest in kin; and hitherto, it would appear, no party has yet obtained this who was not so according to our law. There is no instance that can be found of a mother having ever been appointed who in Scotland does not, in any case, succeed to her children as next of kin.”

The Lord Ordinary reported the case to the Court.

Feb. 10. 1852. *Marshall* (with whom *Boyle*) for the advocator. It is stated, that in the Commissary Court there has been no practice such as that proposed here, but there has been no contrary practice. By the law of Scotland, where there is no competing party, and no one objects, is it incompetent? There are two grounds for sustaining this application—(1.) This lady is one of the next of kin according to the law of the country where the deceased died. She is the only one who, in the circumstances, can expedite the administration; *Williams' Law of Executors*, p. 349. Now, the law of Scotland is, that you give administration to the next of kin, or any one of them. (2.) But there is another and stronger ground—namely, that this lady has a most substantial interest. Now, the law of Scotland allows confirmation to parties having a substantial interest in the estate. The order of confirmation is regulated by the instructions given to the Commissaries on 28th February 1666, inserted by the authority of this Court among the Acts of Sederunt of that date. By these orders any one having interest comes in before the Procurator-Fiscal. Even a general donee and the next of kin have competed; *Earl of Crawford*, 10th January 1755, M. 3819. In this case there is no competition; and you must either confirm this party or the Procurator-Fiscal. In terms of the instructions and of the law of Scotland, you must confirm this party. It appears, from a passage in Lord Stair's report, to have been the understanding of the Court, that the party having the interest in the succession by the law of a foreign country had a right to be confirmed; *Duff*, 18th July 1666, M. 4498—where the deceased had resided in Poland. Again, the very thing we are asking is done in England. If a party dies domiciled in Scotland, and the party next of kin in Scotland obtain a confirmation there, and go to England, that party administers in England, though not next of kin by the law of England.

**LORD JUSTICE-CLERK.** It is a fixed rule, that the moveable property of a deceased party shall be regulated as to succession, whether testate or intestate, by the law of the country to which he belongs; that is, of his proper domicile. In like manner, unless there are some peculiar specialties, or clear convenience, the administration is also to be that of the domicile. It may be that, in the first instance, the collection of the moveable funds either must be, or may be, by a different party from that administering in the country where he is domiciled; and so there may be a dif-

Marchioness  
of Hastings  
v. Executors  
of Marquis of  
Hastings.

ferent title for collection and discharge. But even then the funds <sup>Feb. 10. 1852.</sup> must be sent to the country where the succession is to be settled, <sup>(Marchioness Hastings v. Executors of Marquis of Hastings.)</sup> unless by special arrangement. Hence, in principle, it is clear that the party in whom the *title* of administration is vested should be the same in both countries, since, in the foreign country, it is only a title for collection, and not for final distribution. There is, and can be, no reason why—for such a title as is required in Scotland for the moveable property there situate of a party deceased, who was domiciled in another country—there should be a different rule in giving an edict of executor-dative where the party has died intestate, from what is observed and acted upon where he has died testate; and it seems to be admitted, that there is no contrary practice opposed to the advicator's plea. It is to be kept in view, that the edict is not to decern the advicator in any character of heir, by the law of Scotland, or to recognise in her any right of succession—that her edict is a declaratory proceeding to find the party entitled to be decerned executor-dative. To a party's right to pursue such a proceeding, and to obtain such a decree, there is no limitation, if he has any *interest* in law to obtain such. Relationship, by our law, is not a requisite; nor does the edict, as the Commissaries seem to suppose, imply any such legal relationship as, by our law, gives any right of succession whatever.

Where a party who has obtained *probate* on a will in England applies for confirmation in Scotland as a title for collection of personal estate situate here, it is stated to us that the edict passes, as a matter of course, on production of the probate and without any inquiry as to the validity of the deed. And most correctly both in point of form and principle. What is produced in such a case is the *title* for administering the estate granted by the English Court upon a will proved to them. That *title* to administer and collect the estate in England is the interest proved to the Scotch Court in order to obtain a title here to the funds which must go to England and fall under the English law. Hence, in the case of testate succession, the confirmation, it is admitted, is granted, not in respect of a right to be judged of under the will, or by the foreign law, but in respect of the *title* actually vested by the probate or judgment of the English Court passing on that will and vesting the title to administer. Now to the law of this country it is immaterial on what ground that title is granted, whether in respect of a will, or in respect of rights of succession, as well settled in that country as any rule can be in our law. That probate then is a title to administer. In like manner, a party entitled as

**Feb. 10. 1852.** next of kin by the law of England, obtains letters of administration as the proper party to administer to and distribute or enjoy the funds and personal property of the deceased. These letters of administration are a title just as a probate is, and when produced to us are just as authoritative with our Court, for granting confirmation, as a probate is. In principle there is no distinction, in point of fact there is really no difference, for in the one case it is the *title* which is held to warrant the confirmation, as matter of course, and in the present, confirmation is asked in respect also of a title, constituted in the same manner by the English Court, and equally establishing the party's right to administer. The probate may or may not also have decided more than the granting of letters of administration. But with these questions, whether raised as to a will, or as to a party's right to the character of next of kin, or right to obtain the letters of administration, we have nothing to do and are really ignorant. The title to administer has been given and is proved to us in one case as much as in the other, and that is the only thing to attend to in the one, as it is the only thing which is attended to, we are told, in the other case.

**LORD MEDWYN.** I am satisfied with the course taken by our predecessors in the case of the *Earl of Crawford*, and that we are following out the instructions given to the Commissaries, when we instruct the Commissary of Edinburgh to confirm the Marchioness of Hastings as the person having the interest, and who is unopposed by any of the nearest of kin, or any creditor-executor or legator, the party having died intestate. The only competition could be with the procurator-fiscal, which is not necessary now in the state of our law as to the question of testaments. The title given to the Marchioness here is merely to collect the funds; it will not affect the right of succession or distribution of them. I am for remitting, with instructions, to the Commissary to grant confirmation.

The other judges concurred.

The COURT altered the interlocutor of the Commissary, and remitted, with instructions, to grant confirmation as prayed for.

*Hunter, Blair and Cowan, W.S., Agents.*

#### SECOND DIVISION.

No. 180. **LEBURN AND OTHERS (GRACIES' TRUSTEES) v. FERGUSON.**

*Reduction—Decree of Certification contra non producta.*

In this case (see *ante*, p. 1) the pursuers now moved for decree Feb. 10. 1852. of certification against certain writs.

Leburn, &c.  
v. Ferguson.

*W. G. Dickson* and the *Solicitor-General* were for the pursuer.

*Dundas* and *G. G. Bell* were for the defenders.

The COURT, "In respect the defender has returned to process, Nos. . . . of the said writs which were formerly produced, and has raised actions of proving the tenor of Nos. . . . and further, that he has already, by the inventory, number 50 of process, referred to a decree of adjudication, as being upon record, &c., which is presumed to be No. 10 of said writs, and has likewise referred to Nos. . . . thereof, as being also upon record, and that Nos. . . . being returns of services are in the records of Chancery, refuse the pursuer's motion for certification, grant warrant on the Director of Chancery, and ordain him to appear with the same when it may be necessary; remit to the Lord Ordinary to proceed with the preparation of the cause in regular form, with power to his Lordship, in the event of any undue delay in the production of extracts of the deeds referred to on record, after the same are again called for, or in proceeding with the processes of proving the tenor above referred to, to entertain and dispose of any motion that may be made in respect of such undue delay, for certification *contra non producta*, or to pronounce such other order as the circumstances stated to his Lordship may seem to require."

*Lockhart, Morton, Whitehead, and Greig*, W.S., Agents for the Pursuers.  
*Dundas and Wilson*, C.S., Agents for the Defender.

## SECOND DIVISION.

Pet.—**STEWART v. M'GIVEN.**

No. 181

*Factor—Act of Sederunt 13th February 1830—Recal of Factory.*

The petitioner, in this case, set forth that his father, Daniel Feb. 10. 1852. Stewart, who went abroad, and is believed to be dead, was proprietor Pet. Stewart v. M'Given. of a *pro indiviso* half of certain subjects in the West Port of Edinburgh, of which M'Given, who is proprietor of the other *pro indiviso* half, was appointed factor on the prayer of the present petitioner in the year 1847; that since his appointment M'Given has mismanaged the property, failed to furnish an account of his intromissions, charged large sums for repairs which the petitioner believes were never expended, and rents a portion of the property

Feb. 10. 1852. himself for a rent much under that which it would yield ; and that he has also failed to prepare a rental of the estate, or to lodge the same in the hands of the Clerk of Court ; and although alterations have taken place in the rental, that no account has ever been lodged by M'Given ; and, in fact, that he has not complied with any one of the provisions of the Act of Sederunt, 13th February 1830.

Pet. Stewart  
v. M'Given.

The petition therefore prayed for the removal of M'Given, and the appointment of Kennedy, or some other as factor, in his room.

*Forman* was for the petitioner, and *Donaldson* was for M'Given.

**The LORD JUSTICE-CLERK.** It is sufficient, without enquiry into the accounts of the expenditure of M'Given, that he has failed to comply with the requirements of the Act of Sederunt, in order to authorise the Court to remove him.

Prayer granted.

*David Crawford*, S.S.C., Petitioner's Agent.  
*Charles Stewart*, S.S.C., Respondent's Agent.

### FIRST DIVISION.

#### No. 182.

#### Petition—*Poor WILLIAM SMITH.*

*Poor's Roll—Probabilis causa—Reporters—Division of Opinion.*—Circumstances in which an applicant was admitted to the benefit of the Roll, although the reporters on his *probabilis causa* were equally divided in opinion.

Feb. 11. 1852. This was an application for the benefit of the poor roll. By sec. 1 of the Act of Sederunt, 21st December 1842, regulating the poor's roll, it is ordained "that the Faculty of Advocates, the Writers to the Signet, and Solicitors before the Supreme Courts, besides electing counsel and agents for conducting the causes of the poor as at present, shall also respectively name two advocates, one writer to the Signet, and one solicitor each year, to act exclusively as reporters on the *probabilis causa* of the pauper applicants for the benefit of the poor's roll ;" and by sec. 5 it is provided, that on an application for the benefit of the poor's roll being moved, the Court may either "refuse it *de plano*, or remit to the reporters, who, on considering the party's case, and hearing all objections, shall report whether the applicant has a *probabilis causa litigandi*, and otherwise merits the benefit of the poor's roll."

Pet. Smith.

In this case a remit had been made in terms of sec. 5 of the Act of Sederunt. The reporters, on considering the applicant's case,

differed in opinion, the two counsel being of opinion that there was <sup>Feb. 11. 1852.</sup> a *probabilis causa litigandi*, and the two agents holding that the applicant had no case. The report in the applicant's favour was therefore signed only by the counsel. No separate report was made by the agents.

<sup>(w)</sup>  
Pet. Smith.

On the case being moved, the agents reporters were called, and *Penney* and the *Solicitor-General* on their part explained as the cause of the absence of their names from the report, that the object of the remit by the Court in such cases is to obtain the individual opinion of the whole reporters, and that where a difference of opinion exists, the dissentients could not be called on to subscribe a report from which they differed. They suggested, therefore, that the proper course was either to refuse the application in consequence of the applicant not having made out his case by producing a report from the counsel and agents, in terms of the remit from the Court; or otherwise, to remit to a new set of reporters.

*Tytler*, for the applicant, was not called upon.

The Court declined deciding the general question of the effect of a report in the situation of the present, but held that, in the circumstances of this case, a *probabilis causa* had been made out sufficient to warrant the granting of the application—it being at the same time remarked that, where a diversity of opinion exists as in the present case, the opinion of the counsel must be decisive.

### FIRST DIVISION.

MARR v. BUCHANAN, YOUNGER, and COMPANY.

No. 183.

*Railway Shares—Sale—Transfer—Registration—Liability of Broker—Usage of Stock Exchange.*—A broker employed to sell railway shares, is not bound to get the transfer registered in the books of the company, nor is he responsible for the purchaser's neglect to do so, and therefore is not liable to relieve his constituent of calls made upon the shares subsequent to a sale effected by him, and for which calls his constituent is primarily liable as registered proprietor of the shares.

This was a declarator to have it found and declared that it <sup>Feb. 11. 1852.</sup> was the duty of the defenders, as brokers by whom the sale <sup>Marr v.</sup> Buchanan, &c. of certain railway shares was effected, to see the transfer of those shares registered in name of the purchaser in the books of the railway company, and that, in respect of their failure to do so,

Feb. 11. 1852. they are liable to relieve the pursuer who employed them, of all claims to which he now is, or may hereafter be exposed, in consequence of such non-registration.

Marr v.  
Buchanan, &c.

The circumstances out of which the present case arose were these:—The pursuer, John Marr, writer in Lanark, was registered proprietor of 200 shares of £25 each of New Caledonian stock. On these shares a sum of £3, 15s. per share had been paid, and there consequently remained to be paid the sum of £21, 5s. per share, at the date of the transaction between the pursuer and the defenders. In December 1847, Marr wrote to the defender Buchanan—who is the remaining partner of the firm of Buchanan, Younger, and Co., and a member of the Glasgow Stock Exchange—giving him an order to sell his shares. In consequence of this order the defender sold 100 shares on behalf of the pursuer on 12th January 1848, and on the same day transmitted a sale note in these terms:—“ Sold by your order, and for account, end of January, subject to the rules or constitution of the Glasgow Stock Exchange, extracts from which are endorsed hereon,” &c. On the following day, the defender sold the remainder of the 200 shares, and transmitted to the pursuer a sale note of the same, in similar terms with the preceding. Soon thereafter the necessary transfers of the shares were prepared and transmitted to the pursuer for his signature, and after being subscribed by him were returned by him to the defender; and about the same time the price of the shares, under deduction of the commission payable to the defender upon the transaction, was paid over to the pursuer.

In March 1848, a call having been made on the stock of the Caledonian Railway Company, of which the shares sold by the pursuer formed part, it appeared that the purchasers of ninety of these shares had failed to register the transfers in the books of the company. A demand, therefore, was made upon the pursuer as registered proprietor of the shares for payment of the call, and he thereupon wrote to Buchanan that “the enclosed notice of a call on new Caledonian shares refers to part of those sold by you some time ago for me. I hope the purchaser will attend to it.” Some correspondence ensued between the parties, and the pursuer eventually raised the present action, concluding for payment of £.225, being the amount of the call referred to, and also of another sum of £.225, being the amount of another call on the same shares, both calls being subsequent to the date when the shares were sold by the defenders on the pursuer’s account.

The summons narrates "that it was the duty of the defendants <sup>Feb. 11. 1852.</sup> acting as aforesaid," i.e., as brokers, "to see the said deeds of <sup>Marr v.</sup> transfer after the same were duly executed, delivered to the secretary <sup>Buchanan, &c.</sup> of the railway company, so as to save the pursuer, the vendor of the said shares, from continuing to be liable to the said company for any calls which might thereafter be made upon them. . . . That in consequence of the culpable omission and neglect of the said defenders to get the said transfer registered in the books of the said railway company as aforesaid, or at least to deliver the said deeds of transfer to the secretary thereof, in terms of the foresaid statute (8 Vic. cap. 17, § 16), and of the delay or refusal of the parties who purchased the said shares themselves to do so," the defenders have "rendered themselves liable in relief to the pursuer of all the loss and damage he has sustained, or may yet sustain in the premises, and particularly, of the amount of the said third and fourth calls upon the said stock to the extent of the said ninety shares.

The defenders pleaded that as selling brokers they never undertook to see the transfers registered in the names of the purchasers in the books of the railway company; and no such obligation was imposed on the defenders either by the rules of the Glasgow Stock Exchange or at common law.

The record having been closed on summons and defences, the Lord Ordinary (Wood) "in respect of the novelty of the points at issue in this action, and of the great amount of the interests which it is understood may be affected by its result, it being stated that many other cases are waiting the decision that may be pronounced in this process, . . . appoints the parties to give in mutual cases arguing the whole cause," &c. His Lordship thereafter "grants warrant to enrol in the Inner-House Rolls," and the case having been called to-day,

*Mure and Marshall* for the pursuer.

*J. Campbell and Inglis* for the defenders.

The arguments founded on by both parties in their written pleadings, and also at the Bar, may be shortly stated as follows: —For the pursuer it was argued that by secs. 9, 13, of the 8th Vict. c. 17, the stock certificate constitutes the shareholder's evidence of his rights. These the pursuer sent to the defenders upon their request, with a view to their being delivered over to the purchasers. There is nothing in the statute which gives the purchaser any right to the possession of the deed of transfer in

Feb. 11. 1852. return for the price paid for the shares. On the contrary, § 16 provides that "the said deed of transfer (when duly executed) *Marr v. Buchanan, &c.* shall be delivered to the secretary and be kept by him, and the secretary shall enter a memorial thereof in a book to be called the Register of Transfers, and shall endorse such entry on the deed of transfer, and shall on demand deliver a new certificate to the purchaser," . . . "and until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share," &c. All therefore that a purchaser can in such circumstances demand is, that the deed of transfer shall be duly executed, and when so executed, that it shall be disposed of in such a way as to afford him perfect security that he has acquired a valid title to the shares, and that he can at any time obtain conclusive evidence of his proprietorship. There is no express provision in the statute to the effect that either the seller or the purchaser shall be the party who is actually to deliver the deed of transfer to the secretary. While, therefore, it may at one time be more for the interest of the purchaser to see to the registration of the transfer, it is equally clear, on the other hand, that where there is a small proportion paid upon the shares, the seller has, if not the material interest, at least an equal interest with the purchaser in the matter of registration; and that, in all such cases, it is essential that the deed of transfer should be registered, in order to protect him from liability for further calls. Registration, therefore, is not so clearly for the exclusive interest of the purchaser that it falls to be done by him and his broker, and that the seller's broker can have no duty imposed upon him in this respect. Again, parties in the situation of the defenders undertake not only to find buyers or sellers, but to *effect* a sale. This implies the preparation of a deed of transfer, the object of which is to convey and assign shares to a purchaser. In this way they perform the duty of an agent, who is bound to see that the deed is effectual to convey or transfer the property he is employed to sell, otherwise he is liable in reparation. *Lillie v. M'Donald*, Dec. 13. 1816; *Struthers v. Lang*, Feb. 2. 1826; affirmed May 28. 1827; 2 D. and S., p. 563; *Paris v. Smith*, 5th March 1823, Murray's Rep., iii. 338. The principle of liability recognised in these cases must operate here. The rules of the Glasgow Stock Exchange are silent on the point; and, at any rate, any arrangement entered into among the brokers relative to their transactions

with each other could not affect third parties employing them. Feb. 11. 1852.  
Under the statute it is the duty of the seller's broker to see that <sup>Marr v.</sup>  
the transfer is duly registered in the Company's books. <sup>Buchanan, &c.</sup>

The defenders argued that they were not liable at common law for any neglect of duty as agents of the pursuer. Their agency was of a special and limited nature. They were brokers merely ordered to effect a sale, and accordingly, their duty was limited to effecting a sale in the manner in which such sales are usually effected by brokers. It is almost impossible to separate the rules of law by which the conduct of a broker is to be determined from the usage in conformity with which he acts, and which dictates the language in which is expressed the orders he receives, and points out the mode in which he is to execute such orders. The invariable practice is for the selling broker to exchange the transfer for the price of the shares which is paid over to him by the buying broker. Without delivery of the transfer he could not obtain the price, for primarily the transfer is a conveyance for a price paid, and it contains the only receipt granted by the seller for the price of the shares. It is substantially a deed in favour of the assignee to the shares. In the ordinary course of dealing it would be nearly impracticable for the selling broker either himself to register the transfer, or to see that it was done by the purchaser. Until the deed is subscribed by the purchaser as well as the seller it is incapable of registration. Nor can the subscription of the purchaser be obtained without the deed passing into his hands. Now a broker empowered to sell has no privity with the purchaser. He deals with a purchasing broker whose constituent is unknown to the selling broker, and may reside at a distance from the share-market where the sale takes place. The selling broker has no power to make effectual the obligation to register on the part of the purchaser. He is bound on the one hand to receive payment of the price, and on the other to deliver over the transfer to the purchaser's broker; and after the transfer has been once delivered to the purchasing broker, and handed by him to his principal, the powers of the seller's broker are at an end from the necessity of the case, and his duties also are consequently terminated. The usage of the share market has proceeded on the assumption that when a purchaser pays for property in shares he thinks it worth his while, and for his interest, to register the transfer to them which he has received. This usage is not at variance with the rules of common law. The pursuer has it in his power,

Feb. 11. 1852. by action at law, to compel the party to whom he has transferred his shares to register the transfer, and this is a sufficient answer <sup>Marr v.</sup> Buchanan, &c. to his claim at common law against the defenders. The law of principal and agent infers no such liability on the defenders. A general order given to a broker or other agent is to be executed in conformity with the usage which prevails among such brokers or agents. 1 Bell's Com., p. 434; Paley on Principal and Agent, 3d ed., p. 9; Smith's Mercantile Practice, (ed. 1848), p. 114. According to the practice of the principal share-markets in Great Britain, the selling broker is under no obligation to register the transfer of shares he has sold, or to see that those shares are registered. The usage of brokers in the Glasgow Stock Exchange is in accordance with this practice. The rules of the Exchange were printed on the back of the sale notes transmitted to the pursuer, and he made no objection to them. When a person employs a broker who is a member of a Stock Exchange, the employer is held to have given authority by implication to act in accordance with the rules there established. *Sutton v. Tatham*, 10 Adolphus and Ellis, p. 27; *Bayliffe v. Butterworth*, 16th November 1847, 5th vol. of the Railway Cases, p. 283; *Pollock v. Stubbs*, Queen's Bench, 8th February 1848. The 16th section of the statute refers throughout to the purchaser as the party who is interested in obtaining registration.

**THE LORD PRESIDENT.** This claim is of a very serious nature indeed. It is not one which we have to dispose of according to general rules of law; but we must look to the relative situation of these parties, and doing so, I have not been able to find any ground for sustaining the pursuer's claim. We must keep in view the character in which the defender was employed to sell the shares in question. The pursuer had recourse to him as a stock or sharebroker, one of a new class of men who sprung up throughout the country a few years ago, and whose business became a matter of public interest. In Edinburgh and Glasgow there were stock exchanges established; and we have had a variety of questions before us arising out of the conduct of parties with regard to the sale of stock. Therefore the knowledge of these stock exchanges was universal; and the rules that were in this way established came to form a sort of brokerage law peculiar to their department. The usage and custom of such stock exchanges, and the duties of brokers, have got consistence from the proceedings in England; and the decisions upon them are imperative upon us. This

matter has been thoroughly digested in the English decisions referred Feb. 11. 1852. to by the defenders. A person employing a broker is bound to rely <sup>on</sup> ~~on~~ Marr v. Buchanan, &c. on the transaction being done according to the established rules of the exchange. Now the rules of the Glasgow stock exchange are available to the defender; and the pursuer could not be ignorant of them, for they were endorsed on the back of the note given to him by the defender. These rules imposed upon the defender no obligation to see to the registration of the transfer of shares sold by him. It is material, therefore, to ask is there any case in Scotland by which such liability would be fixed on the broker, by his neglecting to do so? None such has been produced; and therefore I must presume that this liability has been brought up for the first time. On the English decisions, and on the pursuer's presumed knowledge of the rules of the stock exchange, I think the defender is not liable for this claim. As the broker of the seller he was not called on to do any duty whatever beyond what he has done.

LORD FULLERTON. The point is new, like many others which arise in regard to the right and obligation created by the concern in railway shares; and is of great importance, not only in its pecuniary consequences, but in relation to the principles of law involved in it. But considering the nature of the subject which the defenders, the brokers, were employed to dispose of, and applying to that consideration the ordinary and common law principles and responsibilities of agency, I have formed the conclusion that the claim of the pursuer is well founded. The subject of the sale was not anything which had a real, or what may be called an objective existence, like a portion of land, or an ordinary moveable. It was the share of a joint stock company, which, like the share in any other copartnery, has only a theoretical or constructive being, composed of certain legal rights, and certain legal obligations attached to it. On the one hand it gives the copartner the right to participate in the profits, and on the other it imposes on him the duty of bearing the expenses of the company. In the case of a statutory joint stock company, this last is limited to the amount of certain fixed advances to be made good by calls. But as in this case only a small part of these advances had been made at the time of the transaction, the obligatory part of the share still formed an element of its existence. As the share, the subject to be sold, necessarily involves both, the sale, to be an effectual and complete transaction, must be equally comprehensive, and must include the transference of the liability, as well as that of the actual and

Feb. 11. 1852. beneficial right. There was a great deal of force in the remark made on behalf of the defenders, that here there is not any direction that the deed of transfer shall be instantly delivered to the secretary by the broker or agent for the seller. The section does not say so. It is, on the contrary, clear from the schedule of the form of the transfer, that it falls to be delivered to the purchaser or his broker on payment of the price. And that is quite reasonable, because, when the seller has given over the certificates, and signed the deed of transfer, he has performed all his part of the contract of sale, and is therefore entitled to the payment of the price.

But the important, and, what I conceive, the essential part of the question, remains behind, viz., whether the seller's broker is not entitled and bound to see that the deed of transfer executed by the purchaser shall be delivered to the secretary. The enactment is, that the deed of transfer, when duly executed, shall be delivered to the secretary; and this clearly implies the right of the seller to enforce that provision, on the performance of which his relief of liability to the company, by the substitution of the new partner, evidently depends. No doubt it does not absolutely follow that it is the duty of the seller's broker to look to this, though certainly the reasons of expediency are so strong as almost to include this, according to ordinary law principles of agency, among the precautions which he is bound to take for the safety of his employer.

But in addition to considerations of expediency, there are good grounds in law for avoiding the conclusion, that it was no part of the defender's duty to guard against the sale being left in such a situation as in truth to place it entirely at the discretion of the purchaser whether it should be effectually completed or not. The brokers, the defenders, were the paid agents of the pursuers, the intending sellers, for effecting the sale of the shares. Every thing *REQUISITE for the completion of that sale* they were bound to see done, in so far as regarded the interest of their employer, or to be liable for the consequences of the neglect of that duty. It follows, from the very nature of the subject, that the completion of the transmission of it from one party to another legally implies, not only the transference to the purchaser of the active right to draw profits, but the transference of the passive liability for the contingent claims of the company. The latter is as essential an element of the transaction as the former; and must be therefore as essential an object of the agent's atten-

tion. Can it be gravely stated that an agent did his duty by Feb. 11. 1852 assigning the right, without making the stipulated enquiry whether <sup>the</sup> substitution of the new partner was or was not accepted by the Buchanan, &c. company? I think this could hardly be maintained. If I am right in holding that in the transmission of shares of a company the transfer to the purchaser of the liability is as essential an element as that of the active right, it must follow that the former is as clearly within the scope of the agent's duty as any other part of the counter obligations of the purchaser involved in the transaction. It seems to me that the precaution of seeing the 16th section enforced was clearly within those duties, and a duty of which the performance was indispensable for the safety of his employer.

As to the general allegation of the general usage of stock-brokers in this matter, I must say I am not disposed to give it any weight. If the defenders are correct in stating, as they have done in this case, many of the practices said to be followed in the stock exchange, I can only say, that it is at least very doubtful how far they would be sustained in a court of law. And I think that if there be such a practice as that averred here, the proper course is not to give it the sanction of the Court, but to correct it by a judgment founded on the law of the case. For, as I have already explained, there is a most important point of law at issue here, viz. how far, in the sale of a railway share, within the operation of the statute, the measures required by the statute for relieving the seller from his liability to the Company is not an essential element of the transaction. That is a question which must be determined on its own merits; and if it be determined in the affirmative, as it appears to me it ought to be, the liability of the broker for the consequences is the necessary and common law consequence of his relation to his employer; and is just as clear as his liability for the injury done to his employer by the neglect of any other precautions involved in the completion of the transaction committed to his professional guidance.

On these grounds I think that the defence ought to be repelled.

**LORD CUNNINGHAM.** There are no sound grounds for sustaining this claim. The present is a new case. The usage seems to be admitted, that no broker for a seller has hitherto been in use to register transfers. The 16th clause of the Joint Stock Company's Act imposes no such duty, for all the directions therein given are executable after the transference has been sub-

Feb. 11. 1852. scribed, and not before, and seem to be laid as much on the pur-  
chaser as on the seller. Then the rules of the Stock Exchange,  
~~Marr r.~~  
Buchanan, &c. (which are held in the English authorities to rule cases of this  
description), are favourable to the defender, as they prescribe the  
duty of the seller's broker to deliver the transfer immediately on  
receiving the price. His duty as a broker being then closed, and  
as he afterwards did not possess the custody of the transfer, he  
was not called on, and had no opportunity to register it. Neither  
was he entitled to register it and divest the seller *before* payment,  
so that the precaution demanded by the pursuer here would re-  
quire some new regulation. There appears to me to be no com-  
mon law or usage for the liability of the seller's broker to the  
extent claimed. In the conveyance of heritable property, the  
duty of infestment and registration lies on the purchaser's agent,  
and the pursuer admits that no usage existed which the broker  
omitted. On the whole, as the law at present stands, I am of  
opinion that it is the duty of purchasers, and not of sellers, to  
register the transfers after they get them; and if the sellers enter-  
tain any anxiety or suspicion that registration will be evaded or  
indefinitely postponed to their prejudice, they must make a special  
provision for immediate registration, and direct their broker or  
other agent to see it enforced. There is no room for making the  
broker liable on that ground in the present instance.

LORD IVORY.—I agree. I am deeply impressed with the im-  
portance of the question, both as regards its wide and general  
application, and its bearing on the law of agency. The case must  
be considered not simply with reference to the statute, which  
merely regulates the relation between a railway company and its  
partners, but to the understood legal liabilities which attach to  
the character of a broker, and with reference to the effect which  
an alleged custom may have on the contract. A broker is defined  
to be one who makes a bargain for another, and receives a com-  
mission for so doing; Story on Agency, p. 31, 4th ed. He is  
said to be a mere negotiator between the other parties, and he  
never acts in his own name, but in the names of those who em-  
ploy him. Where he is employed to buy or sell goods, he is not  
entrusted with the custody or possession of them, and is not au-  
thorised to buy or to sell them in his own name. He is strictly,  
therefore, a middle-man or intermediate negotiator between the  
parties. From this I deduce this conclusion, that it is the busi-  
ness of the broker to see to the completion of the sale as a con-  
tract, to the completion of that relation between the parties which

gives the *jus ad rem.*; and therefore I think that the broker's business, in general, with regard to a contract of this kind, is complete when the contract, as a contract, is complete. In the ordinary case of a sale of mercantile commodities, as of goods in a bonded warehouse, the only question is, had the broker authority from the principal to bind him in the sale? If he has, then all beyond lies with the principal. He has performed his duty when he has given to the seller the right of demanding implement of the contract. An issue is not asked here as to the usage of trade. The case must therefore rest on common law or the statute. Now, as to the statute, it says nothing, and means to say nothing, which can, directly or indirectly, affect the liability of a broker. Its provisions regarding registration are entirely to regulate matters between the company and its shareholders. Although the statute does say that the vendor shall continue liable to the company until the change of proprietorship is effected on the register, the transaction as between the purchaser and the seller is already complete. While, on the one hand, what the statute looks to is delivery of the deed of transference, on the other hand there is to be payment of the price. But that, again, is at a stage of the proceedings antecedent to the registration of the transfer. The general inference is that it is the duty of the transferee to register the transference of the shares. (See Wordsworth's Treatise with regard to Railway Companies, &c., p. 362.)

The present case was not in the mind of the legislature when this act was passed. It has arisen in consequence of the depreciation of railway property. When this act was passed the property was then assumed to be valuable property, and the purchaser's interest in securing shares purchased by him was thought to be a sufficient guarantee that the transference would be duly registered by him. The statute, therefore, is dealing with that which is a general rule, and has overlooked too much the exceptions to the rule. It looks to the purchaser how he is to be put in safety, and therefore the deed of transfer is put into his hands that he may do what is right to secure his property.

Upon these grounds, I support the views of the Lord President. The whole context of the statute leads to the same opinion. Therefore, taking into consideration the principles of common law, and looking to what is to be inferred from the statute, looking also to the English authorities, and considering the liability of brokers generally, I am satisfied that this claim against the defenders cannot be sustained.

Feb. 11. 1852. The COURT therefore, by a majority, "on report of Lord Marr v. Wood, having considered the revised cases and closed record, Buchanan, &c. and having heard the counsel for the parties, sustain the defences, assoilzie the defender from the conclusions of the summons and decern; find the defender entitled to expenses."

*Menzies and Macnnochie*, W.S., Pursuer's Agents.  
*Campbell and Smith*, S.S.C., Defenders' Agents.

## SECOND DIVISION.

### No. 184.

### FERGUSON v. M'EWEN.

*Poor-Law Act, 8 and 9 Vict. c. 83—Conduct of Collector—Assessment—Damages.*—Circumstances in which an action of damages against a collector of poor-rates for diligence under the Poor Law Act was held incompetent, in consequence of the month's notice, as required by sec. 86 of the statute not having been given. *Observed*, That in all proceedings under the Poor Law Act, the collector was bound to act strictly and literally in terms of the Act, and was not entitled to apportion the assessment laid on a mercantile company among the individual partners.

Feb. 11. 1852. This was an advocation of an action of damages against Dougall M'Ewen, collector of poor-rates for Greenock, and John Gillespie, constable, for the wrongous and oppressive use of diligence under the Poor-Law Act, 8 and 9 Vict., c. 83. It appeared that the pursuer, who is a merchant in Greenock, carried on, with his brothers there, various kinds of business; in particular, that his brother, Alexander Ferguson, and himself, are soap and candle manufacturers, and they are besides shipowners, and carry on a shipping business. In respect of the soap and candle manufactory the parochial board of Greenock laid on an assessment of £3, 12s. for the year from 1st January 1848 to 1st January 1849, which was paid, and about which there appeared to be no dispute. But the board laid on a further sum of £2 : 11 : 4, in respect of the interest John and Alexander Ferguson had in the shipping business, which sum was assessed on them *individually*, at their own request, as alleged. The sum of £1 : 5 : 8 was thus charged against the pursuer, who however failed to pay the same, and in consequence he was given in as a defaulter, and proceeded against by M'Ewen. A warrant of imprisonment was, at his instance, and also at the instance of the other defender, Gillespie, the constable, issued by the Sheriff-substitute, and in virtue of this warrant the pursuer was apprehended in his own house early on the morning of the

Ferguson v.  
M'Ewen.

7th May 1849, by the defenders, with other concurrents and Feb. 11. 1852 assistants. After being kept in the custody of these parties for some time, the pursuer, in order to prevent his being taken to prison, and under protest that the whole proceedings were illegal and oppressive, and in contravention of the statute, paid the said sum of £1:5:8, with £1, 10s. of expenses. The pursuer therefore gave a month's notice, purporting to be that required by section 86 of the Poor Law Act to M'Ewen, but no such notice appeared to have been given to Gillespie. Thereafter he brought his action, concluding for damages against the defenders, jointly and severally, according to their respective liabilities, the same being laid at L.2000.

In defence M'Ewen explained the mode of assessment adopted in the case of the pursuer, but he pleaded, *inter alia*, that the action fell to be dismissed, in respect the defenders have not received the notice required by the statute of "one calendar month *at least before* the commencement of the action."

Gillespie pleaded in defence, that besides the above want of notice he was merely an officer of the law, and that as such he could not be held cognisant of informality or irregularity, but that he was bound to execute the diligence against the pursuer, and that in so doing he merely discharged his legal duty.

The Sheriff-substitute sustained the defence of the want of the statutory month's notice, and the Sheriff adhered.

The pursuer advocated.

The Lord Ordinary (Dundrennan) on the 19th February 1851, pronounced this interlocutor, "in respect the advocator failed to give notice of his action to the respondents one calendar month before raising it, in terms of the 86th section of the statute 8th and 9th Victoria, chap. 83; repels the reasons of advocation: remits *simpliciter* to the Sheriff, and decerns: finds the advocator liable in expenses," &c. His Lordship added a note in which he observed, "that the advocator intended to bring his action under the 86th section of the statute is not disputed. He raised it in the Sheriff-court for irregularity or wrongful proceedings by two officials, the collector and officer, acting in the execution of the statute. The advocator farther gave notice of his action, on which he still relies, to the leading defender, M'Ewen, bearing that this was required by the statute, although he omitted to give notice to the other defender, Gillespie.

"In regard to the notice to M'Ewen, the advocator maintains that it was sufficient, in terms of the statute, on two grounds—

Feb. 11. 1852. (1.) That it was put into the post-office one calendar month before the action was raised, and that this was equivalent to *actual delivery* of the notice to the defender, whatever the course of post may have been before he can have received it; and, (2.) That the notice having been posted on 4th July 1849, while the action was not raised till 4th August following, the statutory period had elapsed. It appears to the Lord Ordinary that the advocator is wrong upon both these points. The statute requires, according to the sound construction of the 86th section, actual intimation of the action *at least* one calendar month before it is brought; but even if posting the notice could be taken as equivalent to this intimation, one calendar month did not elapse between posting the notice on 4th July and raising the action on 4th August 1849. It has, therefore, been held, that, as to notice, the defenders are truly *in pari casu*. . . . . The action is beyond doubt laid upon alleged irregularity and wrongful proceedings, and it seems equally clear, that, whether irregular and wrongful or the reverse, the things complained of were *done in the execution of the Act*, as this expression has been repeatedly construed by the Court." His Lordship referred to the case of *Russel v. Lang*, 21st June 1845, and the case of *Ferguson v. M'Ewen*, 14th February 1850, which was a reduction between the same parties, and strongly pressed as an authority in favour of the advocator, but his Lordship could not view the case in that light. In conclusion, his Lordship observed, "in the present case, it is not pretended that any reduction is necessary, while it cannot be disputed that the most ample and sufficient remedy for the wrongs complained of might have been had in an action under the 86th section of the statute. In the former case, a majority of the Court considered this to be the only competent remedy against Gillespie, the officer; and the Lord Ordinary sees no ground on which he can distinguish the wrongful acts of *falsehood* and *perjury* imputed to him from the *minor offences* charged against M'Ewen, the collector. In this state of matters, the Lord Ordinary cannot assume, upon the authority either of the decisions or opinions of the Second Division of the Court in the former case, that the present action might have been competently brought in the Supreme Court—at any time within forty years of the date of the acts complained of—and without notice to the defenders. Yet, to alter the Sheriff's interlocutor, and sustain the competency of the action, would, as it appears to the Lord Ordinary, unavoidably involve this principle, and have the practical effect of rendering the 86th section of the statute, in a great measure, if not altogether, a dead letter."

The pursuer reclaimed, and the Court adhered so far as re-<sup>Feb. 11. 1852.</sup> garded the defender, Gillespie; but *quoad ultra* they "recal the said interlocutor *in hoc statu*, and grant diligence against havers at <sup>Ferguson v.</sup> M'Ewen. the instance of both parties, for recovery of documents, of which they allow a specification to be lodged; and grant commission to the Judge Ordinary of the bounds within which the havers reside for examination of said havers."

The commission having been reported, it appeared that the sole entry in the roll of assessment was for £2 : 11 : 4 against John and Alexander Ferguson, who were defaulters, and that the charge of £1 : 5 : 8 was not stated in the collector's books. On the facts ascertained, the case came now before the Court to be finally disposed of.

The *Solicitor-General* for the claimer.

*Inglis and Penney* for the respondents.

**THE LORD JUSTICE-CLERK.** The facts ascertained shew that the proceedings of the collector, including the warrant executed against the pursuer, were most irregular and disconform to the provisions of the statute. This is the collection of a tax, and the principle laid down by the late Lord President and the other Judges of the First Division of the Court, as to the mode of assessing in Edinburgh for the annuity-tax, directly applies, that in the collection of a rate or tax there is no warrant whatever for any levy or mode of procedure which deviates one iota from the rates prescribed by the statute, however inveterate and convenient the practice, or however unnecessary, so far as can be seen, the observance of the statutory rules. This is a principle of the highest importance and authority, not only because the statute must be implicitly obeyed by the Court, but still more on the constitutional and broad principle, that by an assessment you take from another a portion of his property, which you have not the power to touch, in any way or to any extent, except with the exact and rigid compliance with the rules of the statute which alone authorises you to levy the rate. Nothing can be more clear, plain, or precise, than the rule prescribed in the Poor Law Act, so plain, that any one who runs may read the law so laid down; and careless as parties are apt to be in large collections, it is difficult to understand how the rule should have been here so manifestly violated by the proceedings of the defenders, and their obtaining a warrant against the pursuer for a sum that was not to be found in the assessment books. But, at the same time, the collector, although he departed in a very grave particular from its rule,

Feb. 11. 1852. <sup>~~~~~</sup> acted in the execution of his duty under the act. The objection also taken to the action by the defenders is well founded ; and the action required to be commenced within the statutory time, and of course, notice in terms of the statute required to be given.

Ferguson v.  
McEwen.

**LORD MEDWYN.** It is now quite clear, that, whatever was done by the collector, was done in the execution of the Poor Law Act. There was an assessment by the Parochial Board on William and Alexander Ferguson, shipowners, for £2 : 11 : 4. This was notified to them, and they appealed. The inspector informs them that the appeal had been refused. A list of defaulters is then put into the hands of the collector, containing the names of J. and A. Ferguson, L.2 : 11 : 4. He applies for a distress, in order to recover the assessment ; but instead of doing so in the above terms, as he ought to have done, when from either brothers he might have charged the full amount, he thought it best and least oppressive for them to divide the sum into two halves, and claim one from each. Accordingly, he gives up John as a defaulter for L.1 : 5 : 8, and the same as to Alexander. Now, the utmost that can be said for this is, that he had no right to do so, to alter in a single iota the roll of assessment given to recover. I have already said, he ought to have made no alteration ; but still he was in the execution of his duty under the Act. But this is nothing more than irregularity in the execution of the Act, under which the assessment was duly made, and it was of the smallest possible kind, infinitesimal almost, to which I think I would not have been inclined to give any encouragement as a foundation for an action of damages, even where notice had been given of the intention to bring an action challenging it in due time. But we are here out of any such case. Notice was not given, within the statutory period, and, therefore, most clearly, the interlocutor is right in this portion of it also.

**LORD COCKBURN.** I am of the same opinion. I do not know whether the procedure is correct or not. I assume there was irregularity. Now, the question is, whether, though the collector was acting irregularly and wrongly, was he in the execution of his duty under the Act ? It is impossible to say that the Act only gives him protection when he does not need it. It means to protect him from the consequence of a wrong done in the execution of his duty. Was he indulging in any malice ? Was he not just collecting the poor's rates ? He was. His error amounted to this, that he divided L.2 : 11 : 4 into two equal halves, and I suppose he could have charged either member of the Com-

pany for the whole. I never saw a case to which the protection Feb. 11. 1852.  
of the statute more clearly applied.

**LORD MURRAY.** I agree. To say that this error does not fall <sup>Ferguson v.</sup> M'Ewen.  
under the protection of the statute really seems absurd.

The COURT pronounced an interlocutor by which they "find that the collector was not entitled in his application against defaulters to depart from the actual terms of the roll of assessment made up as to the parties liable, and the sums for which such parties are so assessed; find that the roll of assessment containing the sums for which each individual is thereby assessed is the only rule under the statute for the levy of the assessment; find that the application for the warrant in the roll of defaulters therein contained, and the warrant granted therein was irregular in point of form under the statute in the levy of the Poor Law assessment from the claimer; find that the claimer was assessed for poor's rates in the said roll, and that the claimer was a defaulter, and liable to be proceeded against for recovery of the sums charged against John and Alexander Ferguson, and that the collector was entitled to apply for a warrant of distress and imprisonment against him as a defaulter; find that the irregularity committed by the collector was in the course of the steps of competent diligence against the claimer for a greater sum due by him than that for which the warrant was granted, and in the execution of the act by the process of recovery of rates actually due by a person in the roll, duly made up of parties liable in the assessment; therefore find that the fact committed by the collector was in the execution of the act, and therefore that the cause of action came within the 86th section of the Poor Law Amendment Act; of new, repel the reasons of advocation, and remit to the Sheriff *simpliciter*; find the advocator liable in expenses," &c.

*Wetherpoon and Mack, S.S.C., Agents for Pursuer.*

*T. Ranken, S.S.C., Agent for the Defender, M'Ewen.*

*Alexander Nairn, W.S., Agent for the Defender, Gillespie.*

## SECOND DIVISION.

**PETITION, Ross, in Loban's Sequestration.**

No. 185.

*Process—Sequestration—Meeting of Creditors—2 and 3 Vict., c. 41.*

Feb. 11. 1852.

The third meeting of the creditors in this sequestration was Pet. Ross.

Feb. 11. 1852. appointed to be held in Stornoway within the statutory period of twenty-one days from the trustee's confirmation. A storm in the north prevented the Gazette notice from being inserted within the proper period, or from reaching Stornoway in time for the meeting, and, in consequence, no meeting could be held. Ross, the trustee, presented the present written note, praying the Court to appoint a new meeting. The Court granted the prayer without intimation.

*Gifford* was for the petitioner.

*Bowie & Skinner*, W.S., Petitioner's Agents.

### FIRST DIVISION.

No. 186.

THOMSON v. ALLAN.

*Act 6 Geo. IV. c. 48—Small Debt Decree—Reduction—Officer's Execution—Conformity with Warrant—Prescription of Action.*—Under the Justice of Peace Act it is not necessary that the constable's execution bear that he has served a copy of the document of debt founded on in the complaint. *Circumstances* in which reduction of a decree brought on the ground of such omission, was refused. The time for bringing such action prescribes within the year.

Feb. 12. 1852. This was an action of reduction of a decree obtained under the 6 Geo. IV. c. 48, commonly called the Justices of the Peace Small Debt Act.

In September 1846, the defender presented a complaint to the Justices of the Peace for Ayrshire, wherein he complained that the pursuer was owing him "the sum of L.5 sterling, *per account.*" On this complaint the clerk granted the usual warrant for citing the pursuer, which warrant appointed "*a copy of the account pursued for, document of debt, or state of the demand,* to be delivered to the defender along with the citation." The return by the constable of the execution of the complaint and warrant, bore that the pursuer had been summoned, and then proceeded in these terms—"This I did, by delivering a full copy of the before complaint and warrant, with a short copy of citation thereto subjoined, as also a full copy of the *claim sued for*, to the said defender, personally apprehended." Under the above complaint the defender, in the absence of the pursuer, obtained the decree which was now sought to be reduced.

The 6 Geo. IV. c. 48, § 3, enacts "that all causes shall proceed

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upon complaint, agreeable to the form in Schedule A," and it is Feb. 12. 1852. also provided, "that a copy of the said complaint and warrant, <sup>Thomson</sup> with the citation annexed, agreeably to the said Schedule A, *v. Allan.* subjoined to this act, and also a copy of the *account, document of debt, or state of demand,* shall be delivered by a constable or Peace officer to the defender, personally, or left at his dwelling-place."

Various grounds of reduction of the above decree were stated in the record; but those which were ultimately relied on were, 1<sup>st</sup>, That the account pursued for was not produced with the complaint, and was not served on the pursuer; and, 2<sup>d</sup>, That the constable's execution was not in conformity with its warrant, inasmuch as it did not set forth, that "*a full copy of the account pursued for, document of debt, or state of the demand,*" was served.

The defender pleaded, as a preliminary defence, that the action was incompetent, under § 14 of the 6 Geo. IV. c. 48, which enacts, that no decree given by the Justices, in any case competent to them under said Act, "shall be set aside on any other ground except that of malice and oppression on the part of the Justices; nor shall any such action of reduction be at all competent after the expiration of one year from the date of the decree of the Justices." This action had not been raised till two years after the date of the decree sought to be reduced.

On the merits, the defender pleaded, that the decree could not be reduced, as it had been obtained in strict conformity with the statute. The preliminary defences were reserved and discussed along with the merits.

The Lord Ordinary (Robertson) reduced the decree, and the defender reclaimed.

*Penney* and the *Solicitor-General* for reclaimer. Under the 14th sec. of the statute, the reduction of a decree of the Justices of the Peace Small Debt Court is incompetent, except on the ground of malice and oppression on the part of the Justices. If reduction was competent, the grounds here stated could not be maintained, as the decree is in strict conformity with the requirements of the statute. The statute does not require that the account or document of debt shall be produced with the complaint. The fact, that the constable stated that he had served "*a copy of the claim sued for,*" whereas the warrant bore, that a copy of the "*account, document of debt, or state of demand,*" should be served, is not such a disconformity as will authorise reduction. Besides, the schedule of the constable's execution, annexed to the statute, does not

Feb. 12. 1852. require the constable to state that he had served the account or document of debt. It was further argued, that the present ground of reduction was not stated in the summons.

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*Maidment*, for the pursuer, referred to the cases of *Brown v. Richmond*, 16th Feb. 1833, 11 Sh. 407; *Browning*, 16th Feb. 1838; *Wallace v. Hume*, 3d July 1835, 10 F. C. 1806.

The LORD PRESIDENT. My opinion is, that this reduction cannot be sustained, and I am the more satisfied of this, from the manner in which the pursuer has conducted his case, not coming forward to have the decree reviewed by a rehearing before the Justices as was competent to him under the 8th section of the statute; but lying bye for two years, and then bringing this summons of reduction, in which the ground of reduction now pleaded is not specifically stated. I can have no hesitation at all in this case. The cases referred to by the pursuer are all cases under the Sheriff's Small Debt Act, 6 Geo. IV. c. 24, the schedule annexed to which has an express *notandum*, that if there is an account founded on, the officer must serve a copy of it on the party; and the *officer's execution must bear that he has done so*. Under the Justice of the Peace Act, however, this is not required. The question, therefore, comes to be, was the Act of Parliament complied with? I think it was.

LORD FULLERTON. I am of same<sup>d</sup> opinion. We would require to look very narrowly indeed into the grounds of such a reduction as this. There are no grounds for it. The objection that the account sued for was not served, is not specially set forth in the summons, and the proposition that it is embraced in the first reason of reduction, which is mere words of style, is utterly untenable. The execution here is exactly in conformity with the schedule annexed to the Justice of Peace Small Debt Act; and I cannot see that because the execution sets forth that a copy of the "claim sued for" was served, that is any evidence that a copy of the account was not served. The question comes to be, can a party get reduction on an extraneous statement altogether, viz., that the account was *de facto* not served? This ought to have been stated to the Justices. The only ground of reduction now is, that he never was cited at all. That ground is not stated in competent form, viz., by reduction-improbation. The party here was cited and then charged, and no objection taken. He was regularly called into the Small Debt Court, and yet states no objection to the proceeding until the lapse of two

years, when the present action is raised. The presumptions are Feb. 12, 1852.  
all against the pursuer.

LORD CUNINGHAME. I agree. This case is certainly in a different situation now from what it would have been had the action of reduction been brought within the year, specified by the statute, although even then the alleged defect could hardly have been listened to. We cannot at this distance of time listen to an allegation that the statute has been contravened.

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LORD IVORY. I agree, and I am glad that the Court is unanimous, for I think if there be any utility to be derived by the public from these small debt actions, it consists in the finality of their judgments.

The ground of reduction now pleaded is not within the reasons contained in the summons. The grounds there stated are, that there never was any service of the complaint at all, and that the decree is disconform to its warrant. I do not see that there is any disconformity between the decree and the warrants on which it proceeded. The warrants are all perfectly regular and are not impugned. There was sufficient citation to bring the party before the Justices, and if there was any defect, he ought to have appeared and pleaded the objection. But as he did not, they had no alternative but to give decree. Suppose he had appeared and stated the objection now founded on, the Justices could have taken the oath of the constable that he duly served the complaint, and if they had repelled the objection on that evidence we could not then have reviewed their decision. The ground stated that there never was any service, cannot be entertained in this form of action. Neither will it do to say that the Justices had no jurisdiction, for with a regular citation and no appearance, the matter is at once brought within their jurisdiction, and it is competent for them to give decree.

We can reduce a decree of the Justices on the ground of malice and oppression, but this ground prescribes within a year, and I do not think that a greater latitude ought to be given to an objection founded on a point of form. It cannot be implied from the use of the words in the constable's execution, that "a full copy of the claim sued for" was served along with the complaint, that therefore no copy of an "account, document of debt, or state of the demand" was served. This does not require to be set forth, but even if it were necessary to go upon that ground, I hold "a full copy of the claim sued for" equivalent to a "state of the demand."

Feb. 12. 1852. Upon the whole I have no hesitation in concurring with your Lordships.

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The COURT "assuizie the defender, with expenses, and remit to the Auditor to tax, &c., and decern."

Richard Arthur, S.S.C., Pursuer's Agent.  
David Crawford, S.S.C., Defender's Agent.

## SECOND DIVISION.

No. 187.

(MURRAY JUNIOR, COMPEARER.)

RODGERS v. KYD and OTHERS.

Feb. 12. 1852. *Process—Agent and Client—Agent's right to exist himself as a party to recover expenses.*—In an action against the trustees of a deceased person by his son for his share of the legitim, the pursuer had granted a discharge to the trustees, for a given sum, after the Lord Ordinary had pronounced an interlocutor, repelling defences founded on an allegation that the pursuer had, during the lifetime of the deceased, received sums in satisfaction of his share of legitim, and appointing the trustees to lodge a state of the executry fund, "reserving all questions of expenses"—*Held* that the agent of the pursuer could not carry on the action in his own name for the recovery of expenses.

Rodgers brought an action of count and reckoning against Kyd and others, his late father's trustees, for his share of legitim due to him out of his father's estate. The pursuer's father, by his trust-disposition and settlement, and codicil, left him a small annuity, which, in consideration of considerable sums paid to the pursuer during his father's lifetime, was declared to be in full of all claims of legitim, bairns' part of gear, and of all that he could claim by and through the testator's death. The pursuer repudiated the provision and claimed his legitim, denying that any sums had been advanced to him during the testator's lifetime. A record was made up and closed, and after a debate, the Lord Ordinary (Robertson) pronounced an interlocutor on 18th July 1851, by which, "in respect there is no evidence of the pursuer having renounced his legitim, he repels the defences, and appoints the defenders, by the first box-day, to put in a state of the executry, reserving all questions of expenses."

On the 24th September, the pursuer, in consideration of a sum of £60, executed in favour of the defenders a discharge of all claims he had against his father's estate, and especially of this action, whole grounds and conclusions thereof, and procedure therein.

The pursuer's agent enrolled the case, and on the allegation that Feb. 12. 1852.  
 the discharge had been granted without his knowledge and collu-  
 sively, for the purpose of defeating his rights as agent disburser, Kyd, &c.  
 was allowed to lodge a minute stating the grounds of his right to  
 insist farther in this action.

The defenders put in answers, and the Lord Ordinary, "in respect, 1st, That there is no interlocutor finding expenses due to the pursuer, or judgment pronounced necessarily leading to that result; 2d, That there is no allegation of the agent, Mr Murray, having rendered his account to his own client, or of any demand for payment having been resisted by him, or that the pursuer is unable to pay that account for which he is primarily liable; and, 3d, That there is no distinct and clear averment of a collusive settlement having been brought about for the purpose of defeating the claim of the agent, and no specification of circumstances, nor any evidence from which such collusion can be made apparent; finds that the said John Murray has no right to insist "in the action, and refuses the prayer of the minute, with expenses."

Murray reclaimed.

*J. Shaw, Macfarlane, and Lord-Advocate*, for the claimer. The interlocutor of 18th July was a final interlocutor repelling the defences, and, consequently, implied that the pursuer's agent was entitled to expenses; next, the discharge by the pursuer having been collusively devised by him and the defenders, could not defeat the agent's claim; *Hamilton v. Bryson*, 17th June 1813, F.C.; *Tod v. Wright*, 7th March 1822; *M'Lean v. Auchinvole*, 29th June 1824; *Cheyne v. Cheyne*, 18th January 1832.

*Goodall and Inglis*, for the respondents and defenders. The interlocutor of 18th July was not a final interlocutor, as the discharge was granted on 24th September, while the first box-day (at any time before which it was competent to reclaim,) was on 15th October, and the agent must be held to take up the action as at the date when the client discharged it. Next, the interlocutor, although it in words repelled the defences, is not an interlocutor on the merits at all. The Lord Ordinary, if he had intended it to be so, would, in compliance with section 17 of the Judicature Act, have at the same time determined the matter of expenses; and, in the circumstances in which that interlocutor was pronounced, there having been no evidence adduced, or renunciation of probation, and parties being at variance on material averments on record, it never could be intended or understood to be an interlocutor on the merits. Farther, collusion stated inferentially from

Feb. 12. 1852. the mere fact of a discharge having been granted, is insufficiently averred. Lastly, the agent not having stated that his own client was unwilling, or unable, or had ever been asked, to pay his account, was not entitled to insist further in an unfinished action, to the effect of recovering his account from the defenders—*Hamilton v. Bryson*, ut antea; *Rox v. Stewart*, 3d July 1818, F.C.; *Sloss v. Kennedy*, 28th May 1823; *M'Lean v. Auchinvole*, ut antea.

At advising,

LORD JUSTICE-CLERK. I do not concur in the application of all the reasons in the Lord Ordinary's interlocutor. I admit that the agent's right has been sustained in certain states of a cause, without regard to the question whether his own client can or is willing to pay him. The rule, it seems to me, rests neither on equity nor expediency, but to be a bounty on most useless litigation; and certainly I cannot consent to its extension. If a man's own client is able and willing to pay him, he is his proper debtor—on his credit he undertook the agency. *Ex hypothesi*, he is sure to get his payment, and sustaining the agent's right to go against the opposite party, when secure of payment from his own client, is a most singular result. It might so happen that the opposite agents, each wishing to oblige their respective clients by not asking payment from them (for really that is the effect when the client is able to pay), might each take up the litigation if there was any general right such as pleaded here, and each go on with the cause against the client of the other, although the two parties had compromised and discharged the case, so that, notwithstanding the settlement, both parties would still be in Court as litigants bound to follow on the case. This seems to be a *reductio ad absurdum*. Yet it might easily happen if the rule, so doubtful in itself, were carried one step further than the cases have gone.

If expenses have been found due, the agent may recover them, though his client has discharged them, and yet is able to pay his account. This seems to me sufficiently iniquitous against the party who has satisfied that demand by the terms of his compromise with the agent's client. To sustain the agent's right to go on with the action regularly discharged, with a view to expenses, when an interlocutor *necessarily implying* expenses has been pronounced, goes a very broad step further, and is indefinite and loose, for it is not easy to say what interlocutor necessarily *implies* expenses. In some few cases it may be easy enough to say that expenses must follow, as in the case of *M'Lean*, where, in a bill

of suspension and liberation, liberation had been granted, and the Feb. 12. 1852. letters expedite.

What is the interlocutor here? It especially *reserves* expenses, Kyd, &c. Rodgers v.  
and appoints an accounting. What might be the result of that no one can tell better than the Lord Ordinary, who pronounced it, and he says it did not imply necessarily a finding for expenses. Hence I must hold that this interlocutor is not of the character which the former cases required, as the condition of the agent's right to sist himself as a party to the litigation. I think we must adhere strictly to that description of the interlocutor, and that a general inquiry into the whole case, or a prosecution of the cause on the merits is not competent in order to obtain a separate and subsequent judgment for expenses. Any after finding of expenses would not be necessarily the legal result from the interlocutor in question, but would be a separate and distinct determination of the expenses reserved, on a review of the whole case, and on materials not yet produced or known to the Court.

Further, the interlocutor in question was not *final* at the date of the compromise, and, with one exception, I see no case in which the agent has been allowed to sist himself unless that interlocutor was final at the time of the compromise. In one case, indeed, it was a judgment against expenses, but the discussion as to the matter of expenses had begun, and the agent was allowed to take up that question, the merits having been decided. In this case the trustees compromise when the interlocutor is not final, and it seems a very one-sided mode of dealing with a case to allow the agent to sist himself on the footing that that interlocutor is final, which became final only by the discharge of the action. I own this revolts my notion of justice or expediency; and this, too, when the agent has not averred that his account cannot be paid by his client.

One case only seems to have gone beyond the requisite of an interlocutor necessarily implying expenses. But then there was a device by both parties to deprive the agent of his claim for expenses. Further, it is the only case in which, so far as I see, a device to defeat the agent's claim was stated, apart from the particular stage and state of the cause at the period of the compromise. Perhaps, however, even in that case the two grounds were combined, at least the remark of the late Lord President would seem to favour this notion when coupled with the observation of Lord Balgray. I must lay aside entirely, therefore, the ground that this interlocutor implies necessarily a liability for expenses.

Feb. 12. 1852. Indeed, the reservation seems to me of itself entirely to exclude  
that view of it.

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Kyd, &c.

But then it is said, this is a conclusive discharge of the action, in order to defeat the agent's claim for expenses, at least as against the defender. I must say when an action is regularly settled, I must require a very special detail indeed of facts to sustain any such general averment.

The old cases imply that there must be a positive *collusion between the two parties* against the agent of one, or against both, for that would be as relevant a statement in many cases by each litigant. The device of the opposite litigant to avoid a finding for expenses is most legitimate, honest, and fair, and he is entitled to buy off that and all other risks, on the terms which his adversary will take. Now, what that collusion means in the ordinary case, when the client can pay, I do not very well know. But the Court have seen, it should seem, such fraudulent collusion, and therefore I suppose it may take place. But then the agent ought to have described and disclosed the collusive scheme between the litigants. To all the reasons in the interlocutor I am not disposed to adhere; but I am of opinion, 1st, that the interlocutor founded on does not necessarily imply liability for expenses; 2dly, that the agent has no right to appear to carry on this particular litigation in order to obtain a separate judgment finding expenses; 3dly, that no collusive arrangement or device between the two parties, such as the Court found had existed in one or two cases, has here been stated or explained to us; 4th, that I am not satisfied that that was intended to be a separate ground apart from the stage to which the process had advanced; and, 5th, that except in so far as constrained by former cases, the Court is not, in my judgment, warranted in restricting a litigant's right to compromise with his adversary a lawsuit on terms which that adversary does not complain of, on the ground that he must necessarily submit to a finding for expenses, to avoid which is one and a most fair object in the compromise.

LORD MEDWYN.—I think the law applicable to the present case was well laid down in the case of *M'Lean* by Lords Glenlee and Pitmilly. The latter observed—“There are three cases in which an agent was entitled to insist in the process to the effect of getting decree for expenses in his own name,—1. Where expenses had actually been found due; 2. Where they followed as a necessary consequence from the interlocutor previously pronounced; and, 3. Where the parties had entered into a com-

promise for the purpose of defeating his claim. Mr Bell, II. Feb. 12. 1852.  
Com. 39, gives this further rule—that it does not follow that in all cases where expenses have even been found due, or are likely to be found due, the agent can insist on going on with the cause." I think it follows as a corollary from these rules, that the decree in the agent's favour must follow as a direct consequence without any further discussion on the merits of the case ; and I would incline further to add this, that the idea of the agent being *damnum litis* should be restricted to a case which had already run some course of procedure, when of course expenses to some considerable extent had been incurred, giving a real interest in the agent to recover them. He could not take up a case just come into Court and compromised.

The agent's right is founded on equity and good policy. Yet it is also a matter of sound policy that lawsuits should be transacted and settled between the parties, contentions not kept up, and, therefore, that the agent will not be permitted to carry on, for his own behoof, a cause that has been settled between the parties, and absolutely taken out of Court, where further discussion is required, unless *mala fides* can be established against the parties so acting. As a check to fraudulent conduct, this very singular benefit is conferred on the agent to give him a right to carry on a suit, on account of his collateral interest, from which the real party will derive no advantage one way or another. As an illustration of the expediency of the rule, that *mala fides* can only confer such a privilege, I need not refer to any better example than the present case. It is very clear that the interlocutor of 18th June is not one on which expenses necessarily and of course follows. It led only to a new course of litigation. The legitim had not been renounced and might be due, but not if the averment that the sum paid was more than the legitim.

I do not hold the payment of the L.60 any proof that anything was due. It might have been natural in a question between brothers and sisters to authorise the payment of such a sum to get quit of such a discussion and to benefit their brother. There was much litigation necessary before the agent could go beyond his own client, who is always primary debtor, and claim his expenses from the father's trustees. I think it would be most unjust to hold that the trust-estate should be saddled with the expenses of a litigation which as to the parties is now out of Court, unless they have done some wilful wrong to the agent collusively with the party litigating against them. But then this wilful wrong

Feb. 12. 1852. must be established. It is not sufficient to say that the case has been compromised while the agent's account is unsettled, and that, he has reason to believe, collusively, to obtain the discharge. I think when an averment of *mala fides* is made, the particulars must be condescended on and proved. Clearly none such are stated here, and I consider it to be quite incompetent at this period of the cause to allow any such condescension and renewed litigation.

Rodgers v.  
Kyd, &c.

LORD COCKBURN.—The defenders have attempted to simplify this case, by laying it down *absolutely*, that there are precisely three situations in which the agent can ever succeed; 1st, where expenses have been *actually found due*; 2d, where they are at least due by *legal necessity*; 3dly, where the claim has been defeated by *collusion*. To these three, the interlocutor adds other three, for the Lord Ordinary considers it as conclusive against the agent, that he does not aver that he *demanded payment* from his own client,—or that that client *refused to pay*,—or that he is *unable to pay*. The whole of these, *if stated as absolute tests*, appear to me to be groundless. The three in the interlocutor, indeed, are new, so far as I am aware; and of the older ones, I attach very little weight to the circumstance of collusion. Because, where the agent has *no right*, I do not see how a right can arise in his favour, merely from the *motive* from which the cause was withdrawn from Court by the parties. And if his right was previously fixed, he does not need to found on their collusion. If the parties were entitled to settle the cause without regarding his claim, their settling it on purpose to defeat that claim seems perfectly immaterial. Then as to expenses being due *necessarily*, I know of no such expenses. Expenses are always in the discretion of the Court.

But when expenses are *found due*, the agent of the successful party is allowed to have the decree in his own name; and when they have not been actually found due, the practice has been, that he may claim, if the cause had reached a point at which a decree for expenses followed, *according to the usual course*, and at which they might be decerned for without *prolonged litigation*. The agent is allowed not only to carry off the crop that had been reaped, but to cut that which was ripe. If the cause was so far back, that the right to expenses could only be ascertained by keeping the cause in Court, and discussing its merits *as if it had not been settled*, this is not allowed, because it would imply very obvious inconvenience and danger. But still, though *some* further discussion may be necessary, the Court has certainly not always

excluded the agent from carrying it on as in the three cases of Feb. 12. 1852.  
*Tod, Cheyne, and Sloss.*

The only question here, therefore, is, Whether the case had <sup>Rodgers v.</sup> *Kyd, &c.* reached the proper point? I am of opinion that it had. The *whole of the defences had been repelled*, but as the defenders were ordered to lodge a state of the executry, all questions of expenses *were reserved*. The cause was in this state when the parties settled it.

Now, though expenses had not been found due, it seems to me that they were very near it. The matter by which they had been incurred had been disposed of, and they were *reserved*. All that the agent desires is, that *he shall be allowed to ask the Lord Ordinary to decide this reserved point*. If the decision shall be that no expenses are due, of course he cannot get them. But is he not to be permitted to move for them, and to shew cause for this motion? These expenses certainly do not follow *necessarily*; but they seem to be naturally implied here in the rejection of the defences. If we do not allow the agent to sist himself to the effect of trying to obtain a decree for reserved costs, I am not aware how we can ever let him in, except where, prior to the settlement, expenses had been *found due*; which would be a restriction totally irreconcileable with the past practice.

LORD MURRAY.—This case is one of considerable difficulty, and had the question been open without previous decisions, I should have been of opinion that, when there was a settlement of the case, the agent should not have been entitled to proceed against the other party at all, unless he put into the hands of the other party the means of recovering expenses from his own client. The parties compromise, one of them getting a certain sum, and he then leaves his agent to recover all the expenses from his opponent. That is unjust. The Court always takes into view the question of *mala fides*, presumed or actual, and whether there is the one or the other there, the party's agent is entitled to recover his expenses. But none such have been averred here.

The COURT, “ before answer, allow the reclaimer to give in a condescendence of the facts he avers, and undertakes to prove, in regard to a collusive device or conspiracy, entered into by the two parties to the law-suit, to defeat his claim for expenses,—the same to be lodged in eight days.”

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Murray lodged a condescendence, in which he stated that, on 1st September 1851, his client, Rodger, wrote him to know, “by

Feb. 12. 1852. *return of post, what you think my share (of the legitim) would come to."* " You did not mention when the first box-day was, and as to who you think will have to pay expenses. I surely cannot have to pay any expenses. Please let me know as to the foregoing ; and, in the event of my receiving an offer for settlement, what you think I should take, and what will be about the amount of your account." In his answer, Murray, " in reference to any proposal of settlement," requested the pursuer to communicate with him before acceding to any such proposal ; and as to the expense of process, Mr Murray stated that he thought the trustees (defenders), would be found liable, seeing that their defences had been repelled by the Lord Ordinary." And he averred that this correspondence was made known to the defenders or their agents.

The COURT were unanimously of opinion, that "the claimer has not made averments relevant to establish his right to insist in this cause, in order to carry on the same with a view to obtain a finding for expenses in favour of the original pursuer, and thereby to pay the account of expenses due to himself, the said John Murray. Therefore, refuse the prayer of the minute, as also of the reclaiming note," with expenses.

*John Murray, Jun., S.S.C., Compearer's Agent.  
Webster and Renny, W. S., Defenders' Agents.*

## SECOND DIVISION.

No. 188.

*Factors—Petition for appointment of Factors.*

See *ante*, p. 112, No. 61.

Feb. 12. 1852. The LORD JUSTICE-CLERK repeated the desire of the Court, *Pet. for ap-* that petitions for the appointment of factors *loco tutoris*, curators *bonis*, &c., should specify as particularly as possible the nature, *pointment of* extent, and value, of all properties to which the pupil has right. The Accountant of Court finds it almost impossible to examine the accounts of factors appointed under former petitions, in which this stereotyped form is used, " having left property of various descriptions to a considerable amount," from the difficulty he has in tracing what property the factors had to deal with and to account for.

## SECOND DIVISION.

*Factor—Accounting by Factor—Discharge by pupil—Pupils' Protection Act.* No. 189.

One of the factors, who appeared personally in Court, on the Feb. 13. 1852. 16th January (*ante*, p. 265), obtained a discharge from his former ward, who is now major, between the date of his citation and by Factor, &c. the date of his appearance,—which discharge contained a reservation in favour of the factor, to charge for commission on the moveable estate, none such having been received by him. A commission had been charged on the heritable estate.

The factor, who had failed to lodge an inventory for some years after his appointment, had now succeeded in satisfying the Accountant of Court of the accuracy of his accounts.

The Court refused to recognise the discharge obtained by the factor;—found that he was not entitled to the commission, and subjected him in the penal interest, which he must pay before receiving his discharge. It was observed, at the same time, that if the lady whose factor he had been, chose, it would be in her power to restore the penal fee, and make the factor an allowance for commission.

## FIRST DIVISION.

PETITION, Mrs MARGARET MARTIN or M'WHIRTER, and Others. No. 190.

*Curator bonis—Factor—Separate Interests—Pro indiviso Shares.—Circumstances in which the Court appointed the same person curator bonis, and factor loco tutoris to two families, for the administration of subjects of which they had pro indiviso shares.*

This was a petition for the appointment of a curator bonis and factor loco tutoris. David M'Whirter, and Mrs Mary M'Whirter or Hutchison, were each entitled to one-ninth share, *pro indiviso*, of certain subjects in the county of Renfrew, contained in a lease in favour of Mrs Helen Keir or M'Whirter, in liferent, and certain other parties therein named, and their heirs whomsoever in fee. David M'Whirter died intestate, and leaving children, but without having named tutors or curators or guardians to them. Mrs Mary M'Whirter or Hutchison also died intestate, and leaving a family. Helen Keir, the liferentrix of the subjects, having now died, the fee has become divisible; and one-ninth part or share *pro indiviso* thereof, belongs to the children of David

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Pet. Martin or  
M'Whirter,  
&c.

Feb. 13. 1852. M'Whirter; and another ninth *pro indiviso* share to the children  
 Pet. Martin or of Mrs Mary M'Whirter or Hutchison.

M'Whirter,  
 &c.

This petition was presented by the nearest of kin of both families, and by such of the children themselves as are above pupillarity, and set forth, that as there is no one in a situation to administer the property and estate of the children of the deceased David M'Whirter, and as, although the father of the second named family is alive, it is highly expedient that the administration of their *pro indiviso* subjects should be in one and the same person, the petitioners therefore craved the appointment of a *curator bonis* of such of the children of both families as are above pupillarity, and a factor *loco tutoris* to the others, and the petition suggested John M'Whirter, Bleacher, Nogganfield, as a fit person to be intrusted with the offices of curator and factor.

*Logan*, in support of the petition, submitted that the special circumstances of the case warranted the appointment as craved.

**LORD IVORY.** There is here one curator sought to be appointed for two families. They have no doubt *pro indiviso* shares, but they may not have the same interest. A separate appointment for each family would perhaps be more regular.

The COURT however granted the prayer of the petitioner, and appointed John M'Whirter to the offices of curator and factor.

*Lockhart, Morton, Whitehead, and Greig*, W.S., Petitioners' Agents.

## SECOND DIVISION.

No. 191.

**MAXWELL v. MAXWELL.**

*Entail—Clause—Construction—11 and 12 Vict., c. 36, § 43.*

Feb. 13. 1852. This was an action by which the pursuer, Sir William Maxwell of Monreith, Baronet, sought to have it found and declared that a deed of entail executed by his deceased grandfather, Sir William Maxwell, on 24th June 1809, of the lands of Drummodrie, and another deed of entail executed by his grandfather's trustees in April and May 1825, of the lands of Chilcarroch and others, were invalid deeds and ineffectual to entail the said lands. The irritant clause following immediately the prohibition against contraction of debt declares that if any of the heirs "shall do on the contrary, then and in that case all and every one of such acts and deeds shall be null, in the same manner as if such acts and deeds had not been done, acted, or committed." The two deeds are similar in their terms. It was pleaded by the pursuer, that the words "in the contrary" referred only to prohibitions against con-

Maxwell v.  
 Maxwell.

traction of debt, and that the irritant clause was not so framed as Feb. 18. 1852. to apply to or fence the prohibition against altering the order of succession or selling the lands ;—that, therefore, under the 11th Maxwell v. and 12th Vict., c. 36, § 43, which declares that entails invalid as to any prohibition shall be invalid as to all, the deeds of entail in question were ineffectual.

The Lord Ordinary (Cowan) found for the defenders, and the pursuer reclaimed.

*Hector* (with whom *Marshall*) for the pursuer. The resolute clause is peculiarly expressed, inasmuch as while the irritant declares that if any of the heirs "shall do on the contrary, then" these "acts and deeds" are to be void, the resolute sets forth that any of the heirs "who shall contravene or do on the contrary of any of the clauses or conditions of this present taillie, shall immediately upon the said contravention," and so forth; and from this difference in the phraseology of the clauses, it follows that a limited, and not a comprehensive meaning ought to be ascribed to the words "do on the contrary" in the irritant clause.

*Ross* and the *Dean of Faculty* for the defenders were not called on.

**LORD JUSTICE-CLERK.** There is no difference between the form of expression used and that in ordinary cases—"if any heir of entail contravene in the premises."

The COURT adhered with expenses.

*Hunter, Blair, and Cowan, W.S.*, Pursuer's Agents.

*A. J. Russell, W.S.*, Defender's Agent.

### FIRST DIVISION.

**JAS. MORRIS and Co. v. STEWART, ROWELL, and Co.**

No. 192.

*Process—Judicial Reference—Referee's Fee.*—Where parties had agreed as to the amount of the fee to be paid to a judicial referee, but not as to how it should be paid by them, the Court remitted to the referee to determine the matter.

In this case the pursuers sought to recover the sum of £750 (subject to certain deductions) from the defenders, as damages for an alleged breach of a contract of charter-party. The defendants denied their liability, and issues having been adjusted, the case was set down for trial at the last autumn Circuit Court at Glasgow. From the state of the criminal business, the trial could

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Feb. 14. 1852. not have come on for several days, and the parties accordingly agreed to submit the whole case to Mr H. J. Robertson, Advocate, "as judge and jury." Evidence having been led at length on both sides, and counsel heard, the judicial referee found the defenders liable in £50 damages, and in modified expenses. A question then arose as to how the referee's fee (which it was mutually agreed should be stated at £60, 19s.) was to be paid.

*Buchanan*, for pursuers. My clients have been substantially successful on the whole case. We asked, indeed, £750 of damages, but subject to very large deductions, and we have got £.50 with expenses. In the case of *Yates v. Mitchell*, 7th June 1848, the Court subjected the losing party in payment of the whole fee, and that is the fixed rule.

*Lord IVORY*. So far as I understand that case from your reading, the party who was made to pay the whole fee had lost the case, out and out, and been cast in expenses. Here the expenses are at least modified.

*Shand*, for defenders. Yes, that alone would take the present case out of any rule which may be thought to be established by the decision in *Yates*, besides it is a mistake to say that the pursuers have gained their case here. They asked £.750 of damages, subject indeed to some deductions, but these, in any view, would have left a very large amount of damages claimed. The referee has given the pursuers only £.50 of damages, and has modified the expenses considerably. The defenders have all along offered either to pay one-half of the fee, or to go before the referee, that he may fix in what proportions it is to be borne. There would be no indelicacy in following the latter course, as parties are quite agreed as to the amount of the fee.

The COURT remitted to the referee to determine the question.

The referee ordered that each party should pay one-half; and thereupon the Court interposed authority to the whole award, in common form.

*John Cullen*, W.S., Agent for Pursuers.

*Shand and Farquhar*, W.S., Agents for Defendants.

## FIRST DIVISION.

THE EDINBURGH and GLASGOW BANK v. EWAN and OTHERS. No. 193.

*Joint Stock Companies—Winding-up Acts—Court of Chancery—Court of Session.*—The affairs of a joint stock company, whose domicile was in England, having been sequestrated under the Winding-up Acts, after proceedings had been instituted by Scotch creditors of the company in the Court of Session against certain partners within the jurisdiction of the Court.—*Held*, that Scotch claims of debt fell under the operation of the Winding-up Acts, and that the proceedings in the Court of Session must be stayed until the claims should be adjudicated upon by the Master in Chancery.

In the year 1840 there was established in London, under the Feb. 14. 1852. name or style of the Royal Bank of Australia, a copartnership, <sup>Edin. and Glas. Bank v.</sup> in the nature of a joint stock company, for the purpose of carrying on in London, in New South Wales, and elsewhere in the British Colonies, the business of bankers and of banking. This business was to include, *inter alia*, the making and issuing of bank notes, and bills payable on demand, after sight, after date, or otherwise, and other business. In the month of September 1849, the Edinburgh and Glasgow Bank being the holders of a number of documents, some of which were due and unpaid, and others still current, instituted a suit against certain parties, shareholders of the Royal Bank of Australia, and who, it was alleged, had been shareholders of the Royal Bank of Australia at the time when the documents were issued, and also against the representatives of certain parties who had been shareholders at the time the documents were issued, but had died before the institution of the action, for payment of the sums contained in the documents past due, and also for obtaining security for the payment of those afterwards to fall due. The parties called in the action were understood to be the only partners of the company under the alleged liability within the jurisdiction of the Court of Session.

In this action defences were lodged on the merits, and also two preliminary objections to the effect:—

1. That the action is competently brought, in respect that the debt sued for, being a debt of the company, had not been constituted against the company.

2. That the action is further incompetent, in respect that all parties interested are not called.

The Lord Ordinary (Ivory) sustained these defences and dismissed the action. The pursuers reclaimed.

Feb. 14. 1852. *Edin. and Glas. Bank v. M'Ewan, &c.* Before giving judgment on these preliminary defences, the Court directed the opinion of English counsel to be taken on certain points, and in February 1851 a case was adjusted and laid before G. J. Turner, Esq., of the Chancery Bar, and Hugh Hill, Esq., of the Common Law Bar, for their opinion. Assuming that the Royal Bank of Australia is not a corporation,—that it does not exist by statute or charter,—that it never had a registered public officer by whom it could sue or be sued,—and that the proceedings in the present case are not proceedings taking place under the Bankrupt Laws,—counsel were asked whether an action or suit could be instituted in the Courts of England against the company, by the name and style of the Royal Bank of Australia? And if not, against what parties actions or suits could be instituted, for the purpose of enforcing debts due, or alleged to be due, from, or incurred by, the company, and in what form? and various other queries were put as to the liability for company debts. The opinion of counsel was to the effect that no such action against the company could be instituted in the Courts of England; that each of the partners who were partners in the company at the time the debts were incurred, is, as respects the creditors, liable for the whole amount of the debts; and “if any of the partners not made defendants are not within the jurisdiction, the parties sued cannot plead in abatement, or otherwise object, that such partners who are out of the jurisdiction had not been joined as defendants in the action.” “If any of the partners are out of the jurisdiction, the creditor may select any one or more of the others, at his option, as defenders against whom he may institute his action, and there can be no plea in abatement in such case by reason of non-rejoinder.” “Unless the partners who are out of England voluntarily consent to appear, they cannot be forced to do so.”

The Court recalled the interlocutor of the Lord Ordinary, *in hoc statu*, and remitted to his Lordship to proceed farther with the cause.

In May, thereafter, the defenders lodged a minute and proposed addition to their defences. The statement contained in this minute was, that since the institution of the action proceedings had been taken in England, the domicile of the company, under the acts for the winding up of joint stock companies, 11 and 12 Vict., c. 45, and 12 and 13 Vict., c. 108, under which there has been appointed an official manager, who represents the company, in whom all its rights, assets, and property, is vested, and who

has in his possession the whole books and writs of the company, Feb. 14. 1852. and against whom, as representing the company, proceedings may be taken. By § 73 of the 11 and 12 Vict., c. 45, it is enacted, <sup>Edin. and Glas. Bank v.</sup> <sup>M'Ewan, &c.</sup> "that after the first appointment of an official manager, no creditor or other person shall, except so far as the master shall permit, have power to commence, or to *proceed with*, any action against the official manager, or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the master, as hereinafter mentioned." They therefore pleaded that the present action must be stayed in terms of this section, until the pursuers shall have proved their alleged debt or demand, or exhibited or made such proof as they may be able before the master. They also pleaded that the present action cannot or ought not to be proceeded with, and that the pursuers are bound to institute proceedings in England, the proper *forum* of the company.

The Lord Ordinary (Ivory) "having heard counsel for the parties, makes avizandum, with the proposed amendment of the defences, and whole cause to the Court," &c.; and in July 1851, "The Lords having resumed consideration of this cause, sist proceedings therein *in hoc statu*, and ordain the defenders to lodge . . . a minute, stating what progress has been made in the affairs of the Royal Bank of Australia since" the proceedings under the Joint Stock Companies' Winding-up Acts, 1848 and 1849, had taken place.

In conformity with this interlocutor a minute was lodged in October 1851, stating *inter alia* that notice had been given in the London Gazette, "that all parties claiming to be creditors of this bank are to come in and prove their debts before Richard Richards, Esq., the Master of the High Court of Chancery, charged with the winding up of the said bank . . . and until they shall so come in, they will be precluded from commencing or prosecuting any proceedings for recovery of their debts." Among other claims was one lodged on behalf of the North British Insurance Company, who had previously raised an action in Scotland against certain alleged shareholders in Scotland. Their claim was opposed by the official manager and certain shareholders, and the result of the proceedings was a judgment disallowing the demand as a debt, but admitting it as a claim; and this claim could now be established as a debt only in a Court of Law. The pursuers, the Edinburgh and Glasgow Bank, had not come forward to claim under the Winding-up Act.

Feb. 14. 1852. To this minute the pursuers lodged answers. They maintained that the refusal by the master to recognise the claim of the North Edin. and Glas. Bank v. British Insurance Company as a debt, or to deal with it as such M' Ewan, &c. till they obtained the judgment of a Court of Law in support of it, did not indicate that the master would recognise a judgment of an English Court of Law only. Agreeably to the opinion of English counsel obtained under the authority of the Court in this case, neither the Royal Bank of Australia as a company, nor the partners resident in Scotland can be proceeded against by way of action in the Courts of England. The only remedy open to the pursuers against the defenders, who are all resident in Scotland is the present action.

The case was called to-day to dispose of the preliminary defences.

*Marshall* and the *Dean of Faculty*, with whom *M'Kenzie* and *M'Farlane* for pursuers.

*Penney* and *Neaves*, with whom *G. Patton*, *T. Ivory*, *Horn*, and *W. B. Clark* for the defenders, referred to the cases of *Thomson v. The Universal Salvage Company*, 6 Railway Cases, 10.

**The LORD PRESIDENT.**—This is entirely an English Banking Company, having its place of business in London, and the affairs of the company have come to be settled under the Winding-up Acts. When we formerly pronounced an interlocutor sisting *in hoc statu*, we made an order at same time to let us know what had been done in the matter, and we find that some claims are not sustained as debts, they are noted merely as claims until a court of law shall establish them as debts. The Master is receiving the claims and adjudicating on them in terms of the statute. Therefore, looking to what this statute is, it appears to me that the claims of debt in Scotland are as much under the operation of that act as if the debts had been contracted in England. Therefore I am of opinion that the principle of staying the process, as expressed in the act, applies to this case independently of the exercise of our sound discretion. Without the authority of the Master no action can be proceeded with. We must apply the principles of common sense to this, and this provision certainly applies to any action like the present already raised, and stops proceedings. All the documents of the company are in London, and there they must remain till removed by authority of the Master, and therefore, before we could proceed to make up a record, we must get the authority of the Master, and he would at once say it is here the parties must come to have their claims investigated. There-

fore, looking to the statute itself we must sit *in hoc statu*, till the Feb. 14. 1852.  
pursuer shall make application to the Master in Chancery.

Edin. and  
Glas. Bank, v.  
M'Ewan, &c.

**LORD FULLERTON.**—The pursuers demanding judgment on the additional pleas in law, it is necessary they shall be disposed of. The second additional plea, which is the leading one, maintains the absolute necessity of sisting the whole proceedings until the conditions of the 73 sec. of the Winding-up Act of the 11th and 13th Vict. shall have been complied with. And on looking at the statute I am clearly of opinion that we have no alternative, but must give effect to the 73d sec. of the statute. Not that I think that the statute extends to Scotland as a distinct act of legislation: it clearly does not. But then there is as little doubt that it is a valid act of legislation in relation to the English contract of copartnery; and as the pursuers claim against these individual defenders solely through the medium of that English contract, they must be bound by the condition attached to it by the law of the domicile of the contract. Here a statute, no doubt properly English, lays down certain conditions as indispensable to the prosecution of any action by creditors against contributors, *i. e.*, persons in the situation of the defenders. The pursuers do and must found on the English contract; they have no other foundation for their case. Consequently they must be affected by the conditions validly attached to the contract by the *lex loci contractus*. I think, therefore, we must give effect to the 73d sec., which is quite clear and imperative. The words "commence or proceed" seem to me quite conclusive. No action against a contributory can proceed until after proof, &c., before the Master. That is now the condition of the enforcement of liability against the individual partners by the law of the domicile of the contract, and it must receive effect. It may be true that the provisions of the statute are not directly binding on Scottish parties, but with reference to Scottish parties suing other Scottish parties on an English contract, it becomes binding on us who are called upon to expound and enforce the English contract.

**LORD CUNNINGHAME.**—I am of opinion that farther procedure in this cause must be sisted till the claims at issue are reported to the Master in Chancery, under the Winding-up Act, and his directions received thereon. I see from my notes when the case was last before us, that this was my opinion then, and I am confirmed in it by the short discussion of to-day. When the present case first came into Court in 1849, no application had been made to the Master in Chancery on the part of the creditors or partners

Feb. 14. 1852. of the Australian Bank under the Winding-up Act, as to English Joint Stock Companies. But such application was made in April Edin. and Glas. Bank v. 1850, and is now in progress in England. In these circumstances M'Ewan, &c. the 73d clause of the Winding-up Act of 1848 applies distinctly to the case. At the same time, there may be some doubt as to this, as it is enacted by a prior clause (sec. 58,) that the proceeding before the Master shall not affect "any actions, suits, or other proceedings pending *at the date of such petition.*" As the case stands, I am rather inclined to send the case to the Master, who will take into view the dependence of the creditors' suit in the Court of Session prior to the application to him, and make such order or give such directions to this Court as would be competent to a Court in England.

**LORD IVORY.** I am of the same opinion. It was said, from the peculiarity of the English law, that the English Company has not a separate person in law, and that a liability attaches to the Company through the sides of the partners. And so the opinion of English counsel was obtained to the effect, that it was premature to throw out the action, as had been done before that opinion was obtained. But if we are not to follow our Scotch practice, are we not to follow the English either? The English partners have gone before the Master in Chancery, who has decided that they must first constitute their debts in the ordinary way, their demand being noted as a claim—which must be something analogous to noting the claims in a sequestration—and that, in the meantime, the Company's estate shall not be distributed to the claimants, until all parties shall be put on the same footing for an equal distribution of the estate. Therefore, what I desiderate is, that if we are to take neither Scotch nor English law, the interest of the Scotch creditors will be overlooked, and the estate be distributed in England; therefore, I am for continuing the *sist* until the parties take the proper remedy open to them under the proceedings in England.

The COURT "sist proceedings in the cause, till the application is made under the Winding-up Act."

*Lockhart, Morton, Whitehead and Greig, W.S., Pursuers' Agents.*

*Smith and Kianear, W.S.,*

*John Rutherford, W.S.,*

*Gibson-Craigs, Dalzell and Brodie, W.S.,*

} Defenders' Agents.

## FIRST DIVISION.

Petition, WILLIAM N. FORBES, Esq.

No. 194.

*Trust-estate—Court of Chancery—Court of Session—Equitable Jurisdiction—Judicial Factor.—Circumstances* in which in the management of a trust-estate, consisting of heritable property in Scotland, and moveable property in Scotland and England.—The Court, in the exercise of its equitable jurisdiction, appointed a judicial factor with regard to the heritable estates in Scotland.

This was a petition for the appointment of a judicial factor to <sup>Feb. 14. 1852.</sup> administer the trust-estates left by the deceased Lieutenant-General <sup>Pet. Forbes.</sup> Nathaniel Forbes of Auchernach and Dunnottar.

General Forbes died on the 16th day of August last, leaving a large succession, consisting both of extensive landed property in Scotland, and considerable moveable estates both in Scotland and England. By two several deeds of entail, General Forbes executed strict entails of his estates of Auchernach, in Aberdeenshire, and Dunnottar, in Kincardineshire, in favour of himself and the heirs-male of his body, whom failing, the heirs-female of his body, whom failing, to the petitioner, William Nathaniel Forbes, his natural son, and the heirs-male of his body, whom failing, to other parties, as therein set forth. He also executed a deed of settlement which directs his trustees, after accomplishing the other purposes of the trust, to invest the accumulation of rents, &c., in the purchase of lands to be afterwards settled and secured upon the series of heirs, and under the same conditions and provisions as are contained in the entails of Auchernach and Dunnottar. The deed of settlement also contains a declaration of his wish and desire that his trustees should, as soon as convenient after his death, make up complete titles to his estates of Auchernach and Dunnottar, and strictly to entail the same according to his intentions, as expressed by his trust-deed.

The petitioner, William Nathaniel Forbes, is the first beneficiary entitled to succeed to and take up General Forbes' landed properties, as well under the trust-disposition as under the deed of entail.

In his trust-deed of settlement General Forbes nominated five trustees, of whom three predeceased him. The petitioner and Mr Gordon Forbes alone survived, and both of them have accepted. The provisions of the deed bearing upon the assumption of new or additional trustees are to the following effect;—“In the first

Feb. 14. 1852. place, the property is left to the parties named in the deed, and the acceptors or acceptor, survivors or survivor of them, and to such persons as may be assumed by them, in virtue of the powers after mentioned, as trustees,' &c. ' And I hereby declare, that a majority of the accepting and surviving and acting trustees for the time shall be a quorum, and every act and deed done by such quorum shall be as valid and effectual as if done by my whole trustees.' ' And farther,' 'with power to the said trustees, in case of the resignation or death of any of their number, (the said trustees, or any of them, being at liberty to resign and be discharged of all farther responsibility at any time during the trust), to nominate and appoint, by a writing under their hand, as they are specially taken bound forthwith to do, so as to fill up the places of the co-trustees who have resigned or died, any person or persons they shall judge fit and proper to be a trustee or trustees, for the purposes herein mentioned, along with them or after their decease,—but so as in no case to exceed the original number of trustees as fixed by me in this deed. And I hereby declare that the person or persons so to be appointed shall have the same powers of acting,' &c."

In this situation a question arose as to the assumption of new trustees ; the accepting and surviving trustees differing in opinion as to their powers in this respect. The opinion of counsel was taken in England and also in Scotland by both parties, and the petitioner was advised that the assumption of trustees would be an incompetent proceeding, and that whether it was so or not, at any rate there was no reason why the two trustees should not proceed to execute these deeds of entail. Mr Gordon Forbes, on the other hand, obtained opinions to the effect that nothing could competently or validly be done by the trustees until they assumed three new trustees in room of the three who predeceased the General. In this stage of the controversy the moveable estate in England was thrown into Chancery at the instance of the widow, and a bill was filed by the petitioner to protect his own interests. In regard to the dispute about the assumption of new trustees, it was suggested that a joint case should be made out and laid before the Dean of Faculty. A memorial was accordingly adjusted for both parties, and the Dean gave an opinion favourable to the views of the petitioner. But in this opinion, however, Mr Gordon Forbes did not concur, and in these circumstances this petition was presented for the appointment of a judicial factor. It sets forth that Mr Gordon Forbes refuses to concur with the peti-

tioner in making up titles to General Forbes' estates, and taking the necessary measures for vesting them in the petitioner; "that the petitioner, of the two trustees, has in reality and at present, the only beneficial interest in the matter, and the other trustee, Mr Gordon Forbes, being called to the succession only on the failure of the petitioner and his heirs. But the petitioner is now and at once entitled to succeed to the large properties of Auchernach and Dunnottar, which yield between L.3000 and L.4000 a-year." In these circumstances, and as it has been found impossible otherwise to go on with the trust-administration in the necessary fulfilment of General Forbes' deed of settlement, the petitioner submitted that the appointment of a judicial factor was necessary and proper, and suggested certain persons whom he prayed to be appointed "with power to enter upon and assume the management of the trust-estate," "so far at least as situated within Scotland, and to execute the purposes of the trust there-  
enant, as contained in his deed of settlement, and with all the usual powers."

To this petition answers were lodged for Gordon Forbes. They stated that the only point upon which a difficulty had arisen between the petitioner and respondent relates to what is properly a question of law, as to their power of naming new trustees under the settlement. That being determined, there need be no difficulty in the administration of the trust. It was also stated for the respondent, that having been unsuccessful in his endeavours to induce the petitioner to concur with him in the assumption of new trustees, he has presented a petition to the Court of Chancery in certain causes arising out of the trust, and also in the matter of "the Trustee Act 1850," praying the Court to appoint new trustees in the room of the three trustees who died in the General's lifetime, and also that the sum of L.61,986, 1s. bank L.3 per cent. annuities, part of the General's estate standing in the names of the petitioner and the respondent, might be brought into Court and invested in the name of the Accountant-General in trust, in these causes, in order that the same might be applied according to the trusts of the General's will, under the order of the Court of Chancery. The petition, it is expected, will be heard and disposed of in a few days. There is nothing in the management of the estates in Scotland requiring the immediate appointment of a judicial factor, and no loss or inconvenience can result from a short delay in completing the title of the trustees, till their powers

Feb. 14. 1852. are properly ascertained. The prayer of the petition ought therefore to be refused.

Pet. Forbes.

*Macfarlane and Inglis* for the petitioner. The respondent's answers amount to this, that we are in the first place bound to try the question as to the assumption of trustees by a process of declarator, or by the proper procedure in some English Court. But, in the meantime, the petitioner may be kept out of these valuable estates for years, and his interests, as well as those of his family, must necessarily suffer. The Court is not asked to interfere in the trust and to set aside the appointment of trustees in its execution. That portion of the moveable estate which is situated in England is already in Chancery and is to be administered there. But the Court of Chancery cannot interfere with the Scotch estates, and what is wished to be done regarding these is simply the making up of a formal title which will be the first and only duty of the judicial factor. This is a case in which the Court is entitled to exercise the power of a court of equity, and to interfere in the trust for the protection of the petitioner's interests.

*T. M'Kenzie* for the respondent. This is an application for the appointment of a judicial factor, not for interim management, or any special purpose, but with all the powers of the trustees, so far, at least, as their powers can be exercised in Scotland. The trust provides, *inter alia*, for the purchase of landed estates in Scotland, and contains large discretionary powers, which it was certainly the intention of the General should be exercised by the trustees. If superseded by the appointment of a factor, the practical result is this, that the respondent will remain a trustee in England, subject to all the liabilities of a trustee in England, while at the same time he is divested of all the powers of a trustee in Scotland. If a factor, therefore, be thought necessary, his powers ought to be limited so as not to supersede the trust.

**The LORD PRESIDENT.** These parties may differ as to the selection of additional trustees; but I can see no reason for their refusing jointly, and at once, to perform the duty imposed upon them by the trust-deed, to make up titles, and to execute the further directions as to investing any funds that existed, and entailing the property. And if one of the trustees persist in refusing to do this, then I am quite clear as to the power of the Court to appoint a judicial factor to have the work done. When a factor is so appointed, he can be directed by our authority to do that

which is absolutely necessary for the real interests of both the parties now before us ; for the interests of the gentleman who is most materially concerned, that he may be able to make provision for his wife and family, and for those of the other gentlemen, who must take care that nothing is done by the factor, in the exercise of those powers, which is inconsistent with his interests. I am, therefore, surprised that, professing his readiness to carry out the intentions of the trust, and only doubting the power to assume new trustees, Mr Gordon Forbes should throw difficulties in the way of the appointment of a judicial factor. The petitioner has filed a bill in Chancery ; but that can only apply to the funds within the jurisdiction of the Court of Chancery. It cannot apply to the management of the Scotch estates, or the collection of the Scotch funds, if there are any. If there are none, then there is nothing to be done but the making up of titles in Scotland. And why apply to Chancery as to that ? I think it is a most useless proceeding. If both parties are determined to give effect to the will of General Forbes, they have nothing more to do than to withdraw this bill before Chancery. As to the widow, if she persists, we cannot, of course, interfere in her case ; but the petitioner can at once withdraw his bill. The fiat of the Court of Chancery can only reach to funds in England. As to any funds in Scotland, they have only to be collected, and applied as soon as possible to the purchase of lands as pointed out in the deed. That the petitioner, because the respondent says he will not concur in this and the other thing, is to be impeded in making up his titles, is not consistent with common sense, and certainly not with justice and equity. If the respondent does not state that he will concur in making up those titles forthwith, I am decidedly of opinion that a judicial factor ought to be appointed.

LORD FULLERTON. I think the right way is to appoint a judicial factor, and to limit his powers exclusively to the heritable estate in Scotland.

LORD IVORY concurred. The parties have placed the subject in a dilemma, by asking for the appointment of a judicial factor in England.

LORD CUNINGHAME also concurred.

The COURT therefore granted the prayer of the petition for the appointment of a factor, with regard to the heritable estate in Scotland.

*William N. Fraser, W.S., Petitioner's Agent.*

*William Duthie, W.S., Respondent's Agent.*

## FIRST DIVISION.

No. 195. CALEDONIAN AND DUMBARTONSHIRE JUNCTION RAILWAY COMPANY v. LOCKHART AND OTHERS.

*Process—Issues—Diligence to recover Documents.*—Circumstance in which a motion for diligence to recover documents after the record was closed, but before adjusting issues, was refused.

Feb. 14. 1852. This case came before the Court on the motion of the defenders for a diligence. The action is one of a series raised Caled. and Dumbarton against various parties for payment of certain calls upon railway shares, of which it is alleged they are registered proprietors. Lockhart, &c. The defence in this action was, *inter alia*, that the shares were not duly or effectually registered by the pursuers, and that the register founded on by them was fabricated and false, unauthenticated in terms of the statute, and otherwise improbatative, and therefore could not support the present action. Averments to this effect were contained in the defenders' statement of facts, and pleas in law. A record was made up and closed, and with a view to the trial of the cause issues were prepared and lodged by the pursuers for the purpose of being adjusted. They were met on the part of the defenders with a motion for recovery of written documents, in particular of the Company's share register book and other relative writings. This motion the Lord Ordinary (Cowan) refused *hoc statu*, and appointed the defenders to lodge such counter issue or issues as they consider to be required by the nature of their defence to the action.

In his note appended to the interlocutor, the Lord Ordinary remarked that "the record being closed, it cannot be alleged that the diligence is required in order to enable the parties to make the allegations on which their pleas in defence are intended to rest. Neither can a diligence be alleged to be necessary towards the adjustment of any issue which the defenders may wish to propose for the trial of the cause on their part. The averments in the closed record can form the only materials from which such issues must be framed. Assuming, therefore, that the matters of fact in dispute between the parties, whether as regards the demand made by the pursuers, or as regards the defences by which the demand is met, fall to be tried in the usual course under issues adjusted for the purpose, there would obviously be no propriety in granting a diligence for recovery of writings at this stage of

the proceedings. The defenders, however, urge that the allegations in the record raise pleas of a nature to exclude the pursuer's action altogether; and it is contemplated, assuming the diligence to be granted and the specified writings recovered, that there shall be a debate on the effect of those writings in barring the pursuer's right to insist in the action. This appears to the Lord Ordinary to be an innovation on the established procedure followed in such actions as the present, and calculated to create great delay in the disposal of the pursuers' claim for the calls in question under their statutes. Any relevant matter in defence, depending on disputed facts, ought to be made the subject of separate issues, if it do not resolve into a mere answer to what is embodied in the pursuers' issue. In the present case, the averments to which the defenders' motion for a diligence particularly applies, being all of them denied, must be made matter of proof; and this probation must be allowed to both parties, and cannot moreover be confined to written documents, but must embrace parole proof as well. Supposing the defenders, in place of urging the pleas founded on *ope exceptionis*, had insisted in an action of reduction, they must have taken an issue which would have gone to trial in the usual course. A reduction has not been brought, and may not be necessary, although on this point the Lord Ordinary does not express an opinion. He assumes the averments to be properly stated and pleaded in the record; but, assuming this, must not the same course be followed as if a process of reduction had been instituted, i.e., the averments be made the subject of probation on the defenders' part under a separate issue? The Lord Ordinary thinks that an issue specially directed to the matter of these averments will be required; but, if not, this must be because, under the comprehensive terms of the pursuers' issue, it will be competent for the defenders to lead the necessary probation of those averments. In this view, the case appears to the Lord Ordinary to be one entirely for the adjustment of issues to try the disputable matter contained in this closed record, and he thinks it premature, until the issues are adjusted, to grant a diligence, which is and can only be moved for *in modum probationis*."

Against this interlocutor the defenders reclaimed.

*Pyper and the Dean of Faculty* for the claimer.

*N. C. Campbell and Inglis* for the respondents.

**LORD FULLERTON.** I look at this case as the Lord Ordinary does. There is no reason for not going on in the usual way.

**LORD CUNINGHAME.** I am of the same opinion. It would be

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Caled. and  
Dumbarton  
Railway Co. v.  
Lockhart, &c.

Feb. 14. 1852. a dangerous proceeding to entertain this motion for a diligence.  
Caled. and Dumbarton Railway Co. v. Lockhart, &c. The record is closed, and if we were to grant the motion, it would come to this, that every party who is interested in putting off a case, would come at this stage and ask for a diligence; and this would be renewed, and so the case would be put off for two or three years. An issue must now be prepared.

LORD IVORY. I am also of same opinion. I do not say that at this stage of the proceedings diligence is incompetent. It is what the party points at as the result and operation of the diligence that gives significance to the finding of the Lord Ordinary; for it is not with a view to the trial of the cause that this is asked, but with a view to interposing some obstacle in the way of proceeding with the case. I should have been ready to grant diligence if it had not been disclosed that it was asked for the purpose of defeating the trial; and the only way of meeting this is to force the defender to take an issue, and then let them recover what documents may be necessary for the defence.

The LORD PRESIDENT declined.

The COURT, therefore, refused the reclaiming note, with additional expenses.

*Thomas Sprot, W.S., Pursuers' Agent.*

*Walker and Melville, W.S., Defenders' Agents.*

### FIRST DIVISION.

No. 196.

MACKENZIE'S TRUSTEES *v.* MACDOWALL.

10th Geo. III., cap. 51—*Improvement Debt—Assignment—Residue.*—A. entailed his estates, and under his trust-settlement destined the residue of his succession to B., who was also institute in the entail. A.'s trustees, with B.'s concurrence, assigned away an improvement debt, which is now sought to be recovered from C., as heir in possession. A.'s trust still subsists:—*Held* there never having been any free residue under the trust, that B., as residuary legatee, had no right to the improvement debt, that it was competently assigned, and was not extinguished by sec. 24 of the Montgomery Act.

Feb. 14. 1852. This case originally came before the Court on the report of Lord Murray (Ordinary). It was an action directed against the defender, Lieutenant Colonel Day Hort Macdowall of Garthland, as the heir of entail in possession of the estate of Barr and others, for payment of certain sums said to have been expended in the improvement of these estates, in terms of the Montgomery Act, by the  
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late Mr William Macdowall of Garthland and Barr. William Mac- Feb. 14. 1852.  
dowall died in 1840. He was succeeded by his brother, Colonel Mackenzie,  
Lawrence Macdowall who died in 1842, and was succeeded by his &c. & Mac-  
cousin, the present defender. By his trust-disposition and deed of dowall.  
settlement William Macdowall authorised his trustees to sell and  
borrow money, and directed them to pay his (the truste's) debts,  
and the various legacies. The residue of his succession, after paying  
debts and the specific legacies, was bestowed upon his brother,  
Colonel Lawrence Macdowall. The following powers are given to  
the trustees : " And I hereby commit to my said trustees and their  
foresaid, full powers of sale, and disposal of the whole or such  
parts of the said trust-subjects as they shall find to be necessary  
in the course of the trust, and also of borrowing such sum or sums  
of money on the security of the trust-funds as they shall require  
in the course of their management thereof," &c. And with the  
trust-settlement William Macdowall left a letter of instructions to  
his trustees, dated 23d February 1820, which contains the follow-  
ing request :— " I request that you will retain the West India  
estates belonging to me till my debts, and the legacies bequeathed  
or to be hereafter bequeathed by me, shall be paid off, unless you  
and my heir shall think it more expedient to sell them," &c. The  
trustees nominated by William Macdowall upon his death accept-  
ed of the trust, and entered upon the administration and manage-  
ment of the trust property. They appointed Mr Smith, W.S.,  
agent for the trust, and authorised him forthwith to take such  
steps as might appear to him expedient for the liquidation of the  
more pressing claims against the trust-estate. Mr Smith raised  
the sum of L.5000 in loan from the pursuers ; and there was as-  
signed to them in security a claim for payment of the sums ex-  
pended on improvements upon the entailed estates by William  
Macdowall, the truste, which were recorded during his lifetime, in  
compliance with the provisions of the Montgomery Act, 10 Geo.  
III. c. 51. Colonel Lawrence Macdowall, the heir of entail in pos-  
session of the entailed estates, and the residuary legatee under the  
trust-settlement of William Macdowall, was a party consenting to  
the bond and assignation in security in favour of the pursuers.

Upwards of a year after the claim of debt was thus assigned to  
the pursuers, an action of declarator and constitution was raised  
in name of William Macdowall's trustees, for the purpose of con-  
stituting against Colonel Lawrence Macdowall, ostensibly as heir  
of entail, in terms of the statute, the amount assigned over to  
the pursuers as the alleged amount of money due under the Im-

Feb. 14. 1852. <sup>provement</sup> Act. No defence was proponed; and although decree was taken against him, no attempt was made to enforce it. In these circumstances the pursuers had instituted the present action against the defender, concluding for payment of the whole sum of money alleged to be constituted by the foresaid decree, under deduction of the proportion payable by Colonel Lawrence Macdowall, referring to the period he possessed the entailed estates.

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dowall.

The defender is heir in possession of the estates of Barr and others, but he does not represent Colonel Lawrence Macdowall in any capacity. In 1843, in consequence of certain claims threatened to be pressed against the estate, an arrangement was made, by which Mr Smith undertook, in the management of the trust, to relieve the trustees of all claims against them, the parties interested conveying to Mr Smith their whole estates, rights, and interests, under the said trusts.

The pursuers, in support of their claim, maintain that the debt was disposed by the trustee to his trustees, with full power of sale and disposal, and to borrow money for payment of his debts, and that the improvement debt was so used and applied by his trustees, the pursuers, and that the improvement debt never was in the person of Lawrence Macdowall, and never could have been claimed by him.

On the part of the defenders, on the other hand, it is maintained, that the whole claim is groundless, the original claim having been extinguished before any attempt was made to assign it to a third party, by the express enactment of the statute upon which the action is founded, and in virtue of which the decree libelled professes to have been taken. By sec. 24 of the improvement statute, it is enacted, "that if the heir of entail who shall succeed to an entailed estate, upon which improvements have been made, shall have right to a claim of debt arising from the making of such improvements, as next of kin, or by the will or settlement of the heir of entail who expended the money, in every such case, the claim of debt shall, and is hereby declared to be, extinguished for ever, and shall never be set up as a debt against any succeeding heir." The defender averred, that a large residue arose out of William Macdowall's trust-estate,—at least larger than the amount now sued for,—the whole of which belonged to Colonel Lawrence Macdowall, under his brother's settlement. He argued that the trustees must be held to have been acting in the transaction for Colonel Lawrence Macdowall, the universal lega-

tee, and general beneficiary under the trust-settlement; and that Feb. 14. 1852. any sums conveyed to, and claimed by them, in name of improvement debt, must form part of, and go to swell the residue of Mr <sup>Mackenzie,  
&c. v. Mac-</sup> William Macdowall's trust-estate, which, in virtue of his settlements, belonged to Colonel Lawrence Macdowall, the residuary legatee. In this way, the improvement debt necessarily came to belong to Colonel Lawrence Macdowall, who was also the heir of entail next called to succeed to the estate of Barr, for improvements on which estate Mr William Macdowall took steps to constitute himself a creditor to the succeeding heirs in terms of the statute. The amount of William Macdowall's debts and specific legacies had not been ascertained, but had they been so, Colonel Macdowall would have been entitled to call on the trustees to make good to him the provisions in his favour contained in his brother's settlements.

This remit having been complied with, the Court 'remit back to Mr Donald Lindsay, accountant, with instructions after hearing the parties, to take such steps as he may consider necessary for ascertaining the true values of the heritable properties still unsold; 1<sup>st</sup>, as at the date of the trustor's death; 2<sup>d</sup>, as at the date of the death of Colonel Lawrence Macdowall; and, 3<sup>d</sup>, as at the present time . . . and thereafter to report as to the amount and value of the trust property, any funds, and debts, and provisions, of the late William Macdowall; and whether the funds and property are or were equal to, or exceeded the debts and provisions," &c. In obedience to this remit, a report was lodged, the general result of which shewed, 1<sup>st</sup>, That as at the period of the trustor's death on 27th April 1840, the trust property and funds appear to have exceeded, by a small amount, the debts and provisions of the late William Macdowall; but "that if the alleged claim, at the instance of J. Brownlie, in respect of which no payment has yet been made, shall prove to be justly due, this surplus would be altogether extinguished, and there would then be a deficiency of funds." 2<sup>d</sup>, That as at the death of Colonel Lawrence Macdowall, on 9th September 1842, the trust property and funds also exceeded the debts and provisions. That the surplus which, upon the data before assumed, existed as at the commencement of the trust, was, by the receipt of revenue yielded by the trust-estate during the interval, increased to an extent more than sufficient to meet the alleged claim at Brownlie's instance, if established; 3<sup>d</sup>, That as at the present time, 18th July 1850, the trust property and funds, exclusive of the improvement debt, are insufficient to meet the debts and provisions.

Feb. 14. 1852. The case was again called to-day.

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dowall.

*M. Napier* and the *Solicitor-General* for the pursuers.

*Mure* and *G. G. Bell*, for the defenders. Colonel Lawrence Macdowall acquired right to the claim for improvement debt, along with the residue in virtue of the trust-disposition and settlement of the disburser of the debt, and thus being debtor in this sum, this is a case which is clearly struck at by the statute, *Earl of Stair*, 2 W. and S. Ap. Cases, p. 414 and 614.

LORD WOOD (called in to make a quorum).—On this report we can come to no other conclusion than that there will be no residue to be enjoyed by the executors of Colonel Lawrence Macdowall. It is not possible in a trust such as this to take any particular time, such as the death of William Macdowall, and fix the residue as at that time, and hold it to belong to Colonel Lawrence Macdowall; therefore, under sec. 24 of the statute no claim can be made. The right to the residue vested in Colonel Macdowall, but his beneficial interest necessarily depends on the trust management. The case of the *Earl of Stair* does not apply. It decided that accumulations were to go to the heir in possession. The difficulty in this case is that there was at no time any thing that could be said to be realized funds. Even supposing there had been an absolute making over of the estate to Smith in 1843, and he had made a large surplus out of it—what was that to Colonel Macdowall? Smith, in that case, would have made it for his own benefit. He took the estate with no valuation, and with all the chances of loss that might befall them. But Smith made no surplus. We are not told that the estate realised anything whatever, and we must look to Smith as part of the trust management, and that is not yet discharged. If it were alleged that in 1843, and subsequently, there had been mismanagement of the trust, then it would be safer to take the state of the residue as in 1843, but mismanagement is not alleged, and therefore we must take it as in 1850. Therefore, upon the whole matter, I can come to no other conclusion than that we must look to the progress of the trust which, it is not alleged was mismanaged; and if we see now that there is, *de facto*, no residue, it necessarily follows that no question under sec. 24 of the statute arises.

LORD IVORY.—I am satisfied that Lord Wood's conclusion is the only sound one in the present case. The question is, whether there has been a free residue in the winding up of this estate, so as to put Colonel Lawrence Macdowall in the position of being able

to avail himself of sec. 24 of the statute. The trust is not yet wound up; and the accountant's report does not shew that, in any view, there has been at any time a free residue under it. To take the residue as in 1840 is out of the question: it is not on an estimate we are to take it. In 1843 the trustees were in embarrassment, and did not expect to raise sufficient funds to meet liabilities; and by the agreement entered into with Mr Smith, all benefit competent to the residuary was made over to Mr Smith, he undertaking to relieve the trustees of all liabilities; therefore it is with Smith, and not with the trustees, that an accounting is to be held. I do not think we are called on to follow the progress of the trust farther than this; and I see no point of time in the history of this trust, at which the trustees had a free residue realised in their hands, and therefore can come to no other conclusion than that to which Lord Wood has already arrived.

**THE LORD PRESIDENT.** I have come to the same conclusion. The simple question is, is there evidence of free residue which went to Colonel Macdowall? In order to satisfy ourselves of the facts, we have remitted to an accountant, to whose report we are now called on to give effect. The arrangement which the trustees made with Mr Smith cannot alter the nature of the question we have here to decide at all. No doubt, he relieved the trustees of the debts of the trust; but I look on the matter in the same point of view as if we had the trustees still before us, and I am satisfied that, where there is no allegation of mismanagement in any way previous to, or after, this transaction, we must hold the facts, as disclosed in this report, as *probatio probata* till challenged. The question is one of fact, What is the value of the property, so as to have a residue? and I concur that we must hold there has been no free residue realised, and therefore that the sec. 24 of the statute does not apply.

**LORDS FULLERTON and CUNNINGHAME** declined.

**THE COURT,** "In respect there appears to be no free residue on the estate of the deceased William Macdowall, sustain the action, repel the defences, decern in terms of the libel, find the defendant liable in expenses, but subject to modification," &c.

*Alexander Smith, W.S., Pursuers' Agent.*

*Tods and Romanes, W.S., Defender's Agents.*

## FIRST DIVISION.

No. 197.

Petition, TRUSTEES OF BLAIR'S CHARITY.

*Petition—Trust—Consigned money—Application.*

Feb. 14. 1852.

Pet. Trustees  
of Blair's  
Charity.

This was a petition for a warrant to apply consigned money. The late Charles Blair of Longhouse, by trust deed, conveyed to trustees his lands of Longhouse and others, for the purpose *inter alia*, of founding and endowing a free school; and the trust deed provides, that "in the meantime my said trustees shall retain, hold, and manage, the trust in the most prudent manner, until the trust shall produce a free yearly permanent income of L.200 sterling, and all charges of management." The trustees were directed to vest the funds other than the lands left to them, in the purchase of lands in certain specified parishes, but with this provision, that "if at any time there shall be an accumulation of funds, such accumulation shall be vested in lands, or lent out at interest, on undoubted security, as may appear to the trustees most advisable at the time." The trustees were prohibited from selling any part of the lands of Longhouse, but were empowered to feu the lands, "if it shall be found advisable, or for the evident interest of the trust."

The trustees having accumulated funds sufficient to yield L.200 per annum, erected a schoolhouse, and schoolmaster's house, in the town of Galston. The Glasgow and South Western Railway having been carried through a part of the lands belonging to the trustees, the purchase money and compensation to be paid by the Railway Company were fixed by arbitration at L.494 : 18 : 4, which sum was consigned in the bank in terms of the Lands Clauses Consolidation Act, 1845.

The acting trustees in Blair's trust have presented this petition, in which, founding on sec. 67 of the Lands Clauses Act, they crave the Court to authorise them to apply the consigned sum partly in the purchase of a piece of ground adjoining to the schoolhouse and schoolmaster's house, and partly in rebuilding a house on the lands of Longhouse, which is in a ruinous state: farther, founding on sec. 79 of the Act, they pray the Court to order the expense of the present application, and proceedings to follow thereon, including the expense of the purchase of the piece of ground, to be paid by the Glasgow and South Western Railway Company.

The Lord Ordinary (Cowan) remitted to Mr William Campbell, W.S., to inquire into the facts, and report, and to Mr An-

drew Scott, factor on Loudoun, to examine into the facts, and to report whether the proposed application of the consigned money be proper and expedient. The report was to the effect, that the application of the funds in the purchase of lands, appeared to be in terms of sec. 67 of the statute, and that if the Court should consider the application of the funds in the rebuilding of the house to be within the purposes of the statute, it would be for the benefit of the trust that it should be so applied; and also that the Railway Company were properly burdened with the expenses attending the purchase of the ground.

The Lord Ordinary was of opinion, that "the proposed application of the consigned money, in so far as regards the rebuilding of the house mentioned in the petition, requires to be specially mentioned to the Court for their disposal." He therefore now reported the cause.

*Bruce*, for the petitioners.

**LORD IVORY.** There is very little difference between rebuilding a house and buying one. Although this is not a purpose embraced by the statute, still, under the trust, it is a legitimate application of the money.

The other Judges concurred.

The Court, therefore, authorised payment to the trustees of the portion of the consigned money required for the purpose craved, and of the remainder on the deeds being executed, and remitted to the Lord Ordinary to proceed with the same.

*A. and A. Campbell, W.S., Agents.*

#### FIRST DIVISION.

**M'CHLERY OR PERRYMAN v. M'CLYMONT.**

No. 198.

*Process—Recall of Sequestration—Competency—Affidavit—Act 2 and 3 Vict., cap. 41.*

This was a petition for recall of M'Clymont's sequestration, in Feb. 14. 1852. terms of sec. 21 of the Act 2 and 3 Vict., cap. 41. Along with the petition there was produced an affidavit by Perryman to the verity of the debt, and a decree therefor.

The respondent objected that the name attached to the affidavit had been so tampered with, or written over, as to be almost entirely illegible; the name was not "Perryman" but "Perryomian."

Feb. 17. 1852. The Lord Ordinary (Murray) refused the petition, adding to his interlocutor the following note:—"The Lord Ordinary does M'Chlery, &c. v. M'Clymont not feel himself authorised to give effect to proceedings founded on an affidavit so signed by the petitioner, or rather not signed at all."

The petitioner reclaimed.

*E. F. Maitland* for petitioner. It is not alleged that the signature attached to the affidavit is not the genuine subscription of the petitioner, but only that it is more like "Perryomigan" than "Perryman." But that it is her genuine subscription is sufficiently attested by the subscription of the Justice of Peace before whom the oath was taken. Besides, although an affidavit has been produced in the present case, none was in reality necessary. This petition may go on without an affidavit at all. The petitioner is a creditor, which is all that is necessary, under section 21 of the statute, to found her title to sue the present process.

*Maidment* for respondent.

**The LORD PRESIDENT.** Assuming an affidavit to be necessary as the foundation of the petitioner's title, is this the affidavit of Mrs Perryman? There is no doubt that it is; for although the signature is not well written, it may fairly, and at once, be pronounced to be "Perryman;" and this is sufficiently attested by the Justice of Peace, who, by signing after the maker of the affidavit, attests the fact that she made it. The body of the document, to which there is no objection, bears this, and the statement is duly authenticated. Besides, it is not said that this signature is not genuine. I am therefore for altering, for it would be a bad precedent to give effect to this objection.

**LORD FULLERTON.** The signature is certainly "Perryman," and is duly attested. The Justice certifies that the petitioner, "being solemnly sworn and interrogated, depones," &c. Now, the signature of the Justice of the Peace shews, that Perryman's name was signed in his presence.

**LORD CUNINGHAME.** Looking at the body of the affidavit, I have no doubt of the authenticity of the signature. Very likely the petitioner had begun to sign her maiden name, and then changed, and signed "Perryman."

**LORD IVORY.** I can more easily see "Perryman" than "Perryomigan" in this signature; and the respondent's objection does not go the length of denying its authenticity. I have no doubt that the affidavit is good, and that the signature is the ge-

nine subscription of the petitioner; but even if there was any Feb. 17. 1852.  
doubt, it would require very strong grounds to support the inter-  
locutor, for the recal is thus for ever put an end to—the forty days. <sup>M'Chlery, &c.</sup> <sub>M'Clymont.</sub>  
within which a petition may be presented having expired. It is  
not necessary to go into the question whether an affidavit be ne-  
cessary.

The Court recalled the Lord Ordinary's interlocutor, and re-  
mitted to the Lord Ordinary to proceed farther in the cause.

*David Crawford, S.S.C., Agent for Petitioner.*

*Richard Arthur, S.S.C., Agent for Respondent.*

### FIRST DIVISION.

DOBBINS AND BIBBY v. STEPHENSON AND COMPANY.

No. 199.

*Process—Sheriff-Court—Decree in Absence—Petition to Repone.*—Where a charge had been given upon a decree in absence in the Sheriff-Court, and poinding had been executed,—*Held* that the Sheriff had not then power to repone the defender.

This case was reported verbally by LORD WOOD. The action Feb. 17. 1852. was raised in the Sheriff Court of Dumfries, at the instance of Dobbins, &c. Dobbins and Bibby against Stephenson and Company for £.235, *v.* Stephenson & Co. under certain deductions, and they obtained decree in absence in 1848, which was extracted. On 19th May a charge was given on letters of horning; the charge expired on the 21st May, and then a poinding on the charge was executed on the 3d June. A petition to be reponed as against a decree in absence was then presented by Stevenson and Company on the 5th June. The poinding was reported on the 6th June, and warrant to sell granted on the 10th. The material point is, that the poinding had been executed on decree in absence on the 3d June, and that the petition to be reponed was not presented till the 5th June. A suspension and interdict was presented against the sale proceeding to this Court, on the ground that it was competent for the Sheriff to repone the suspenders, and the proceedings in the Sheriff Court were brought up on an advocation *ob contingentiam* by the pursuers. The question, therefore, was, Is it competent or not for the Sheriff in terms of the statute, 1 and 2 Vic. c. 19, sec. 18, or relative Act of Sederunt, to repone Stephenson and Company against a decree in absence, after it had not only been extracted, and horning had followed upon it, but also where poinding had been executed upon these letters of horning, but before a sale

Feb. 17. 1852. had followed on the poinding? The act provides, that "where any decree in absence in any civil cause shall have been pronounced Dobbins, &c. v. Stephenson or extracted in any Sheriff-court, . . . a petition may be presented to the Sheriff-court in which such decree was pronounced, to be reponed against the said decree, and any letters of horning or charge following thereon, where the same shall not have been implemented in whole or in part." On the one hand, Dobbins and Bibby maintain that the charge has been implemented, the poinding having been executed. On the other hand, Stephenson and Company maintain that it has not, there having been no transference of property to Dobbins and Bibby; there were only proceedings for the purpose of getting implement, and therefore they are entitled to be reponed. The effect of reponing is, that "on consignation in the hands of the Clerk of Court of the expenses incurred as the same may be modified on taxation, the Sheriff shall repone the defender, and revive the action or proceeding in which such decree had been pronounced, as if decree had not been pronounced or extracted." If, therefore, reponing is competent, it must be to the effect of sweeping away the diligence altogether.

*Baillie* and *Marshall*, for the suspenders. Inchoate diligence is no implement of a decree. Suspension here came in between the poinding being reported to the Sheriff and the sale, therefore there was no implement under the statute at all, 2 Bell's Com. p. 264. There is no transference of the poinded articles till the sale, under sec. 28 of the statute; therefore, as the suspension came in before that took place, it is clear there was no implement of the charge in any sense.

*Maidment* for Dobbins and Bibby. If it be held competent to repone, the preference my clients have obtained over the estate will be set aside. If not implemented in whole, the charge is implemented to this extent, that I cannot be interfered with afterwards by any of the other creditors. The sale merely puts me in possession of the means of paying myself, and of handing over any balance to the party. According to the Act of Parliament, the charge has been implemented. *M'Lean v. M'Kinlay*, 23d Jan. 1827, 5 S. & D. 232; *Edington v. Astley*, 5th Dec. 1829, 8 S. & D. 192, 2 Bell's Com. p. 61.

LORD WOOD, at the request of the Court, stated his opinion. — Stephenson and Company cannot be reponed. The act says, that even if there had been letters of horning, you may go the Sheriff to be reponed; but it does not say that there

shall be power to repone, not only if there have been letters of <sup>Feb. 17. 1852.</sup> horning and a charge, but also execution. Now, there is here something more than letters of horning and a charge. On a fair <sup>Dobbins, &c.</sup> construction, therefore, can it be said that the party has not got <sup>n. Stephenson & Co.</sup> implement, in whole or in part, having actually proceeded to use the diligence of the law by execution. The property may not be his, but this important thing has been done, that a *nexus* has been laid on the property, which secures it to him, except in competition with certain parties, over whom, he says, he has got a preference. Now, it is said that the object of the regulations in the statute was to repone in the same way as if no decree had been pronounced. That could not be the object of the statute, for it would just come to this, that the creditor who had used diligence would be put in precisely the same position as the other creditors who had used none ; and thus the party who had allowed decree in absence to be pronounced against him, and who should wish to favour the other creditors, would have only to put in a petition to be reponed, and the creditor who had used diligence must then come into competition with the whole body of creditors. Where anything has followed the charge, it is not competent for the party to be reponed. Suspension and interdict may be presented, to the effect that no sale shall take place until the merits of the action are tried ; but this particular remedy now asked for is incompetent.

**The LORD PRESIDENT.** This is a matter of practice of importance. I am of the same opinion as the Lord Ordinary with regard to it. It is impossible to look to the section which regulates this matter without being satisfied that it is the true interpretation which has been put on it. No doubt there is a remedy provided in certain circumstances—there is an opportunity given of applying in proper time to get the matter reviewed by the Sheriff, under whose decree the letters of horning had proceeded ; but there is no power given to repone in the circumstances now before us, and where a legal *nexus* has been laid on the estate. This is just an application to put an extinguisher on these proceedings, and cannot be entertained.

**LORD FULLERTON.** I am of the same opinion. This party allows decree in absence to go against him. He takes no steps to appear on the merits of the case, and he now comes forward to maintain that, by the simple act of his application to be reponed, he shall be entitled to cut down the whole proceedings, and be reponed in the same way as if they had never taken place. I adopt the views of the Lord Ordinary and the Lord President. The whole

Feb. 17. 1852. question turns on this, whether there has been implement in whole or in part. Is it not implement that the party has on the strength *Dobbins, &c.* of the decree obtained by him laid a *nexus* on the property, and obtained a security in terms of that decree? Is not that implement in part at least? A beneficial interest has been created in favour of the pursuer in virtue of that decree. That is a most important implement, and therefore I see no grounds for holding that it shall be in the power of the debtor to cut down that implement and put the creditor in the position of competing with any other creditor.

**LORD CUNNINGHAME.** I perfectly agree, and on the same grounds. If an ulterior step has been taken, I see no authority for the Court to set aside the diligence which has been used.

**LORD IVORY.** I am of same opinion. I have all along held (and the question has repeatedly been before me in the Bill Chamber) this to be the true reading of the statute. It is the only conclusion that can be deduced from it.

The COURT, therefore, held that the suspenders could not at this stage of the procedure be competently reponed.

*Richard Arthur*, S.S.C., Pursuers' Agent.

*J. B. Bell*, W.S., Defenders' Agents.

## SECOND DIVISION.

No. 200.

**KENNEDY v. BUICK and OTHERS (RAMSAY'S TRUSTEES.)**

*Process—Reduction—Sheriff-Court Decree—Decree of Pointing of the Ground—Execution of the Decree.*—An extract of a decree of pointing of the ground obtained in the Sheriff Court, is a sufficient warrant for the pointing; and it is not necessary either (1.) to obtain letters under the Signet; or (2.) that a precept or warrant to point should issue from the Sheriff on the extract decree.

Feb. 17. 1852. The defenders in this action, the trustees of the deceased John Ramsay, merchant, Dundee, raised an action of pointing the ground against the present pursuer before the Sheriff of Forfarshire, in which action they obtained decree in absence. The decree was extracted, and an execution of pointing returned by a messenger, and the Sheriff then granted warrant to sell. The present action of reduction was raised to reduce the summons, interlocutors pronounced and execution, on various grounds; amongst others, “*Quarto*, because the execution, grounds, and all proceedings following thereon, were illegal, irregular, and incompetent, in respect it proceeded on the extract decree of pointing the

*Kennedy v.  
Buick, &c.*

ground, above referred to, whereas letters of poinding the ground Feb. 17. 1852. passing under the Signet, ought to have been obtained before any execution of poinding the ground could competently be proceeded <sup>Kennedy v. Buick, &c.</sup> with."

The Lord Ordinary (Cunningham) repelled this among the other reasons of reduction, and assailed the defenders. Referring to this reason in his note, he says, "In running over the various questions raised upon poindings of the ground in our reports, it will be found that nearly half of them originated before Sheriffs; and no example occurs finding the Sheriff cannot in this, as in other cases, issue a warrant to carry his decree into execution on moveable effects within his own territory. It would require very clear authority to establish such an anomaly. But it is groundless. Mr Bell, II. Com. 58, expressly says, that poindings of the ground may be instituted either before this Court, or before the Sheriff; he repeats the same doctrine in his Principles, § 2285. And there are numerous examples on record, in which such processes have been reviewed in this Court by advocation and suspension, without such an objection to the competency being indicated as that now under consideration. Parker, D. 2868; Tullis, 18th June 1817; Bell, 3d Dec. 1831; and many others; *voce* poinding of the ground, competition, &c.

The pursuer reclaimed.

The Court, before further answer, remitted to "Mr Charles Neaves, advocate, to make such enquiries as he may, on hearing parties, deem proper as to the practice, before the date of the diligence act, respecting poindings of the ground, when decree was obtained on a summons in the Sheriff-Court, in order to ascertain whether, in such decrees, the usual practice was to obtain letters under the Signet, or whether the actual poinding was, in such cases, carried on on the Sheriff-Court decree; and if so, whether the poinding proceeded on the extracted decree without any precept or warrant issuing thereon from the Sheriff, and to what extent the practice of either kind can be ascertained."

Mr Neaves reported that he had applied for and received information from the Sheriff-Clerks of nine counties, as also from the officers of the Signet. The result was "that although the species of diligence referred to in the remit is of comparatively rare occurrence, and although its mode of execution is not always traceable, from not being reported or returned to the Sheriff-Courts, even when taken out, there seems to have been a usage or prac-

Feb. 17. 1852. tice established, though not of a uniform character, 1<sup>st</sup>, of executing poinding of the ground on Sheriff-Court decrees without Signet letters; and, 2<sup>d</sup>, of doing so on the precepts attached to, or incorporated in, the Sheriff's decrees, without separate precepts or warnings."

Kennedy v.  
Buick, &c.

At the debate,

*Ogilvy* and the *Solicitor-General* for the pursuer. The report shews that the practice contended for by the defenders is not uniform. Next, all our institutional writers speak as if it were necessary that letters under the Signet should be obtained; Stair ii. vol. 7, and iv. 23; 4 Bell's ii. Com. 59; Kaime's Law Tracts, 4th edition, 179, and App. No. 4; Ersk. ii. 8, 32; Ross' Lectures, ii. 421. The Books of Practice also support the pursuer's view; Boyd's Judicial Proceedings, ed. 1814, p. 201; Drummond on the Sheriff Court, ed. 1826, p. 44; Clark's View of the Office of Sheriff in Scotland, 1824, p. 80; Darling on Messengers-at-arms, ed. 1840, c. 16, p. 169.

*Henderson* and *Buchanan* for defenders. The extracted decree contains a warrant to officers of court, and messengers-at-arms to poind and distrain. It is a principle that a Sheriff can carry into effect his own decree; Bell's Princ., ed. 33, secs. 2353; Ersk. iv. iii. 16; Stair, iv. xxiii, 2, referring to Act 1469; Bankton, iv. 37, 1. Sometimes, indeed, it is necessary to apply for Signet letters, where, for instance, a farm is partly in one county, partly in another. 1 and 2 Vict. c. 114, sec. 9; Act of Sed. 24; Dict. 1838.

At advising,

**LORD MEDWYN.** There is no doubt that since the institution of the Court of Session, a poinding of the ground was an executorial of that Court in obtaining payment of a *debitum fundi*, and that it was also a diligence upon the decree of a Sheriff upon the same ground. All our authors agree in this; Bell's Prin. sec. 2297; and the Books on Practice. The question now is, how is execution to follow upon such a decree of the Sheriff-court? Now, we must attend to a distinction which exists between the executorials on the decrees of the Supreme Court, and those on decrees of the Inferior Court. In the Supreme Court, it is the sovereign's authority which calls the defender into Court, and which is again resorted to, to carry the judgment into effect—warrant being granted for letters of diligence under the Signet for this purpose. In the Sheriff-court, the course is different. The party is called into Court by the Sheriff, and with the exception of execution by per-

sonal diligence of horning and caption, he has power to execute his Feb. 17. 1852. own decrees. At one time, a doubt was thrown upon his power to Kennedy v. enforce his own decrees by a judgment of the Court, in the case of Buick, &c. *Murray v. Bisset*, 10th May 1810. But the subsequent cases of *Kaeburn v. Reid*, 4th June 1824, and *Gentle*, 9th July 1825, removed this erroneous impression. Among the decrees which a Sheriff may enforce, is a poinding, both personal and real. Now, a difference is observable in the summons of poinding the ground in the Inferior and Supreme Court. In the Supreme Court (see Stair, iv. xxiii. 10), the proprietor of the land and his tenants are summoned, not to see their goods poinded, but to hear and see letters of poinding the ground and apprising direct by decree of the Lords for poinding, &c. Accordingly, when decree is obtained, this is merely a warrant for the executorials, which is letters of poinding under the Signet. The style in the Sheriff-court is different. It authorises a direct decree for poinding by the authority of the Sheriff himself; for it decerns, &c., the officers of Court, &c., to pass, search, and seek for the moveable goods, &c., of the defenders to be poinded and apprised, &c. In the Sheriff-court formerly, it is likely that, on obtaining the decree, application would be made to the Sheriff for a separate warrant to carry it into effect; Stair, iv. xlvi. 1, and Ersk. iv. iii. 16. When execution was wished upon a Sheriff's decree beyond his jurisdiction, or against the person, the form was to apply to the Supreme Court to pronounce a decree conform, on which letters under the Signet issued. By degrees alterations were introduced, and by sec. 1608, c. 10, it was enacted, that letters of horning and execution of horning be direct and granted by the Lords of Session, upon all acts, decreets, and sentences of Sheriffs, stewards, and baillies. Now, then, as it was competent to apply for horning, which might be followed by caption upon a Sheriff's decree, by letters under the Signet, I have no doubt that a practice arose quite unnecessary, as I think, except in very peculiar cases, for applying occasionally for letters of poinding, or of poinding the ground, from the Bill-Chamber. But this did not exclude the right of the Sheriff to authorise such poinding by issuing his own precept, or warrant to carry his decree into effect. Nor do writers on the Sheriff Court practice ever say that this was incompetent, although they may speak of letters from the Signet as the more common case. Now there seems nothing incorrect in the procedure in the present case. The extracted decree gives full warrant to poind after the decerniture under the summons, and any separate

Feb. 17. 1852. precept following upon it might not be incompetent, but I ~~cer-~~  
 Kennedy v.  
~~tainly think,~~ quite unnecessary. On the whole, I ~~am~~ for repel-  
 Buick, &c. ling the reason of reduction.

LORD JUSTICE CLERK.—I have come to the same result, but with more difficulty. The practice appears to me not to be very precise. If the practice were more open, I confess I do think letters under the Signet would be necessary, but I should be unwilling to disturb the practice. Then, as to the other point, whether there ought to be a precept from the Sheriff issued on the extract decree, in principle I think there ought; but on the whole, although with difficulty, I concur.

LORD COCKBURN concurred. In principle, he thought Signet letters were not required.

LORD MURRAY also concurred.

The COURT adhered, with expenses.

*W. S. Stewart, S.S.C., Pursuer's Agent.*  
*J. S. Johnstone, S.S.C., Defendants' Agent.*

## SECOND DIVISION.

### No. 201.

#### HENNING v. HOWATSON.

*Issue—Malice and want of probable cause—Arrestment during dependence.*  
 —In an action of damages for injury done by arrestments used during the dependence of an action from which the defender was assoilzied, Held that the issue must put the question, whether the arrestments were used “maliciously, and without probable cause.”

Feb. 17. 1852. This case came before the Court for the adjustment of issues. The action was an action of damages, partly on account of injury sustained by the pursuer from arrestments, used by the defender on the dependence of an action brought by him against the present pursuer in the Sheriff-Court of Dumfries. The summons set forth that Howatson had raised an action against the present pursuer Henning, for the delivery of certain sheep or hogs, or failing his doing so, for the sum of £79 : 4s., and interest, from which action the present pursuer was assoilzied; that during its dependence Howatson caused arrestments to be used to the extent of £350, thus greatly exceeding the sum due; that one of the arrestments was used in the Lockerbie Lamb Fair, in the open market, in presence of a number of persons, so as to attract much observation, in the hands of a person to whom the pursuer had just sold

certain lambs ; and that these arrestments " were nimious and oppressive, and were used maliciously and unnecessarily, and to an extent and in a manner wholly unjustifiable."

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Howatson.

The issue proposed by the pursuer was, " It being admitted, &c., that the defender raised the said action against the pursuer, that the pursuer was ultimately assoilzied from the said action ; and that on or about the 2d day of August 1843, the defender raised, or caused raise, a precept of arrestment on the dependence of the said action. Whether the defender wrongfully, maliciously, and oppressively, executed, or caused execute, the said precept of arrestment—by using, &c., &c., all to the loss, injury, and damage, of the pursuer ?" The defender maintained that the pursuer was bound to insert in the issue, *in addition* to the word " maliciously," the words " without probable cause," and proposed this issue, " whether the defender wrongfully, oppressively, maliciously, and without probable cause, executed, or caused execute, the said precept of arrestment," &c., &c.

The point was reported by Lord Ordinary (Colonsay.)

*Pattison* for the pursuer. The cases previous to that of *Brodie v. Young*, 19th February 1851, do not throw much light on the present question. In the case of *Lord Duffus v. Davidson and Clyne*, 17th July 1828, 4 Mur. 558, the gist of the action was stated by the Lord Chief Commissioner to be malice, and want of probable cause. In the discussion in the case of *Brodie v. Young*, it was said that there was no case where, in an action of damages, an issue was taken without malice and probable cause. But in *Rutherglen* — 1843, unreported, the issue was " wrongfully, nimiously, oppressively, and injuriously," without malice, even. Again, in *Roberts v. Wallace and Douglas*, also unreported, an issue was approved of by First Division, without either malice or want of probable cause. The case of *Brodie* did not decide that both malice and want of probable cause were necessary. There the pursuer did not wish to take even malice.

*Macfarlane* and the *Dean of Faculty* were for the defenders.

**LORD JUSTICE-CLERK.** The distinction is plain between the case in which it is enough to prove malice, and in which both malice and want of probable cause must be proved. It is a distinction we were first made acquainted with by Lord Eldon, in the case of *Arbuthnot*. When a person exercises a legal right in the ordinary use of legal forms of procedure and diligence, the law holds, if it is said he has abused that right, that you must prove malice, and

Feb. 17. 1852. that you must also shew that he had no probable cause for that which he did. Accordingly that was put into the issue in the case of *Hallam v. Gye*, 22d December 1835, which was an action on account of the arrestment of the person as a mode of obtaining bail for an action to be brought. Otherwise you would deter people from taking measures to enforce their legal rights. The word "oppressively" is in both issues. I do not see the use of that.

LORD MURRAY. I should be sorry to differ, but I hold the law to be this, that the defender may prove there was probable cause as a defence. In the case of *Brodie* nothing more was done than to allow the pursuer to put in his libel malice and want of probable cause; the Court was not then settling the issue. To introduce these words in the issue taken by the pursuer seems to me inconsistent with the proper form of issues, which should always be positive. The defender may take an issue, saying the arrestment was used with probable cause.

LORD JUSTICE-CLERK. The point raised by your Lordship is an important one, and I am aware it is the opinion of English lawyers that there was a great error all along in the structure of Scotch issues, and that the matter you refer to was a matter to be raised in defence at the trial. But we can hardly go back now, and alter the whole principle of our issues.

The other judges concurred with the Lord Justice-Clerk.

The COURT deleted the word "oppressively," and substituted the words, "without probable cause."

*William Mason, S.S.C., Pursuer's Agent.*

*Brodie and Kennedy, W.S., Defender's Agents.*

## SECOND DIVISION.

No. 202.

PETITION, YOUNG, for *Appointment of Judicial Factor.*

*Factory—Joint Adventure—Winding-up—Share of deceased Partner.*—Circumstances in which the Court, on the application of the executor of one of three parties who had entered on a joint railway contract, appointed a factor to wind up the affairs of the copartnery, the other two partners being both alive and solvent.

Feb. 17. 1852. This petition, which was presented by the executor of the deceased Alexander Young, builder in Falkirk, set forth;—That the deceased was a partner of the company of Daniel Collins, Alexander Young, and Peter Feely, railway contractors. They entered

Pet. Young.

on three several contracts with the Edinburgh and Bathgate Rail-way Company, for the execution of three contracts, known by the name of the Bathgate, Houston, and Uphall Branch contracts, for the sum altogether of £47,383, 13s.,—extra work to be paid according to its value. The two former were finished in November 1849, and taken off the contractor's hands in November 1850. The Uphall Branch works were stopped, and remain still unfinished. Young died on 27th January 1851, leaving the present petitioner his sole executor. No settlement of accounts has ever taken place between the said company of contractors and the Railway Company, and a large balance still remains due to the contractors by the Railway Company, stated in the petition generally, as being £16,754 : 16 : 10. Since the dissolution of the company by Young's death, no progress has been made in winding up its affairs,—debts due to it have not been recovered, and debts due by it have not been paid. The business books are unbalanced, and the state of the partner's accounts unascertained. The petition therefore prays, that a neutral person be appointed to collect and administer the property of the company, and to wind up its affairs, with power to realise and recover the hall effects of the company, to pay all debts due by the company, to balance the company's books, adjust the accounts of the partners *inter se*, and divide the residue of the estates among the two surviving partners and the petitioner, as executor of Young.

Answers were lodged for Collins and Feely. In these they explained that the Bathgate and Houston contracts were not completed till 31st July 1851, and that the obligation to maintain the works on the Uphall contract did not expire till 8th November 1851. They stated that the business of the joint adventure had been managed almost entirely by Collins; that Young had advanced very little to the stock, while Collins for himself and Feely had advanced several thousands of pounds; that since Young's death great progress had been made not only in the completion of the works, but in ascertaining the contractor's claims and winding up generally, and that matters were going on as quickly as possible; that all accounts rendered against the Company had been discharged; that the settlement of accounts with the Railway Company was the subject of a submission to Mr Grainger, C.E., in which submission as much progress was being made as could be; that such payments to account as have been made to Collins, as acting for the company, have been shared by him with his co-adventurers; that to the present petitioner, since his

Feb. 17. 1852. father's death, about £315 have been paid, in addition to sums  
~~~~~ paid to his father during his lifetime.  
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Millar and the *Dean of Faculty* appeared for the petitioners.

Gordon and *Inglis* for the respondents objected. If, on the vague allegations of the petitioners, the surviving partners are to be deprived of the management of the concern, whenever a partner dies, a factor will be applied for by others. Here the contract does not contain a clause authorising the surviving partners to wind up, but it is a rule of common law that they may do so. The respondents have done all they can to expedite a settlement. The application is a novel one. We have a joint adventure by three skilled persons to execute a certain work. One dies. That does not put an end to the adventure. Accordingly, the work went on after Young's death. Now, the work having come to an end, let us see the position of the parties. This is not an ordinary partnership, and the only debt to be collected is the debt due by the Railway Company. What then is to be the office of the judicial factor? He is to take the place of the respondents in the submission, to the effect of getting payment of L.16,000 or as much as the Railway Company owes; and next, to go on to balance the books, and to fix the shares in which the L.16,000 is to be divided between the different partners. But no officer the Court can appoint as judicial factor has jurisdiction to do anything of the kind; for the winding up of partnership, the realising of funds, and balancing of books, is the subject of count and reckoning only. There is no allegation of insolvency, or incapacity, or disqualification on the part of the partners, to wind up. Therefore, the respondents are only standing on their undoubted rights, when they say we will keep matters in our own hands.

LORD JUSTICE CLERK.—I am for granting the prayer. This is an adventure of contractors to execute different jobs. They have large advances to make, great payments to receive, and great outlay going on. In an advanced stage of the work one partner dies, and, it is admitted, his executor has received only a small sum to account of his share. He denies he has seen any accounts, and it is remarkable that the answers, while positively averring there are such, make no statement of their result, and the respondents themselves tell us that there are extra advances by Collins, and that he has large claims for personal services against Young. Hence, he contemplates a lawsuit for retention of the sum he claims from the otherwise admitted share of Young. Well, since Ja-

nuary 1851 nothing has been done as to the settlement of accounts between the partners. They did not necessarily stand still because they could get nothing from the Company. They might have got the shares struck in an arbitration. Was it not the business of the two surviving partners when the other one died, to have had the shares of the different partners immediately ascertained? It is said now that the other partners are to remain in possession of their right to receive the money, unless, to be sure, an action of count and reckoning may be raised, on which diligence may follow, and thus the Railway Company be interpellated from paying anybody. Is it expedient for the interests of these parties that the son of the person who is dead shall be obliged to come forward as a separate party in this submission? There is no novelty in the application.

LORD MEDWYN. I entirely concur. I proceed on this; Young died in January 1851, and since then nothing effectual has been done in regulating the rights of the partners. Mr Grainger, the arbiter, is not the proper person to do that, he has only to fix what is due to the contractors by the Railway Company; but in regard to the respective rights of the partners in these contracts there is a great deal to settle.

LORD COCKBURN. I take an opposite view. I consider that at common law when a copartnery is dissolved by the death of one, the duty of winding up is vested in the survivors. True, the right may be abused, and the Court may be called on to controul the natural and legal winder-up; but to justify the interference of the Court it is necessary to state and prove a sufficient case, not to give mere general statements. But nothing of the kind is here given. I see no great delay. At the utmost it is only a year; besides one contract was only finished last August, and an interim payment is made. Considering the ordinary course of legal proceeding, I see no delay to excite surprise and suspicion. As to fraud, nothing of that kind is stated. I see no opposite interest in the party resisting the application. His interest is the same as that of the party making it, to get as much from the common debtor and as soon as possible. If any thing goes wrong both parties have remedies at law. But this proposal supersedes the common law. The proposal is to place the estate under legal sequestration, to be managed by an officer of Court. My impression is that the proceeding is strongly tainted with novelty—not new absolutely, perhaps, for there are few things in law absolutely new. But I was surprised at the application when reading the

Feb. 17. 1852. petition, and I looked for a statement of fraud to be made at the bar. But if the application is new, I doubt if it will be new hereafter. For there is nothing peculiar in this case. There is only the dissolution of the company by the death of one of the partners; and it is said the legal winder-up shall be set aside, and matters thrown into the Court. The consequence will be, that whenever a company is dissolved by the death of one of its partners, if the slightest circumstance occurs in the winding up of its affairs by the surviving partners to dissatisfy the executors of the deceased, they will make application to the Court to have the affairs of the company settled by some other than the survivors, to the great delay, and annoyance, and loss of all.

LORD MURRAY. Two facts are clear, first, the adventure is at an end; next, one of the three partners is dead. Suppose the adventure were at an end, and all three alive, would not the right of each be as good as the right of the others? Now one is dead, but we have his executor. Is he not as much entitled to the favour of the Court as his father would have been? Would not the father, if alive, have right of management to protect his interests? The son has even greater right—certainly not less. The respondents say to the petitioner, "You may bring an action of accounting against us;" "why not you," the petitioner may answer, "against me as well? I have as much right to the possession of the subjects as you." This is a different case from that of a company established by contract of copartnery, and going on. I give no opinion as to that. I confine myself to the special case before the Court, where the adventure is completely at an end.

The COURT granted the prayer of the petition "to the extent after mentioned:—Nominate and appoint Mr Kenneth M'Kenzie, accountant in Edinburgh, to be judicial factor on the estate of the said company of David Colins, Alexander Young, and Peter Feely, and for winding up the affairs of that company, with power to realise and receive the haill effects of the company; to pay all debts due by the company; to balance the company's books, with reference to the accounts and claims of the partners *inter se.*"

James Gordon, Jun., W.S., Petitioner's Agent.

Baxter and Macdougall, W.S., Respondent's Agents.

SECOND DIVISION

BUTLER or WATERSTON v. KIRKPATRICK.

No. 203.

*Process—Reclaiming Note—Interlocutor final by inadvertency—
Act 48 Geo. III. c. 151.*

In this action (which was an action of reduction) the defender Feb. 17. 1852, failed to lodge revised answers, and, on 24th January 1852, the Lord Ordinary (Colonsay) in respect of their failure, reduced, ^{Butler v.} _{Kirkpatrick.} decerned, and declared in favour of the pursuer. The reclaiming days were, by a mistake of the defender, allowed to elapse, without a reclaiming note being presented by him, to have himself reponed. Application was made to the Lord Ordinary under 48 Geo. III. c. 151, which provides, "that if the reclaiming or representing days against an interlocutor of a Lord Ordinary shall, from mistake or inadvertency, have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor, by petition," to review; "but declaring always, that in the event of such petition being presented, the petitioner shall be subjected in the payment of the expenses previously incurred in the process by the other party." And on 11th February 1852, the Lord Ordinary pronounced an interlocutor, by which he "allows the defender to submit to review of the Lords of the Second Division the interlocutor of the 24th January 1852, in terms of the Act 48 Geo. III. c. 151, sec. 16."

The case was called on the 14th.

Macfarlane for the reclamer. Although the Act of Sederunt speaks of a petition as the proper mode of applying for review of an interlocutor final through inadvertency, still, in the case of *Bennet v. Pyper*, 19th Feb. 1833, 11 S. 414, it was held that a reclaiming note was the proper form.

Buchanan was for the pursuer.

The COURT, while entertaining no doubt as to the competency of the reclaiming note, in the circumstances thought that it was necessary the case should go to the roll, to be judged of in the ordinary course, and the defender reponed by the Inner House, rather than that the case should be remitted back to the Lord Ordinary to repone the defender, as in the case of a decree in absence.

Feb. 17. 1852. The case accordingly appeared again to-day, when the defender
Butler v. was reponed on payment of expenses.
Kirkpatrick.

John Cullen, W.S., Pursuer's Agent.
John Murray junior, S.S.C., Defender's Agent.

FIRST DIVISION.

No. 204.

GILMOUR v. CRAIG and OTHERS.

8 and 9 Vict., c. 83—Parochial Board—Statutory Qualification—Interdict—Expenses.—Members of a parochial board having been interdicted from acting as such, in respect of the want of the statutory qualification:—*Held* that they were liable in the expenses of the proceedings against them.

Feb. 18. 1852. This was a note of suspension and interdict at the instance of Allan Gilmour of Eaglesham, member of the Parochial Board of the parish of Mearns, and was directed against John Craig and others, for the purpose of preventing them from acting as members of the Parochial Board, “so long as the said respondents do not possess the statutory qualification” of L.20, as the yearly value of lands and heritages (8 and 9 Vict., c. 83, sec. 22,) entitling them to act as members of the Board. The original complainant having died, his trustees were sisted in his room. The note also prayed the Court to suspend certain proceedings of the Board in which the respondents had taken part.

The respondents, in their answers, maintained that the value here spoken of is the value to be estimated for the purpose of assessment, and for no other purpose. They averred that the members of the Parochial Board, including the original suspender, always up to the presenting of the note of suspension in this case, acted on the understanding and belief that L.20 gross value afforded and constituted the qualification for members of the Board; and they pleaded that, although the suspenders were right in holding the respondents unqualified, this was not a case for suspension and interdict. The proper course would have been to obtain the opinion and direction of the Board of Supervision, or other sufficient legal opinion on the subject. At same time, the respondents were willing to allow judgment to go against them in terms of the interdict, provided expenses should not be asked from them.

To this, however, the suspenders would not accede; a record was therefore made up, and the Lord Ordinary (Cunninghame)

Gilmour v.
Craig, &c.

“in respect it is not denied that the respondents, John Craig and Feb. 18. 1852.
John Pollock are not proprietors at present in the parish of ^{Gilmour v.} Mearns to the extent and value required by the statute in constituent members of the Parochial Board of the said parish, finds that their acting in that capacity was incompetent and illegal; therefore, sustains the reasons of suspension as against them. . . . Finds the suspenders entitled to expenses, &c.” His Lordship added the following note:—“The plea chiefly relied on by the respondents is, that any proceedings against them by *suspension* and *interdict* is incompetent, referring to certain precedents in this Court, and in the House of Lords, finding that the elections of Town Councils, and similar bodies, must be challenged by *declarator* or *reduction*, and *not* by suspension. The Lord Ordinary has no idea that these authorities rule, or at all apply to the present case. The present is not a disputed election on a vacancy, it is a case of gross *intrusion*, when parties destitute of the statutory qualification are attempting to act *without a title*. It is surely competent to check such an intrusion by interdict. There are innumerable cases where the Court is bound to protect, by interdict, parties injured by such lawless conduct, more especially *when instantly verified*. For example, by statute, road trustees must generally have £100 of valuation in every county where they act; but surely if a proprietor, valued only at £50 in the cess books, or having his valuation in another county, threatened to act, and intruded himself among the legal trustees, the Court would be bound to stop such a party, by interdict, from acting.”

Against this interlocutor the respondents presented a reclaiming note, praying the Court to “recal the said interlocutor, to recal the said interdict, to refuse the prayer of the said note of suspension and interdict, and find the suspenders liable in expenses to the respondents.”

Pattison and *Inglis* for the reclaimers: We do not mean to maintain that the reclaimers were possessed of the statutory qualification for members of the Parochial Board. The question is now one of expenses. Gilmour does not complain of any personal injury to himself as a member of the Board. He pursues as one of the public. In these circumstances it is hard that we should be liable in expenses.

Wood and Dean of Faculty for the suspenders.

The LORD PRESIDENT.—The suspenders’ allegations being admitted, expenses must follow.

Feb. 18. 1852. The other Judges concurred.

Gilmour v. Craig, &c. The COURT therefore refused the reclaiming note with additional expenses.

*Hunter Blair, and Cowan, W.S., Suspenders' Agents.
Patrick Graham, W.S., Respondent's Agent.*

FIRST DIVISION.

No. 205.

M'DOULLS v. M'DOULL.

Marriage—Domicile—Legitimation.—A domiciled Scotchman having married in Edinburgh a domiciled Englishwoman, by whom he had had children born to him in England—*Held*, that the doctrine of legitimation *per subsequens matrimonium* applied.

Feb. 18. 1852. This was a declarator of legitimacy. The pursuers are the children of Colonel James M'Douall, heir of entail of the estate of Logan, in the county of Wigton, and of Bankton, in the county of Haddington. Colonel M'Douall was from his birth, and still is, domiciled in Scotland. A contract of marriage was executed between him and Mrs M'Douall in Edinburgh in 1847. It was admitted that Mrs M'Douall is a native of England, and never resided in Scotland till after the birth of the pursuers.

Defences were lodged for Colonel and Mrs M'Douall, admitting generally the whole facts and conclusions of the summons. Defences were also lodged for Roland James M'Douall, grandson of the deceased Andrew M'Douall, formerly of Logan, and brother of Colonel M'Douall, now of Logan. These defences bore, that the mother of the pursuers did not reside in family with their father in England, and formed no part of his establishment, so that his domicile might be taken to be hers. It was pleaded, therefore, that the connection between the parents of the pursuers having been unquestionably illicit in its character originally, and with no view to marriage—their birth having taken place in England while the connection possessed that character, and their mother having been domiciled in England at and subsequent to their birth—the doctrine of legitimation *per subsequens matrimonium* does not apply to the case.

Proof was led by both parties, and thereafter the Lord Ordinary (Ivory) “having especial regard to the fact (admitted in the defences), that the father of the pursuers is a native, and has always been a domiciled Scotchman : Finds, declares, prohibits,

and discharges *simpliciter*, in terms of the libel ; but, in the circumstances, finds no expenses due, and decerns.'

In a note his Lordship remarked,— "As to the paternity of the pursuers, the proof leaves no room for doubt, while, on the question of legitimation, again, (with its correlative patrimonial results,) the authority of the House of Lords' judgment in the former cases of M'Douall and Munro is absolute and conclusive."

M'Douall v.
M'Douall.

The defender reclaimed.

Moir and Dean of Faculty for the claimer.

T. Mackenzie and Marshall for the respondents.

The LORD PRESIDENT. I cannot come to a different conclusion from the Lord Ordinary. According to the decisions we have already pronounced his judgment is correct.

LORD FULLERTON. I am of the same opinion. The whole facts of the case here are admitted. The effect of this marriage is to make the lady a Scotchwoman ; and therefore the principle of legitimation *per subsequens matrimonium* applies.

LORD CUNINGHAME. So many cases of importance have occurred of late in our practice, relative to the law of marriage and legitimacy, that few points in them now remain undecided. If the pursuer's father was a *domiciled* Scotsman, there can be no doubt that his children, though born in England, were legitimated by the contract of marriage executed between them in Scotland in 1847. The case of *Munro*, as contrasted with the *Strathmore* and *Ross* case, settled that point incontrovertibly. Some countenance was given, in the case of *Strathmore* and *Cromarty*, to the rule, that bastardy in England was *indelible*,—but that idea is exploded by the case of *Foulis*. When the father is a *domiciled* Scotsman, who subsequently marries the woman, she follows his domicile ; and the marriage is, to all intents and purposes, a *Scotch* marriage. In this view, the interlocutor under review is incontrovertible.

LORD IVORY also adhered to his former opinion as Lord Ordinary.

THE COURT therefore refused the reclaiming note, and adhered to the Lord Ordinary's interlocutor.

Arthur Campbell, W.S., Agent for Pursuers.

Brodies & Kennedy, W.S., Agents for Defender.

Murray & Beith, W.S., Agents for Colonel and Mrs M'Douall.

FIRST DIVISION.

No. 206.

MENZIES v. MENZIES.

Entail Amendment Act—11 and 12 Vict., c. 36, sec. 43—Prohibition against sale—Defect in Resolutive Clause.—Where the resolutive clause of a deed of entail is framed on the principle of specific enumeration, and does not specify sales and alienations:—*Held* that the *prohibition* against sales, &c., was defective, and that, therefore, the statute applied.

Feb. 18. 1852. This was a declarator at the instance of Ronald Stewart Menzies of Culdares, to have it declared that the entail of the lands of Culdares and others is defective in regard to the prohibition against sales and alienations, and that, therefore, in virtue of the 10th and 11th Vict., c. 36, sec. 43, the pursuer is entitled to enjoy or dispose of the estate as if held by him in fee-simple.

*Menzies v.
Menzies.*

The prohibitory, irritant, and resolutive clauses in the various deeds enumerated in the summons are in the following terms:—
 “ And sicklike, it is hereby specially provided and declared, as an express quality and condition hereof, that it shall be noways liesome to, nor in the power of, the said James and Archibald Menzies, or any of the heirs of tailzie and provision above mentioned, contained in the foresaid nomination and disposition of tailzie, or in these presents, succeeding in the right of the lands and others foresaid, by virtue of the foresaid disposition and tailzie, or of these presents, to sell, annailzie, dispone, dilapidate, nor put away, the foresaid lands and estate *simpliciter*, or any part or portion thereof, nor to innovate or infringe the foresaid disposition, nomination, and tailzie, or these presents, nor to contract debt, nor to suffer adjudications to be led, or at least to expire unredeemed, for any of the debts or sums wherewith the foresaid tailzie is, or may be burdened, nor do no other fact or deed whereby the same may be anywise evicted or effected, in prejudice and defraud of the subsequent heirs of tailzie foresaid, successive, according to the order, method, and substitution above set down:— Which haill deeds, if any such shall happen, are not only declared hereby void and null *ipso facto*, by way of exception or reply, without necessity of declarator to follow hereon, in so far as the same may burden and affect the lands and others foresaid:—But also, it is hereby provided and declared, that the heir of tailzie, who shall contravene and incur the said clauses irritant, or any of them, either by not assuming and taking on him the sirname and arms of Menzies, and bearing and using the same without change or alter-

ation, as said is, as to such of them, who, by their acceptation Feb. 18. 1852. hereof, are obliged so to do, or by their, or the other heirs of ^{tailzie} foresaid, their breaking or innovating the foresaid tailzie, ^{Menzies v.} Menzies. and these presents, or contracting debt, or committing any other fact or deed, whereby the said lands, or others foresaid, may be anywise evicted or effected in manner above express: That then, and in any of these cases, the said person or persons so contravening, as said is, and all the descendants of their bodys, shall forfeit, amitt, and tyne the right of succession of the foresaid lands and estate, and the same shall, from thenceforth as to them, become extinct, void, and null, *ipso facto*, by way of exception or reply, without declarator, as said is; and it shall be lawful to the next and immediate heir of tailzie in being for the time . . . either to be served heir in special or general therein . . . or otherwise to pursue for declarators, &c. . . . so that the foresaid tailzie made by the said Colonel James Menzies, and these presents, according to the genuine intent and meaning thereof, shall stand inviolable and irrefringible in all time coming."

The summons sets forth that the said irritant clauses are defective and insufficient in law to deprive the heir in possession of the power to sell and alienate the said lands and others: That, and at all events, the said resolutive clauses are framed and constructed on the principle of specific enumeration, and do not apply to or embrace sales or alienations of the lands, having no specific mention in the enumerative parts thereof of "alienating, selling, annailizing, dilapidating, or putting away the said lands," and consequently, no specific reference to that part of the prohibitory clauses therein, and, therefore, concluding that under the New Entail Act the pursuer is legally entitled, under these entails, to sell and alienate the whole lands or any part thereof at pleasure.

Defences were lodged for John Stewart Menzies of Chesthill, one of the heirs-substitute under the deeds of entail referred to in the summons. He maintained that whatever defect may exist in the irritant or resolutive clauses of the deeds in question, the prohibitory clause is so framed as to affect sales and alienations, the contracting of debt, and the alteration of the order of succession. It is in every respect complete. But the 43d section of the Act 11 and 12 Vict. applies only where the entail is defective "in regard to the *prohibitions* against alienation," &c., a condition of matters which does not arise where the prohibition is, as here, quite complete, but where the inefficiency of the entail is said to arise from the failure properly to annul the right of the contravener of

Feb. 18. 1852. the prohibition. At all events, whatever the effect may be of the
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 Menzies v.
 Menzies. alleged defects with reference to the pursuer's power of alienating or burdening the estate for onerous causes, the prohibition against gratuitous alienation remains unaffected by the provisions of the Act.

The Lord Ordinary (Wood) "In respect of the defect in the resolutive clause in all the entails libelled, repels the defence, and finds, declares and decerns, in terms of the conclusions of the libel; Finds no expenses due to either party, and decerns." His Lordship added the following note:—"The Lord Ordinary has not made his interlocutor proceed upon the ground of any defect in the irritant clause, that being unnecessary; but it appears to him upon the authority of the case of *Lord Wharncliffe*, November 13. 1849, and others, that the entails are defective in the irritant clause."

The defender reclaimed.

Patton for the reclaimer, referred to *Carrick v. Buchanan*, 30th May 1842, 1 Bell's Ap. Cases, p. 368, and pleaded that the 43d clause of the statute was not intended to affect destinations with a prohibition which disabled the party taking under it from executing gratuitous deeds, altering the order of succession, or alienating, but to take away the fetters of the entail, in so far as such fetters interfered with onerous transactions, where the fettering clauses were defective in any one particular. Thus if the prohibition against contracting debt was not duly fenced, a party might sell, or *e contra*; but here there was a perfectly good prohibition against altering the order of succession which ought to subsist as regulating the succession. If a deed with a destination and a prohibitory clause alone were executed, it would be perfectly valid—and if so, why should the mere *conatus* to superadd fetters against alienation, &c., defeat the rights of succeeding heirs?

The *Dean of Faculty* for the respondent. The tailzie being defective in respect of one of its prohibitions, is defective as regards them all. *Urquhart v. Urquhart*, 20th Feb. 1851; Scottish Jurist, *Baillie v. Baillie*, 12th July 1850; *Boswell v. Boswell*, *ante*, p. 337.

The LORD PRESIDENT. The case of *Boswell* is conclusive; and, in conformity with the case of *Urquhart* and other decisions, this is a defective entail, and struck at by the statute.

LORD FULLERTON was of the same opinion.

LORD CUNINGHAME concurred. One of the prohibitions of

the entail is entirely defective, and in that case there can be no Feb. 18. 1852.
doubt that the entail is ineffectual.

LORD IVORY. The objection is, that this is not an entail in the Menzies v. sense of the Entail Act; that it is a disposition simply *sub conditione*; but such a disposition *sub conditione*, with regard to the destination of the estate, is what we have considered a defective entail, and the statute says that any such entail shall be defective in all respects. It seems to be quite within the substance of the Amendment Act.

The COURT "refuse the prayer of the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against."

James S. Ducat, W.S., Pursuer's Agent.

James Ferguson, W.S., Defender's Agent.

HIGH COURT OF JUSTICIARY.

BEFORE THE LORD JUSTICE-CLERK, LORDS WOOD AND
COLONSAY.

No. 207.

BLYTHS v. M'BAIN.

General Police Act, 13 & 14 Vict., c. 33 — Procedure — Defence. — Where two parties were apprehended and summarily tried and convicted in a Burgh Police Court, without any previous service of the complaint, and without having been allowed time to prepare their defence, according to the rules and regulations framed for the Police Court, under the General Police Act 13 and 14 Vict. c. 33, the Court suspended the sentence of imprisonment *simpliciter*, and ordered the fine imposed on one of the parties to be repaid.

[Sequel of case reported *ante*, p. 242, No. 113, January 12. 1852.]

The proof ordered by the interlocutor of 12th January having Feb. 20. 1852. been taken and reported to the Court, the same now came on for argument with a view to the case being finally disposed of.

Blyths v.
M'Bain.

Pattison and the Dean of Faculty were for the complainers.

Logan and the Solicitor-General for the respondent.

The LORD JUSTICE-CLERK said that the opinion of the Court would be best expressed by the interlocutor, which was as follows:—

"The Lord Justice-Clerk and Commissioners of Justiciary having resumed consideration of this case, considered the proof, and

Feb. 20. 1852. heard counsel for both parties, Find that the evidence does not actually amount to proof of the specific allegation in point of fact contained in the interlocutor of 12th January, but find that it appears that the suspender had not been aware that the case could be proceeded in without a summons, and warning thereby to be prepared, and that he did express some surprise or complaint that the matter could be then disposed of, and that the right to apply for time was not intimated to the suspender, to whom the new regulations were unknown, and hence that he was not enabled to put his application into any correct form; and under the whole circumstances, as there appears to have been some want of explanation, although unintentional and accidental on the part of the magistrate in not making the purport of the new regulations more fully known: Therefore pass the bill; Suspend the sentence complained of *simpliciter*, and ordain the fine awarded against, and paid by the suspender, to be repaid to him. Find no expenses due, and decern."

An interlocutor in similar terms was pronounced in the case of the female suspender, except as to the fine, she having been imprisoned formerly, but not fined.

*James Somerville, S.S.C., and Alexander Jeffrey, Writer, Jedburgh,
Agents for the Complainers.*

*Adam Paterson, W.S., and John Pringle, Writer, Galashiels, Agents
for the Respondent.*

FIRST DIVISION.

No. 208.

PETITION, Mrs MARGARET REID or SHAW.

Judicial Factor—Heritable Creditor—Trust-deed—Failure of Trustees.

Feb. 21. 1852. This was a petition for the appointment of a judicial factor over heritable subjects in Dundee, which had been invested in the trustees of a Mr Steele, but who had died without assuming new trustees. The petitioner's interest was that of a creditor under an heritable bond over the subjects, and it had been proposed by her to proceed to bring the property to sale under the powers contained in the original bond; but by that deed intimation had to be made to the acting trustees, or the survivor of them, or any "other trustees or trustee who might thereafter be assumed into the said trust." The trustees having died, and there having been no assumption of new trustees, there is no party to whom the in-

timation could be effectually made. In these circumstances, "and ^{Feb. 21, 1852.} Petition, Reid. in order to preserve the said subjects, and the rents thereof, and adopt the proper steps in regard thereto," the petitioner prayed for the appointment of a judicial factor, with the usual powers.

To this petition answers were lodged for Mrs Steele, the trustee's widow, and also for his children, who opposed the application on the ground, *inter alia*, that there is not one purpose of the trust-deed that remains to be fulfilled by the trustees, or by a judicial factor coming in their room.

The COURT, on the ground that it was reasonable that the petitioner should have some party to represent the trust, and that this course would save expense, granted the application for the appointment of a factor.

Henderson was for the petitioner.

P. Fraser for the respondents.

J. S. Johnston, S.S.C., Petitioner's Agent.

John Galtely, S.S.C., Respondents' Agent.

FIRST DIVISION.

BALD v. THE ALLOA COLLERY COMPANY.

No. 209.

Process—Issues—Adjustment.—Where parties do not agree as to the adjustment of issues, at the joint meeting, under the Act of Sederunt, a second meeting is not necessary, and the Lord Ordinary may at once report the issues to the Inner-House.

This case was reported verbally by Lord Colonsay. By sec. ^{Feb. 21, 1852.} Bald v. Alloa Collery Co. 38 of the late Act of Sederunt it is provided, in the procedure for the adjustment of issues, that the Lord Ordinary "shall appoint parties to attend him at chambers, or shall order the case to the roll," for the adjustment of issues; "and if such issue or issues be not adjusted and settled with the consent of parties, at the meeting or enrolment so fixed, or at a second such meeting or enrolment for the same purpose, if such second meeting shall be appointed by the Lord Ordinary, the Lord Ordinary shall immediately report the matter to the Inner-House by whom such issue or issues shall, upon such report, be adjusted and settled." This is an action at the instance of Bald against the Alloa Collery Company and Lord Mar, for certain alleged injury to ground in the course of their undermining operations in the neighbourhood of the pursuer's property. Issues were ordered to be lodged,

Feb. 21. 1852. and upon the pursuer's failure to comply with this order, the case was enrolled for the purpose of circumduction. Issues were thereupon lodged at the bar, and a discussion took place between the pursuer on the one side, and the defenders, the Alloa Colliery Company, on the other. No appearance was made for Lord Mar at that discussion, he supposing that circumduction was to be passed from, and not being aware that issues were lodged. An objection was taken to the issue, that it was not framed in terms to which the defender could agree. Parties were appointed to discuss the matter again to-day; and Lord Mar made appearance, and said, that he had not been aware of the second meeting, and had never had an opportunity of instructing counsel. An objection was raised, that the case being in the roll yesterday for the purpose of circumduction, and not by appointment of the Lord Ordinary, to consider the matter, the discussion of yesterday could not be considered a first discussion, under the Act of Sederunt, and the second one must be appointed for Tuesday, by which time the case would be too late for trial at the ensuing vacation. The practical question is, Whether it is necessary, under this statute, to have a second meeting before reporting the case to the Inner-House?

N. Campbell and Inglis for the Pursuer.

T. Mackenzie for the Alloa Coal Company.

The COURT held, that a second meeting was not imperative, under the statute.

Wotherspoon and Mack, S.S.C., Pursuer's Agents.

Lockhart, Morton, Whithead and Greig, W.S., Defender's Agents.

FIRST DIVISION.

Process—Assignee.—An assignation of a decree in an action of damages and diligence thereon *Held* to be a sufficient title to sue a reduction of a disposition alleged to be granted *in fraudem* of that diligence.

Feb. 21. 1852. This was an action of reduction, and the question now before the Court related to the sisting of a mandatory. After a variety of litigation the pursuer Stewart had obtained decree for £150 and *solatium*, with expenses of process, in an action of damages raised before the magistrates of Dundee, at his instance, against a person of the name of John Hay Philips. Inhibition had been

*Stewart v.
Kidd.*

raised by Stewart upon the dependence of this action, but certain heritable subjects belonging to Philips were sold by him as alleged by Stewart "spreta inhibitione."

Feb. 21. 1852.
Stewart v.
Kidd.

Stewart left Dundee to follow his trade as a seaman, from ports not belonging to this country, but previous to his departure he executed an assignation in favour of Robert Greig, teacher in Dundee, of the following tenor :—"And now having resolved to convey the foresaid decree, and the claim to the expenses in the foresaid action in trust for the purpose of recovering the same in security to Robert Greig, teacher in Dundee, therefore, I have made, constituted, and appointed, . . . the said Robert Greig, . . . my lawful cessioners and assignees in and to the said sum of £150 contained in the said decree, whole interest due, and to become due thereon, and also in and to my claim for expenses in the foresaid process, together with the foresaid decree, and diligence done thereon, including the arrestments used on the said decree, &c., with all that has followed or is competent to follow upon the said decree, and in and to my claim for expenses in the foresaid process, in any manner of way, the present assignation being to an extent not exceeding £250: Surrogating hereby, and substituting the said Robert Greig and his foresaids in my full right and place of the premises, with power to him to ask, crave, and uplift the sum of money, principal and interest, in the said decree; and also the sums that may arise, or be recoverable under the arrestments and diligence before assigned; and, on payment, to grant discharges or conveyances thereof, either in whole or in part, and generally to do everything concerning the premises that I might have done before granting hereof; and also with power to use my name in all, or any, proceedings for recovering the foresaid sum of £150, and expenses, &c: Which assignation before written, I bind and oblige myself and my foresaids to warrant to the said Robert Greig and his foresaids, and I have herewith delivered up to the said Robert Greig the foresaid decree and diligence."

The present action of reduction of the above-mentioned conveyance by Philips was raised in Stewart's name before he left this country; but after defences had been lodged, the defenders demanded that a mandatory should be sisted for Stewart. Greig then came forward and offered to sist himself either as assignee or mandatory, one or both, in virtue of the above assignation, but the defenders objected that the assignation founded on, though sufficient to carry the decree, yet did not assign the

Feb. 21. 1852. inhibition following thereon, the same not being therein *nominatio*n contained, that therefore Greig had no right to insist in the present reduction *qua* assignee of Stewart, and that the words with "power to use my name in all or any proceedings," did not import a mandate authorising Greig to appear in an action raised in Stewart's name, which Greig as assignee had not in virtue of the assignation, right to have raised himself, and that even supposing the terms of the assignation sufficiently broad to entitle Greig to sist himself as assignee in a process raised by Stewart, yet there was no mandate contained in the assignation sufficient to bind Stewart in the expenses incurred by the assignee, and that Stewart was therefore bound to sist another mandatory.

The Lord Ordinary (Colonsay), held, that in the circumstances it was not necessary that any other mandatory should be sisted by the pursuer.

Penney and Dean of Faculty for the claimer. Greig is not entitled to be sisted either as an assignee or mandatory for the pursuer in this case.

Macknight and the *Solicitor-General* for the respondent. The assignation in favour of Greig entitled him to be sisted in this action. That assignation, *ex gremio*, conferred upon him all right to carry on, in the name of the cedent, all diligence in actions which might be necessary to make good the right assigned.

LORD FULLERTON. The assignation makes over the diligence used by Stewart. This action is the necessary consequence of that diligence. This is here a sufficient mandate to sist Greig.

The other Judges concurred.

The COURT therefore refused the note, and adhered to the Lord Ordinary's interlocutor.

Laurence M. Macara, W.S., Claimer's Agent.
James Macknight, W.S., Respondent's Agent.

SECOND DIVISION.

No. 211.

HILL and ANOTHER (Lang's Trustees) v. LANG.

Expenses—Implement of Obligation in Marriage Contract.

Feb. 21. 1852. Lang, by contract of marriage, dated in April 1841, bound himself to assign and convey to his wife, Ann Macartney Hill or Lang, a policy of insurance on his life for £.400; and it was

*Hill, &c. v.
Lang.*

agreed, that all action and execution should pass thereon in favour Feb. 21. 1852. of Mrs Hill, and the children of the marriage, in the name of the ^{Hill, &c. v.} pursuers, who were her brothers. Mr and Mrs Lang were married ^{Lang.} in April 1841, and the present action was raised by the pursuers on 21st February 1849, to enforce the obligation. The defence was, that Mrs Lang had deserted her husband in 1844, and had not lived with him since, and that he was not, therefore, bound to implement the obligation to convey the policy.

About the same time that the present action was raised, an action of adherence was brought at Lang's instance against his wife, in which decree was obtained in June 1851. An action of divorce was then raised, and this action was sisted till the result of the action of divorce was known. Decree of divorce was obtained on 6th December 1851.

The Lord Ordinary (Rutherford) assailed the defender, and found the pursuers liable in expenses.

Against this interlocutor the pursuers reclaimed, so far as it found them liable in expenses.

W. Ivory (with whom *Penney*) for the reclaimers. Lang should have assigned the policy immediately after his marriage in 1841. Had that been done the present action would never have been rendered necessary. The pursuers were bound to insist on the conveyance of the policy.

Millar was for the defender.

LORD JUSTICE-CLERK. This is a most vexatious proceeding against Lang. He seems to have been quite ready to receive his wife back, if she chose to live with him. The pursuers, who are her brothers, seem to have sided with her to annoy him. They are justly subjected in expenses.

The Court adhered, with additional expenses.

William Lorimer, S.S.C., Pursuers' Agent.

Duncan & Miller, S.S.C., Defender's Agent.

SECOND DIVISION.

APPEAL, KIPPEN v. STEWART.

No. 212.

Sale of Heritable Subjects—Personal Obligation.—The sale of heritable subjects burdened with debt infers no transference of the personal obligation of the disponer to the donee, without express words to that effect.

Feb. 21. 1852. In 1836, Stewart and Young granted a bond and disposition in security for L.4600, over certain properties in Glasgow. In 1837 they granted another bond, over the same properties, for the farther sum of L.2000. In 1840 William Kippen, the appellant, acquired right to the latter bond to the extent of L.1600, and in 1841 he acquired right to the former to the extent of L.3000. He was duly infant on the assignations to both bonds.

Kippen v.
Stewart.

Meantime, in 1840, Stewart and Young had sold the subjects on which these burdens (besides some others) were constituted to George Kippen, son of William Kippen, "in consideration of the sum of L.200 sterling instantly advanced and paid to us," "and also in consideration of the said George Kippen, freeing and relieving us of certain heritable debts affecting the said subjects to the extent of L.7600 sterling." And the dispositive clause conveyed the subjects "to and in favour of the said George Kippen, but always with and under the express burden of theforesaid sum of L.7600 sterling, being the amount of the said heritable debts affecting the said subjects, and of the interest thereon, from the term of Martinmas last."

George Kippen having been sequestered, William Kippen claimed to rank on his estate for the sum of L.2290, 12s. 3d., being the balance of the heritable debts, with interest thereon, vested in him as above narrated, after deducting the sum of L.2500, at which he valued the heritable property over which they were secured, and the sum of 3s. at which he valued the personal obligation of Stewart and Young. This claim was admitted by the trustee, but repelled by the Sheriff-substitute (Glassford Bell) on appeal.

Against this judgment William Kippen appealed.

Inglis and Neaves for appellant. The sale of this property to George Kippen was not of the ordinary nature of such transactions, in which the purging of all incumbrances by the seller is made an express stipulation. Here the incumbrances were transferred to the purchaser, and the seller's relief of them was specially made a part of the consideration he received. G. Kippen, therefore, contracted to put himself in the same situation as the disponers of the subjects were in; and as he thus came under a personal obligation for these debts, which were not merely limited to the extent of the value of the subjects over which they were secured, the creditor in them was entitled, after deducting that value, to rank for the balance against the rest of the estate. In

any view, Stewart and Young had a right of relief against G. Feb. 21. 1852. Kippen for their personal obligations to W. Kippen, and it was unnecessary to compel the adoption of the circuitous course by Stewart. ^{Kippen v.} which William Kippen might vest that right of relief in himself.

Patton and *H. Robertson* for respondent. The form of the disposition to G. Kippen is by no means unusual, only where it is desired to transfer the personal obligations of the disposer to the donee, the ordinary and necessary course is for the latter to grant a bond of corroboration to the heritable creditors. The mere transfer of the property infers no transference of the personal obligations, without express words to that effect. No words, out of which such a meaning can be construed, are used here. There is no more than an obligation to relieve Stewart and Young, if the heritable creditors should come against them. There is no mode by which these creditors can vest themselves with that right of relief competent to Stewart and Young, these latter being themselves now sequestrated.

LORD JUSTICE-CLERK. The point actually before the Court here seems to me free from doubt. Stewart and Young became debtors in a personal bond, to which personal obligation was superadded a security over certain lands. They sold the lands, but that transaction could not annul their independent personal liability. Their creditors were not made parties to the arrangement at all. They did not relieve Stewart and Young of their obligations, nor receive any additional security from the purchaser. That might have been done, as it often is done, by taking from him a bond of corroboration, but nothing of the sort was done here. And I think it quite hopeless to attempt to spell a personal obligation by the purchaser to and in favour of the creditor out of the conveyance which he obtained. The sole obligation by him was one of relief of Stewart and Young in case they should be come against by their creditors under their still subsisting personal liability. That obligation was granted in consideration of the price not being required to be paid up, and under the belief which has turned out erroneous, that the heritable property was equal in value to the debts upon it. But however imprudent the transaction may have turned out, the obligation to relieve Stewart and Young cannot possibly be construed, as the appellant would have us to do, into an obligation to guarantee Stewart and Young's solvency. I lay aside the point whether Stewart and Young have been discharged under a sequestration, and whether

Feb. 21. 1852. in consequence the personal obligation against them may have been extinguished altogether, and thence their right of relief against G. Kippen evacuated.

*Kippen v.
Stewart.*

The other Judges concurred.

The COURT "refuse the note (of appeal,) affirm the judgment of the Sheriff-substitute of 28th May 1851 appealed from, dismiss the appeal and decern, find the appellant liable in the expenses incurred in this Court."

*William Muir, S.S.C., Agent for Appellant.
James Burness, S.S.C., Agent for Respondent.*

FIRST DIVISION.

No. 213.

CARNEGY v. SCOTT.

Process—Act of Sederunt—11th July 1839, sec. 39—Summary Application.
—Circumstances in which held competent to apply by summary application to enforce restoration of manure carried off the farm by tenant.

Feb. 24. 1852.

*Carnegy v.
Scott.*

This case came by advocation from the Sheriff-court of Forfar. Carnegy presented a petition to the Sheriff of Forfar for a summary warrant to obtain restoration of a large quantity of manure, removed from the farm of which he is proprietor, by Scott, the tenant. Carnegy maintained that Scott was bound, according to the rules of good husbandry, as well as according to his own practice, and the practice of the district, in laying down the way-going crop of the year 1848, to apply to the ground for that purpose the whole manure which had been made from the straw and fodder of crop 1847, (which was the penult crop of Scott, who was to remove at Martinmas 1848,) or from the straw and fodder of any preceding year, or to leave it for the use of the land without payment. In the course of spring 1848 he learned it was not the intention of Scott so to use the manure, and addressed to him remonstrances on the subject. But notwithstanding these remonstrances, Scott manured the land with guano; and on 1st November last, after intimating his intention to do so, and offering the manure at a valuation to Carnegy, he commenced to drive away the manure for the purpose of being either sold, or used elsewhere. Carnegy thereupon presented to the Lord Ordinary on the Bills a note of suspension and interdict, against removing or disposing of the manure. The respondent, anticipating such an application, had lodged a caveat, which led to a

discussion in the Bill-Chamber, and on 7th November interim Feb. 24. 1852. interdict was granted. By this time the manure had been removed, but the interdict took effect against using or disposing of it. The note of suspension and answers did not come to be advised in the Bill-Chamber till 15th December, when the note was passed, and the interdict continued. Thereupon on 18th December this summary application was presented by Carnegy to have the manure brought back, on caution, or consignation of the value that might be put upon it by inspectors to be appointed by the Sheriff, and also for damages, reserving the question of whether he was entitled to have it without payment, or was bound to pay for it.

Besides answers to this petition on the merits, Scott objected to the summary petition as incompetent, and not authorised by the Act of Sederunt, 11th July 1839, sec. 137, because, although made aware, in spring 1848, of the respondent's intention not to lay the manure on the lands, and on 1st November 1848, of the respondent's intention to remove the manure from the lands, if not agreed to be paid for at a valuation, yet the petitioner did not present his application till 18th December 1848, being several weeks after the removal of the manure, and after the lease had expired, and the respondent had removed from the lands; and because, in the meantime, the respondent had been allowed, with the knowledge of the petitioner, to provide and lay upon the lands other manure, in place of the manure in dispute.

This plea was sustained by the Sheriff, confirming the opinion of the Sheriff-substitute; and Carnegy brought a note of advocacy.

The Lord Ordinary (Colonsay), "advocated the cause, and recalled the Sheriff's interlocutor." In his note he says, "If the complainer was entitled to have the manure brought back, a summary application to the Sheriff was the proper course of proceeding. It was, therefore, the proper mode of trying the question of his right to get back the manure. If he was not entitled to have the manure brought back, then the petition should have been refused, on a consideration of its merits. But the merits were not considered. The Lord Ordinary has, therefore, recalled the interlocutor, which dealt only with the competency."

Scott reclaimed.

Inglis and the *Solicitor-General* for the claimer. The Act of Sederunt of 1839 authorises application by summary petition only in cases which require extraordinary despatch, and where the

Feb. 24. 1852. interests of the party might suffer by abiding the ordinary *inducia*.
 Carney v. Scott. If there has been delay on his part in seeking redress, the application is incompetent; *Presbytery of Dunoon v. Campbell*, 13th June 1844. In this case there was unquestionable delay. This is not a case for specific implement of any obligation to use the manure in a particular way, but for a forfeiture of what is the tenant's property. The cases of *Wemyss*, 16th June 1801, M. Ap. v. Tack, No. 7; *Forrester*, 19th Feb. 1808, M. Ap. v. Tack, No. 16; *Brownlee*, 27th June 1846; *Armstrong*, 29th January 1846, are cases in which the tenant was expressly taken bound in certain obligations; and it was to compel observance of these that the action was raised.

Moir and Marshall were for Carney.

The LORD PRESIDENT. It seems that the delay in the present case is imputable more to the tenant than the landlord. The letter of 1st November is the first that indicates the purpose of the tenant to remove the manure. There was an application for interdict on the 4th, but in consequence of the caveat, it was not till the 15th interdict was obtained. That was three days before the 18th. What could the proprietor do? I do not enter at all on the question as to the right of the landlord to the manure. The application is quite within the Act of Sederunt.

LORD FULLERTON. I am entirely of the same opinion. The subject was liable to deterioration. The application to the Sheriff was not the first step taken. There was the proceeding by suspension and interdict which was too little to do anything more than to prevent the tenant disposing of the dung. Now the tenant had got possession of the dung. In these circumstances the landlord applies to the Sheriff to get the dung back again, and in this summary form. I think that a perfectly correct form. The case needed despatch.

LORD CUNINGHAME. I assent to the view taken by the Lord Ordinary. The learned Sheriff is of opinion that the dilatory conduct of the complainant was such as to negative the ground of despatch. But that is determining the boundaries of a *class* of cases by an individual instance, which is plainly not legitimate. This is a case relating to the custody of a perishable article of daily requirement on a farm, and I cannot doubt that it falls within the class of summary cases entitled to despatch. The case is analogous with complaints of breach of sequestration. It has never been doubted that if cattle or corn are carried off after sequestration a summary complaint lies to the Sheriff for their immediate

restoration. But the dung made from fodder, in the middle of the Feb. 24. 1852. lease, is hypothecated to the farm or the landlord, and if that is removed, a summary complaint lies to bring it back. As to the charge that there was delay on the part of the landlord in making the application, it seems totally groundless. He intimated in June his resolution to oppose the tenant's claim to withdraw the dung in dispute; but he had no occasion to involve himself and the tenant in a lawsuit, till the latter began actually to remove the fodder of 1847, when the landlord had a bill of suspension and interdict ten days before Martinmas, (the term of removal,) which was frustrated by manœuvres in the Bill-Chamber. I reserve my opinion on the merits.

LORD IVORY concurred.

The COURT adhered, with expenses since the date of the Lord Ordinary's interlocutor.

Shepherd, Grant, and Culbertson, W.S., Agents for Pursuer.

J. R. Culvert, W.S., Agent for Defender.

FIRST DIVISION.

DREW v. DREW AND LEBURN.

No. 214.

Submission—Irregular Conduct of Arbitrator—Action of Declarator to set aside Submission.—Circumstances in which an action to declare an arbiter in a pending submission disqualified from farther acting on the ground of interest and partial conduct was dismissed.

The pursuer Alexander Drew, and the defender Peter Drew, Feb. 24. 1852. entered into a submission to the defender Thomas Leburn, S.S.C., ^{Leburn v. Drew,} of certain differences which had arisen between them in regard to &c. the settlement of accounts between them as partners in the business of brass-founders in Glasgow, which they had carried on under the firm of William Drew. The submission was dated the 28th June 1848. And the arbiter proceeded immediately thereafter to act.

The present action was raised in January 1850 while the submission was still pending, no decree having been pronounced, to have it found and declared that Leburn is legally disqualified from any longer holding or exercising the office of arbiter, and that the defender Drew should hold count and reckoning with the pursuer. The grounds, as set forth in the summons, were that since the submission began it has appeared that Leburn "was entirely disquali-

Feb. 24. 1852. fied from exercising the office of an arbiter between the said par-
ties, inasmuch, as he stood in a position and in relation towards
Drew v. Drew, the said Peter Drew which gave him a personal interest in sup-
porting his credit and solvency ;” and then it is set forth that he
had acted as agent for the defender in certain proceedings against
the pursuer, “in a way and to an extent unknown to the pursuer
when he signed the said submission ;” and, farther, that by the
change of the security of a loan given by certain trustees, of whom
Leburn was one, and for whom he acted as factor to the late firm
of William Drew, and now transferred to Peter only, Leburn
had and has a manifest interest in supporting Peter’s solvency ; ac-
cordingly, it is said that in the proceedings under the submission,
Leburn “has shewn by his conduct that he is actuated by the
foresaid interest, creating in him an improper bias towards the
claims of the said Peter Drew, and has in various instances act-
ed corruptly and with undue partiality towards him ;” and then
various instances are set forth in the course of the submission, in
which Leburn had held meetings, outwith the presence of the pur-
suer, with parties favourably disposed towards the other defender,
in regard to questions between them, and then corruptly, illegally,
partially, and contrary to the facts and evidence, found by an in-
terlocutor in the submission in favour of Peter.

Besides defences on the merits, it was pleaded as a preliminary
defence by the defender Drew, that the action having no con-
clusions reductive of the submission, or of any of the proceedings
in it, is an incompetent action ; at least is incompetent on the
grounds set forth ; and for both the defenders, that the action is
not laid relevantly, sufficiently, or intelligibly, with reference to
the conclusions.

The Lord Ordinary (Cowan) repelled the plea of incompetency,
and reported the question of relevancy to the Court, along with
the following issue proposed by the pursuer :—It being admitted
that the submission was entered into, and various proceedings
had under it, “whether, in the course of the proceedings under
said submission, the said defender, Thomas Leburn, contrary to
his duty as arbiter, did, wrongously and corruptly, hold an inter-
view or interviews with, and receive material information from,
the defenders Peter Drew, William Drew, and Janet Drew, his
brother and sister, and Donald Ferguson, his servant, or any of
these persons, touching the matter submitted, and that without
the presence of the pursuer, or any notice to him ; on which infor-
mation the said defender, Thomas Leburn, proceeded to act, and

did act, with a view to the determination, as arbiter, of the said Feb. 24. 1852.
matters submitted to him?"

Drew v. Drew,

Against the interlocutor, so far as it repelled the plea of incompetency, a reclaiming note was presented by the defender Drew.

At the calling to-day,

Penney (with whom *W. Peddie* for Peter Drew, and *Inglis* and the *Solicitor-General* for Leburn.) No decree has been pronounced in this case, and any error committed by the arbiter in the mode of procedure may be rectified by him. Indeed, by an order subsequent to that interlocutor in which are contained the findings favourable to Peter Drew, which are referred to in the summons, he gives an opportunity to the parties to lead such proof as they may think necessary. At the most, therefore, admitting, for the sake of argument, that the arbiter has acted irregularly, there is a mere error in judgment, nothing implying corruption, so as to warrant the Court to interfere. True, he is said to have acted corruptly, but a mere averment of corruption is not sufficient; facts must be set forth inferring it. Now, the pursuer indeed says, that the arbiter stood in a relation to the other defender, which biassed him; but he shews his own sense of the insufficiency of the corrupt motive thence arising, by proposing no issue to try the question, whether or not his relation to Peter is such as to disqualify him.

Macfarlane (with whom *Neaves*), for the pursuer. The Court, in *Mitchell v. Cable*, 17th June 1848, found that irregular conduct in the management of the submission, even where there was no moral corruption, amounted to legal corruption, and set aside his award. In that case, it is true, decree was pronounced, but it does not matter whether it has been pronounced or not. If an irregularity has once been committed, such as that here, a bias and taint is given to the mind of the arbiter, of which he may not be able to free himself. Besides the corrupt motive we allege, although not such as of itself to disqualify, still when taken in connection with irregular actings, accounts for these, and is sufficient, along with them, to warrant interference.

LORD PRESIDENT. There is nothing in the statements in this summons to warrant us to prevent this submission from proceeding. The arbiter has issued notes, and is affording opportunity to bring the matters submitted to him to a final issue. But no decree, not even an interim one, has been pronounced. The connection of Leburn with the other defender as agent was known

Feb. 24. 1852. equally well to both brothers before commencing the litigation,
and was indeed the reason why Leburn was selected as arbiter.
Drew v. Drew, Unless there are stated circumstances which shew the submission

&c. is going on manifestly contrary to truth, and justice, and corruptly, the Court will not interfere. The mere reiterations of the statement that the arbiter did this and that corruptly will not do. I do not swerve one iota from my opinion in the case of *Mitchell*. The arbiter in that case had ordered a proof, but declined to give an opportunity for proceeding with it, and had then pronounced his decree.

LORD FULLERTON. I concur. It is indispensable for the Court to look narrowly into the record in a case brought, not for the purpose of reducing the final decree, but of interrupting a submission going on. Now the pursuer does not pretend there was any such interest as justifies him saying the arbiter was *ab initio* disqualified; and consequently he does not bring a reduction of the submission. All that he says is, that the arbiter has acted corruptly in certain things, and he proposes to take an issue on that question. It is clear that in such a case it is not enough to say that the arbiter has acted corruptly, he must state facts from which that corruption must be inferred. The word corruptly is to be construed very differently here from the manner in which it was construed in the case of *Mitchell*, which was a reduction of a decree-arbitral. The Court there felt themselves a good deal hampered, and they said that in a case of that kind the word corruptly must be taken in a broad sense to let in its application to that case. But it is a very different thing where the party does not wait for final judgment, and the question occurs not in the reduction of a decree-arbitral, but in this, a most novel application, for the purpose of stopping the proceedings of the submission altogether. To make out a case of that kind something extraneous must be averred inferring corruption, and it is not enough to say that the arbiter has gone wrong. For all we know the arbiter may not adhere to his present opinion, but take a different course of proceeding. If he does not, then the proper course of a reduction lies open, when his award has been pronounced.

LORD CUNINGHAME. I consider that it would be a precedent of the worst example to entertain the present action and to stop the proceedings of an arbiter in the middle of the discussion before decree-arbitral. The charges of corruption here are too vague to be listened to in this stage, or perhaps in any stage, and the par-

ties who have entered into a submission are bound to state any *Feb. 24. 1852.* complaint that occurs pending the proceedings to the arbiter himself, who, it must be presumed, will give it due consideration and effect; after which they must await the decree-arbitral before it can be ascertained that there is any real ground of complaint. The cases cited are strong authorities to shew that the Court has hitherto acted on this rule. In the often quoted case of *Sharpe and M'Kenzie against Bickerdicke* the House of Lords reduced an award, because the arbiter had refused to hear the parties; but the question *arose upon the decree*, and not upon a complaint pending the reference.

Drew v. Drew,
&c.

LORD IVORY.—The very interlocutor of 1849 containing the deliverances objected to appoints the parties to undergo a more formal examination before the arbiter. He is in the course of doing justice between the parties. The arbiter is doing his duty, perhaps, in too anxious a way. I think it would be *pessimi exempli* to allow a party whenever he became displeased with the proceedings in an arbitration to raise a litigation which may not end till it is too late. The arbiter may recast all his proceedings.

The COURT “find that the pursuer has not set forth any relevant grounds for calling in this Court to interrupt or interfere with the proceedings before the arbiter. Therefore dismiss the action and assoilzie the defenders with expenses.”

John Leishman, W.S., Agent for Pursuer.

James Peddie, W.S., Agent for Defender, Drew.

Wm. Miller, S.S.C., Agent for Defender, Leburn.

FIRST DIVISION.

BARRON v. NATIONAL BANK OF SCOTLAND.

No. 215.

* *Railway Shares—Certificates—Pledge—Liability.*—The certificates of certain railway shares having been lodged with a bank in security for advances made by them to the pledger, who was the owner but not the registered proprietor of the shares, and the bank having afterwards refused to give up the certificates to the registered proprietor so as to enable him to sell the shares: *Held* that the bank was liable in relief to the registered proprietor for calls made upon such shares.

This was an action of relief against the National Bank of Scotland for certain calls on fifty railway shares, the certificates of which had been originally deposited with the bank in security, Barron v. *National* and of which shares it was alleged they had now become proprie- *Bank of Scot.* *Feb. 25. 1852.*

Feb. 25. 1852. tors. The action was raised on the ground that the bank had
illegally detained the certificates of the shares, and thereby pre-
vented the registered proprietor selling the shares so as to get
quit of his responsibility to the railway company.

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Bank of Scot.

In 1845, William Cleland, share and stockbroker in Edinburgh, had a current deposit account with the defenders, upon which he operated in the usual manner. Having overdrawn his account, and become largely indebted to the bank, the defenders called upon him for security against the advances made to him. On 20th March 1846 he accordingly deposited with the defenders various certificates of railway stock and scrip. Amongst other documents, he deposited with the defenders certificates of fifty shares of the Dublin and Belfast Junction Railway, then valued by Cleland at £325. The certificates of that stock were in name of Barron, the present pursuer; but it was, at the date of the transaction, explained by Cleland to the defenders that he, Cleland, was the true owner of the stock and of the certificates, having himself purchased them from the original holders, but taken the transfer in name of the pursuer, who was at the date of the purchase, his managing clerk. Barron, was thus the registered proprietor of the shares, although Cleland was the true owner. No transfer was executed by Barron or Cleland in favour of the Bank. At the time the certificates of the shares were lodged with the Bank by Cleland, a call or deposit of L.2, 10s. purchase was due, and was paid by Cleland. Soon thereafter he became insolvent, and was sequestered; and a further call of L.5 per share having been made, payment was demanded from Barron as the registered proprietor. Thereupon, Barron addressed a letter, in July 1846, to the secretary of the Bank, in which he called upon the Bank either to "take the shares, and relieve me of the calls, or hand them to me, that I may dispose of them." Various communications passed between the parties, in the course of which the defenders intimated to the pursuer and his agents that they would neither take the shares as owners, nor give up the certificates to the pursuer. Ultimately a summons was raised against the pursuer by the Railway Company for payment of the arrears of calls, amounting in all to L.750, with interest from, the times the respective calls became payable. The present action was therefore raised by Barron against the Bank for payment to him of the L.750, in order that he might operate his own relief by paying the same to the Railway Company, and also to have the Bank ordained to

relieve him of all further calls, and of the action raised against him at the instance of the Railway Company, and also of all the loss, expense, and damage he has sustained or may sustain in reference thereto, in consequence of the Bank having illegally retained the certificates, and not paid the calls.

The defenders pleaded that as the shares, and certificates thereof, were lawfully pledged to the defenders by Cleland, the true owner, as a security, they were not bound either to take the shares or give them up to the pursuer; but as pledgees, were entitled to hold the certificates until paid their advances,—or, at least, the sum at which the pledger himself valued them; and even if it could be held that the defenders were bound to deliver up to the pursuer these certificates, their failure to do so would not subject them in the liability concluded for in the present action.

The Lord Ordinary (Robertson) found that the pursuer had no right of property or personal interest in the shares; that by Cleland's deposit of them with the defenders "the pursuer incurred no obligation to the defenders beyond any liability already incurred by him holding the shares, as trustee for Cleland's behoof; and finds it not alleged that the pursuer was indebted in any sum to the Bank, or that he received any sum, or other advantage, by the circumstance of the transfer of the shares having been taken in his name as aforesaid; finds that the said William Cleland could not, of his own authority, deposit the said shares with the defenders, or transfer the same to them, excepting subject to the conditions of the said trust, and to the responsibilities attaching to the owner of the said shares, and that he could make no deposit, so as to render the pursuer liable for future calls on the said shares without having relief for the same, if *bona fide* paid, against Cleland or his depository or assignee." He therefore held, that the pursuer was entitled to relief against the defenders, and to that effect repelled the defences.

Against this interlocutor the Bank reclaimed.

Bell and Dean of Faculty for reclaimers. The mere taking the certificates from Cleland, the true owner of the shares, did not impose on the Bank any liability to relieve Cleland of the stock. The Bank were not purchasers of the stock: they possessed none of the privileges of ownership. They could not draw dividends, nor sell the shares in the market. Cleland was liable to relieve Barron, his own trustee, of all responsibility; but that liability was not turned over to the Bank, merely by giving them the cer-

Feb. 25. 1852. *tificates of the shares to be held by them in security.* Again, the
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*Barron v.* Bank having taken the certificates honestly and lawfully, for the  
*National* purpose of creating a security for themselves, were not bound  
*Bank of Scot.* to give them up, except on condition of Cleland paying his debt,  
in respect of which they had been pledged. This would be to  
destroy their security. If Barron and Cleland could not sell the  
shares without getting up the certificates, the security was merely  
brought into operation. This action truly resolves into an action  
of damages; and it is necessary, therefore, for Barron to shew  
that he was not able, by dint of the regulations in the statute, to  
operate his relief by selling the shares without the certificates.  
The certificates were not necessary to enable Barron to sell the  
shares, 8 Vict. c. 17, sec. 12.

*Inglis and Neaves* for respondent. The certificates are the statutory and *prima facie* evidence of the ownership of shares; and the possession of them is material, as affording despatch in business transactions. The argument of the Bank amounts to this, that the possession of the certificates in truth afforded no security at all; but that argument comes too late; for the Bank accepted and retained the certificates as affording them a security over the shares, and had Barron gone into the market to sell them, the Bank would have interpellated him as the pledgees of the stock. It is a principle at the root of all trusts, that the trustee shall be kept scathless. Now, the Bank were informed of the relation between Cleland and Barron. Cleland could not do anything to subject Barron to responsibility or loss. Could Cleland's assignee be in a better position than himself? This trust, although latent as regards the Railway Company, was not so as regards the Bank. This, therefore, is an attempt by the Bank to work out a liability which shall enrich them at Barron's expense.

The case was debated in November last; but the Court not being agreed as to the plea founded on the statute, the case was ordered to be farther heard to-day.

**The LORD PRESIDENT.** Having read everything in the statute that appears to apply to certificates of railway shares, I am satisfied that my former impression was erroneous, which was, that without possession of the *ipsa corpora* of the certificates, a sale of the shares could be effected. It is necessary to attend to the terms of sec. 16 of the statute (Companies' Clauses, Scotland). On the request of the purchaser of any share, an endorsement of each transfer shall be made on the certificate of such share, instead of a new certificate being granted, &c., and until such transfer has

been so delivered to the secretary it is provided that the vendor Feb. 25. 1852. of the share shall continue liable to the company for any calls that may be made upon such share. In connection with this clause Barron v. National Bank of Scot. we must look to secs. 11 and 12, which bear that the certificate shall specify the share in the undertaking to which such shareholder is entitled, and shall be admitted in all courts as *prima facie* evidence of the title of such shareholder. Now the bank was warned by letter and otherwise that Barron was the registered proprietor of the certificates; and they refused to comply with his request to give him the certificates, so as to allow him to operate his relief by selling the shares. I concur with the finding of the Lord Ordinary that Cleland could make no deposit so as to render the pursuer liable for future calls on the said shares, without having relief for the sum *bona fide* paid against Cleland, or his depository assignee. I therefore adhere to the interlocutor reclaimed against.

LORD FULLERTON. I agree. Barron was trustee for Cleland; and if, in these circumstances, there had been a demand for a call on Barron as the proprietor of the shares, he would have had a good claim against Cleland, who must have indemnified him upon the ordinary principle that the trust property must keep the trustee indemnified. The Bank took these certificates in the full knowledge of the relation of the parties. Now it followed that when the Bank took the security on that footing, they accepted the beneficial interest possessed by Cleland so far as that was a security. They were bound to give Barron the fullest facility of obtaining access to the means of indemnifying himself, and they were under the obligation to throw no obstacle in the way of Barron so indemnifying himself. And were they not bound to accept either the one alternative or the other offered to them? But they would not; and in the meantime this claim is made against Barron. Now the defenders say, you have suffered no injury, because it was possible for you to have sold the shares without actual possession of the certificates. This is a new ground of defence taken by the Bank for the purpose of evading this liability. But knowing that the certificates were considered by the Bank as a security over the stock, and was held by them as such, could Barron have held himself out to the public as the real proprietor of these shares and so have effected a sale? To have done so would have been a palpable fraud. And, if the Bank maintain that the right to sell was in Barron, then these certificates were the muniments of

Feb. 25. 1852. Barron's estate, and not of Cleland's, and therefore the Bank were not entitled to hold them as security for Cleland's debt. I adhere to the interlocutor of the Lord Ordinary.

*Barron v.  
National  
Bank of Scot.* LORD CUNINGHAME. I have formed a clear opinion that, in point of law, justice, and good faith, the interlocutor of the Lord Ordinary is well-founded. Separate from the statute altogether, it is a point of common and mercantile law, that when a pledgee gets the munitments of any rights vested in him, and when he is told that they belong to a third party, the pledgee keeps that property at his own risk. In such a case as this, which concerned vouchers of transferable property, is it right that the loss should fall on the nominal holder of the property, or on the parties who tortuously retain the vouchers? That is hardly a case to be put; and there are cases to shew that, in times of mercantile hazard, a party who retains documents, and refuses to relieve the party entitled to be relieved, does so at his own peril. But as to any plea under the statute, it does not supersede any right of a trustee at common law to operate his own relief in a variety of cases. I do not know that the sale here, without the certificates, would have operated relief under the circumstances. At any rate I do not think that anything contained in the statute supersedes the liability incurred by the Bank acting as it did.

LORD IVORY.—When the case was last before us I indicated an opinion adverse to the pursuer, but I am now satisfied that this was erroneous. For the purpose of expediency the shares were registered in the name of Barron; but as proprietor Cleland wished to have some security over them, and therefore he kept possession of the certificates. No purchaser from Barron could have held the stock to the prejudice of Cleland, and Cleland could not have disposed of the certificates to the prejudice of Barron. But here, besides the mere want of the certificates which prevented a sale, there is also such knowledge on the part of the Bank as implied *mala fides* in retaining the certificates. They knew the relation in which the parties stood to each other, and I am satisfied that the Bank must be held to have taken the certificates subject to all claims which might arise to Cleland as registered proprietor.

The COURT therefore "adhered to the Lord Ordinary's note submitted to review, and refused the note with additional expenses," &c.

*Andrew Howden, W.S., Agent for the Pursuer.*

*Archibald W. Goldie, W.S., Agent for the Defender.*

## FIRST DIVISION.

MUIRHEAD v. PEEBLES and CAMPBELL.

No. 216.

*Bill-Chamber—Interdict—Juratory Caution.*—Where creditors poinded stock on a farm of which their debtor was proprietor, but which stock was claimed by the debtor's son under an alleged lease granted by his father, (and which lease was challenged by the creditors as collusive),—Interdict by the son against a sale of the stock refused on juratory caution.

This was a note of suspension and interdict presented against the respondents "selling or disposing of the goods and effects on the farm of Waterhead poinded by them." The complainer represented himself as tenant of the farm under a lease granted in 1850 by his father who is the proprietor. By this lease the lands are let to the complainer, together with "the use of the whole stock, farm implements, and others, all as enumerated in an inventory" annexed to the lease. The respondents executed a poinding of certain goods and effects, including cattle, horses, and farm implements on the farm of Waterhead, for a debt of L.61, 10s. 2d. said to be due by the complainer's father to them. The complainer pleaded that the subjects poinded were his property, and in his possession, and were not liable to be poinded in diligence against a third party,—at least he was entitled to the use of the subjects as stipulated in the lease; that this right cannot be defeated by the poinding creditor, and falls to be protected by the interdict craved; and that in the whole circumstances of the case, he was entitled to have this note passed and the interdict granted, without caution or consignation.

The respondents stated that at the date of granting the lease, the complainer's father was bankrupt, and that the arrangement between the parties in 1850 was a mere device to avoid the diligence of the father's creditors. A letter was produced from Muirhead, senior, to the respondents in 1851, stating that after taking into consideration the state of his affairs, "I will not attempt to keep the lands of Waterhead any longer in my own hands," and requesting the respondents to call a meeting of his creditors. The pretended lease was therefore latent, and was never truly acted upon by any change of possession or otherwise.

The Lord Ordinary (Cowan) on considering the note, expressed his willingness to pass it if caution were offered, and to this course the charger did not object; but the suspender, instead of offering caution, as he undertook to do, lodged a minute, offering juratory

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Muirhead v.  
Peebles, &c.

Feb. 26. 1852. caution; and thereafter presented a second note of suspension and interdict of another poinding, also upon juratory caution. No *sale* of the poinded effects was alleged ever to have taken place by their owner, Mr Muirhead Kirkwood, to his son, the complainer. It was not denied at the meeting before the Lord Ordinary that the father is living on the farm with the complainer. The Lord Ordinary therefore refused the note, and found the suspender liable in expenses. In the note appended to his interlocutor, his Lordship remarked, "had there been any evidence adduced by the complainer that he had paid for the stocking on the farm, and obtained possession as the owner of it, it would have been necessary to have passed the note, that the respondent's allegations might be admitted to probation. But the mere privilege of *using* the stock and effects conferred by the lease could not transfer the radical property of them. . . . Then as regards the right to *use* the stocking, and the alleged change of possession, the Lord Ordinary cannot hold the receipt produced (said to have been granted by the father for the half year's rent due at Martinmas 1851) sufficient to instruct the fact of the complainer having obtained delivery even for the limited purpose of *use*, to which his right in any view is confined by the terms of the lease. The letter from the father, produced with the answers, is quite inconsistent with the idea that he had ceded possession of the lands and stocking to the complainer as his tenant. The diligence of the father's creditors ought therefore to be allowed to proceed."

The suspender reclaimed.

*Monro and G. G. Bell* for the claimer.

*T. Mackenzie* for the respondents.

**LORD CUNINGHAME.** There can be no doubt in this case. A lease by a landlord to a stranger tenant, with what is called the *use* of a valuable stock, which remains the property of the landlord, is a transaction which would be exceptionable as a means of withdrawing the landlord's moveable effects from his creditors; but when this takes place between father and son, the former continuing to reside on the farm, it has all the appearance of collusion; and I am of opinion that a note of suspension cannot be passed to suspend diligence, without satisfactory caution, and by no means on juratory caution.

The other Judges concurred.

Note refused.

*Junner and Stuart*, S.S.C., Suspender's Agents.

*Gibson-Craigs, Dalziell, and Brodie*, W.S., Respondents' Agents.

## FIRST DIVISION.

MORRIS and Co. v. STEWART and Co.

No. 217.

*Process—Partnership—Executor—Discharge.*—Where an action was raised in the name of a Company and the individual partners, and one of the partners died during the litigation, and his widow was sisted in his room as his trustee on the pursuers' succeeding in the action:—*Held* that the defenders were not bound to pay, except on a receipt in which the trustee should concur, after expediting confirmation, although she alleged that she had no interest to confirm, as she gained nothing by the result of the case.

This was an action of damages for alleged breach of contract Feb. 26. 1852. in regard to the hiring of a ship on a charter party. The summons was raised in the name of “James Morris and Co., and James Morris and James George Morris, the individual partners of that Company.” Pending the litigation, James Morris died, leaving a trust-deed in which his wife and certain other parties were named his trustees. She alone accepted and acted, and was allowed to be sisted in his room, undertaking, should the pursuers succeed in the action, “to confirm before extract.”

The case resulted in the pursuers being found entitled to damages to the extent of £50, with modified expenses.

A receipt for the damages being tendered to the defender, signed by James Morris and Co. and the agent alone, the defenders refused to pay, unless Mrs Morris should also concur in this receipt as representing her late husband, and that after expediting confirmation as his executrix.

Whereupon the pursuers enrolled the case, stating that Mrs Morris had no interest in the case, as after settling all expenses with her agent there would be nothing over for her to receive,—that she was willing to allow the decree to go out in the name of James Morris and Co., and they therefore moved the Court to allow the decree to go out accordingly.

*Buchanan* in support of the motion. Mrs Morris could not be compelled to confirm and concur in the discharge to the defenders. She had nothing to confirm to, as there was nothing to be received by her after paying the agent's expenses. The real pursuers were James Morris and Co., and the discharge of the sole surviving partner was sufficient, and they were not bound to submit to the delay and expense of a confirmation.

*Shand* for defenders. All that the defenders wish is a legal

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Feb. 26. 1852. and valid discharge when they pay the damages. The widow  
 Morris & Co. v. came in the place of her deceased husband and must discharge  
 Stewart & Co. her interest, which she had specially engaged to do when sisted.

The statement that there would be no balance payable to her, after settling with her agent, is irrelevant.

**LORD IVORY.** It is by no means clear that the surviving partner here is *in titulo* to discharge the damages awarded. On the contrary, the widow was sisted in the place of the deceased partner. She now represents him, and must, in my opinion, put herself in a situation to discharge her interest as his representative, before the defenders can be compelled to pay the damages awarded.

**LORD PRESIDENT.** Things must be allowed to take their usual course here. We will not interfere.

The other Judges concurred. Motion refused.

*John Cullen, W.S., Agent for the Pursuers.*

*Shand and Farquhar, W.S., Agents for Defendants.*

#### FIRST DIVISION.

##### No. 218.

##### AITKEN v. WOODSIDE.

*Trustee—Act 2 and 3 Vict. secs. 9, 11—Bill—Special Indorsement—Oath of Verity—Vouchers of Debt.*—In a competition for the office of trustee, a vote on a bill was objected to, in respect the bill had been specially indorsed by the drawer to a bank, and had not been re-indorsed to him, the original indorsement not being scored:—*Held*, that the bill was a good voucher of debt for the drawer, and that the indorsement might competently be scored; Also *Held*, that the factor for the deceased drawer's representatives had a good title to sue on producing his confirmation; and although the affidavit did not state that any part of the debt had been paid to the drawer during his lifetime, the oath of verity was complete, and in terms of the statute.

Feb. 26. 1852. This was a competition for the office of trustee on the sequestered estate of the deceased James Johnston, coal-master and spirit-dealer in Airdrie. The case came before the Court, on appeal by Aitken against an interlocutor of the Sheriff of Lanarkshire, declaring Archibald Woodside, accountant in Glasgow, to have been duly elected trustee. A counter appeal was presented by Woodside. At the meeting for the election of the trustee, creditors to the amount of L.908 : 3 : 4*½* voted for Mr Robert Aitken, and to the amount of L.404 : 8 : 11 sterling for Mr Woodside, giving to Mr Aitken a large apparent majority. The Sheriff-

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Woodside.

substitute however sustained objections to certain votes in favour of Aitken, which reduced his majority. Certain of these objections were now brought under review, of which the principal one was an objection to Mr Kidd claiming to vote upon a debt of £585 : 8 : 9, and which vote, if sustained, would turn the balance in favour of Aitken. Kidd claims as factor *loco absens* and factor *loco tutoris* to the representatives of Mr Campbell, now deceased; and in support of his claim he produced a bill drawn by Mr Campbell and accepted by the bankrupt. This bill, however, is specially indorsed by Mr Campbell to the National Bank; there is no re-indorsement to Campbell, the drawer, nor is the original indorsement scored. The Sheriff held, that, *ex facie* at least of the bill, the debt thus appears to be due, not to Mr Kidd's constituents, but to the National Bank. It was offered on behalf of the claimant to prove *scripto*, that if the bill was ever delivered to the bank with the indorsement in their favour, the drawer re-acquired right thereto by payment. A testament-dative, produced with the claim, was founded on as a proof of this retrocession, and a diligence was craved to recover farther written evidence. This diligence the Sheriff-substitute refused. He also refused to allow an offer made to score the indorsation upon the bill. Besides being factor for Campbell's children, Kidd was also agent for the bank.

*T. Mackenzie* for the appellant. The bill is a good document of debt. The indorsement on the bill might competently have been scored. *Mayer v. Jadis*, 1 Moody and Robinson, 247; Roscoe's Law of Evidence, 7th ed., p. 219, and the case of *Cocks v. Borrodale*, there cited, reported by Chitty on Bills, 7th ed., 392.

*Macfarlane* for the respondent. Under the 2 and 3 Vict. c. 41, sec. 11, the creditor must produce with his oath such accounts and vouchers as are necessary to prove his debt. This bill, indorsed to the bank, does not prove the debt in virtue of which Kidd claims to vote. Special indorsements cannot competently be scored.

**The LORD PRESIDENT.** We can have no difficulty that this was a genuine production on the part of Kidd. Nor can it be maintained that it has come in an improper way into his hands. Kidd is the agent for the bank, and the curator for the family; and being the natural custodian of the bill, the presumption is, that he got it from the bank when it had been discounted. This would be a very critical objection to sustain against this bill, when there

Feb. 26. 1852. can be no doubt whatever that there is a true and genuine debt to Campbell, and that this bill is a good voucher of that debt.

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**LORD FULLERTON.** Suppose Campbell alive, and that he had produced the affidavit, could it be said that, from the circumstance of there being a special indorsation on the bill, he had not complied with the Act in producing a good voucher of debt? It could not. Campbell is, *ex facie* of the bill, the proper creditor. There is an indorsation to the bank; but how does this necessarily prove that the right is in the bank? It might have happened that the bill had never been in the hands of the bank at all; and if it had been delivered to the bank, it would not have got back into Campbell's hands if it had not been paid. It is quite clear that a party in these circumstances would have been quite entitled to score out the endorsement. Then comes this other specialty—the only doubt which could have arisen was, whether this bill could have got freely into Kidd's hands? but this doubt is removed, because the party is the holder of the bill for behoof of Campbell's family, for whom he acts as factor. I think this objection to Kidd's vote cannot be sustained.

**LORD CUNINGHAME.** I am of opinion that the appellant has shewn a clear case in support of Mr Kidd's title to the balance of L.585 on the bill mentioned in the affidavit. He produced the bill, and offered to score the indorsations in favour of the bank, so as to leave the bill *in bonis* of Daniel Campbell, the original drawer, and he produced a *confirmation* in his own favour as Mr Campbell's executor. This was a sufficient title in that stage. When the indorsations were scored, Kidd's title was complete. Few cases of scored indorsations have been so clear upon the right to cancel as the present. Kidd was the principal agent of the bank, as well as the confirmed executor; so he would do nothing to the prejudice of the bank. The respondent attempted to shew that blank indorsations might be scored, but not special indorsations. There is no such doctrine laid down in any of the cases, or by any writer.

**LORD IVORY.** I am of the same opinion. This claim is made by Kidd, who holds the twofold character of agent for the bank, and factor for Campbell's children. It is his claim, as *factor loco tutoris*, that is rejected. If he had been in the capacity of law agent for the parties, the case might have been different; but it is not so. In his affidavit, therefore, it is implied that he has no claim on the part of the bank. It is impossible to conceive a more narrow or rigorous objection than this.

The Court, therefore, sustained the appeal.

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*Macfarlane* for the respondent, stated, that there were other objections to the same vote; (1.) Kidd has not produced sufficient title; *Anderson v. Thomson*, 9th July 1847, 9 D. 1460; (2.) The bill had become due three months prior to Campbell's death, and part of it had been paid to him. There is no statement in the affidavit, that any part of the debt had been paid to Campbell during his life. Therefore there was no complete oath in terms of sec. 9 of the Act; *Taylor v. Drummond*, 11th January 1848, 10 D. 335; *Glen v. Borthwick*, 19th January 1849, 11 D. 387.

*T. Mackenzie* for appellant: (1.) We produce our confirmation as our title to vote. It entitles us to uplift this bill to recover payment of the debt. We are therefore not claiming on the bill without producing our title; (2.) The affidavit bears, "That no part of the said sum of L.585, 8s. 9d. has been paid or compensated to the deponent or to the said executors, and that they and he hold no other person than the said deceased James Johnston bound for the debt," &c. This is a sufficient compliance with the statute; *Wixon and Deans v. M<sup>c</sup>Coll and Company*, 22d June 1849, 11 D. 1188.

The LORD PRESIDENT was of opinion that both objections should be repelled.

LORD FULLERTON. It is difficult to distinguish this case from the case of *Glen*. In questions of this kind as to the competition of trustees, I think we have given many rash decisions. No previous decision can be exactly in point, and we must just judge of each case on its own merits. In the case of *Glen* there was an oath as to the verity of the debt, but there the party went still farther and swore that no part of the debt had been paid, which he was not bound to do by the statute at all. The view I took was that if a party will go out of the statute and swear to the verity of a debt, and that no part of it has been paid, he places himself in the position of having his oath examined whether it is a good oath or not. But in the circumstances I think the oath is good enough, and that the statute is sufficiently complied with. With regard to the other point I agree with the Lord President.

LORD CUNINGHAME. I agree. The other cases do not rule this. There is here sufficient title, and as to the validity of the affidavit I concur in thinking the objections to it not maintainable.

LORD IVORY. With reference to the objection on the title, I

Feb. 26. 1852. agree with the Lord President. This party produces as his title, Aitken v. Woodsidge. his confirmation as *factor loco absentis*. That is quite sufficient as a good title to vote.

The objection that this is not an oath of verity in the sense of the statute, is founded on the assumption that the party has not fulfilled the condition of that enactment. Now, when I read it, I see nothing in which he has failed to fulfil it. The question is, Is this an oath of verity in the sense of the statute? Is it possible to read the terms of the oath without seeing that it is so? There is no question of construction here which was raised in the case of *Glen or Taylor.*

The COURT, therefore, "alter the interlocutor of the Sheriff; Find that the said Robert Aitken was duly elected trustee, and remit to the Sheriff to proceed accordingly; Find the said Archibald Woodside liable to the appellant in the expenses incurred by him both in the Sheriff Court and in this Court, &c."

*Gibson Craigs, Dalziel & Brodie*, W.S., Appellant's Agents.  
*John Leishman*, W.S., Defender's Agent.

#### FIRST DIVISION.

No. 219. **HOOK v. MRS FLORA CAMPBELL GALBRAITH or HOOK.**

*Evidence—Divorce—Proof—Extrajudicial Statement—Deposition—Solemnities of—Witness's Age.*—In the proof in an action of divorce:—*Held* that an extrajudicial statement by one of the witnesses could not be founded on as evidence; (2) That a deposition which concluded without the usual words of solemnity was sufficient. *Observed*, that the age of the witness should always be stated in the deposition.

Feb. 26. 1852. This was an action of divorce raised by the pursuer against his wife on the ground of adultery. In the course of the proof, and Hook v. Hook. during the examination of Miss Galbraith, the defender's sister, a question arose as to the competency of founding on an extrajudicial statement by Miss Galbraith, as evidence with regard to the defender's alleged habits of intemperance. The evidence was as follows:—"Being shewn a paper, dated 18th April 1850, and subscribed 'Mary Davinia Galbraith,' I see that it is my handwriting. It was written under compulsion and threats of the pursuer, and at his dictation, not of the date it bears, but in the month of May. The statements in that paper are in part true, and part entirely false, and very little true without exaggeration. I say that the defender was not addicted to drink too much."

"Here the defender's counsel moved the Commissioner to reject this document as evidence, which the Sheriff-commissary did, and against which the pursuer appealed." Feb. 26. 1852.  
Hook v. Hook.

The Lord Ordinary (Robertson) "having heard parties' procurators on the various appeals taken in the course of the proof, finds, with respect to the appeal in the course of the evidence of Miss Galbraith . . . that the written statement by the witness may, under the special circumstances in which it was tendered, and with the view of affecting or explaining her testimony, be received in evidence, and therefore admits the same . . . and having heard parties' procurators on the merits at great length . . . finds no evidence to support any of the acts of adultery libelled, and that the defender has not been guilty thereof; therefore sustains the defences, assails the defender from the whole conclusions of the libel, and decerns; finds the pursuer liable in expenses," &c.

Against the latter part of this interlocutor the pursuer reclaimed, and the defender reclaimed as to the admissibility of the evidence.

*Monro and Neaves* for the claimer.

*Fraser, Inglis, and Crauford* for the respondent.

The question of evidence having been discussed,

**THE LORD PRESIDENT.** It would have been better had this matter been earlier discussed. As the interlocutor of the Lord Ordinary stands, this document is made a part of the witness's statement. I must own, on hearing the discussion, that I am not prepared to sustain the document as evidence. To try and put this document into the case for the purpose of being contrasted with the deposition of the witness, and made use of with reference to other witnesses, would be a most hazardous proposition.

**LORD FULLERTON.** I am of opinion that this document ought not to be admitted. It cannot be considered as part of the *res gestae*; and on this subject it differs from letters produced and put into the hand of the witness, for instance, to shew that the witness had been dealing with a party as sane, although when under examination he had sworn that he considered the person insane. In a case of that kind the letters are allowed to be put into the hands of the witness, to ask him how he reconciles the statements. The document here is a narrative of facts that had taken place some time before it was written, and is nothing but a precognition. It has not been confined to testing the credibility of the witness herself, but has been used to discredit other witnesses.

Feb. 26. 1852. **LORD CUNINGHAME.** I consider this as a momentous question in the law of evidence, because I should hold it a most dangerous precedent to allow such a paper as that in dispute to be received to any effect. It has been taken antecedently from a party intended, or likely to be adduced, as a witness; and as the interlocutor stands, it is admitted as evidence without qualification, or any special ground to justify so unusual a precedent. Parties, no doubt, are allowed to precognosce witnesses, and they may preserve written notes of the precognition for their own use; but to produce these in Court with the view of impeaching the testimony of the witness afterwards on oath, would, indeed, be a precedent of bad example. The rules of evidence are founded on principles of general jurisprudence; but I can find no example of such a proceeding as the present, in the practice either of our own Courts, or those of England. This cannot be justified on the ground that Miss Galbraith was a *necessary* witness for the pursuer in a contemplated suit, whose testimony he was anxious to preserve from all hazard. In that case a party may take notes for his future guidance; and as soon as he institutes his action, the law provides a course for taking instantly the evidence of peculiar witnesses—such as instrumental witnesses, framers of deeds, and the like, before a judge or commissioner, in presence of both parties. But the preparation by one of the parties to an impending suit of an extrajudicial declaration by a witness, is little short of malpractice, and must ever be reprobated by the Court. It is obviously essential, for the protection of witnesses, and for the purity of evidence, to have this erroneous practice promptly corrected.

**LORD IVORY.** I am of the same opinion. The judgment of the Sheriff Commissary was to reject this document as evidence. That was a right judgment. How far the document might be used in testing the witness is not the question. This document cannot be received as evidence.

In the course of the discussion **LORD IVORY** observed that the deposition of one of the witnesses concluded without the usual words of solemnity, "all which is truth, as the deponent shall answer to God." *A. v. B.*, 16 S. 630.

The COURT were of opinion that the deposition was sufficient. It was also observed by **LORD CUNINGHAME**, that the age of one of the witnesses was not given. He thought that the old practice of mentioning the age of the witness ought to be followed by Commissary Sheriffs.

In this opinion the Court concurred.

Feb. 26. 1852.

*Hook v. Hook.*

To-day the case was advised, and the Court " Alter the Lord Ordinary's interlocutor submitted to review, so far as it finds that the written statement by Miss Galbraith can be received as evidence, and admits the same; but, *quoad ultra*, and on the merits, adhere to the Lord Ordinary's interlocutor, and refuse the note for the pursuer: Find him liable in additional expenses," &c.

*Murray and Beith*, W.S., Pursuer's Agents.

*William Alexander*, W.S., Defender's Agent.

### FIRST DIVISION.

OUTRAM *v.* REID.

No. 220.

*Damages—Bankruptcy—Notice in newspaper—Omission of Designation—Liability.*—A notice of a Glasgow bankruptcy abridged from the Edinburgh Gazette having been inserted in a Glasgow newspaper:—*Held*, the designation of the bankrupt having been omitted, that the newspaper proprietor was liable in damages to a party resident in Glasgow of the same name and trade as the bankrupt, and to whom it had been publicly reported the notice of bankruptcy applied.

This was an action of damages raised under the following cir.<sup>Feb. 27. 1852.</sup> *Outram v. Reid.* circumstances. In the Edinburgh Gazette published on the 18th day of May 1847, there was inserted a notice, the first part of which is inserted in these terms:—"The estates of John Reid, wine and spirit merchant, 251. Gallowgate Street, Glasgow, were sequestrated on 17th May 1847," &c., and in the Glasgow Herald (of which the defenders are proprietors,) of 21st May 1847, the following notice, abridged from the Gazette, appeared:—"Scotch Bankrupts. May 17. John Reid, wine and spirit merchant, Glasgow, creditors to meet in the writing chambers of Mr Andrew Gemmill, on 28th May and 25th June, at one o'clock." This notice omits that part of the designation of John Reid contained in the Gazette, which consists of "251. Gallowgate Street," and by which that notice was restricted to that individual.

The pursuer, John Reid, is a wine and spirit merchant in Glasgow, carrying on business in Princes' Street, Buchanan Street, and this notice in the Herald having been supposed by his friends and others to apply to him, he, on 22d May, sent a party to the defenders' place of business to point out the error and request them to take an early opportunity of correcting it, and he was told

Feb. 27. 1852. that the matter would be mentioned to the defenders' reporter, who was not in the office at the time. In the next number of the Herald, published on the 24th May, no notice of the error was inserted; and, thereafter, the pursuer intimated through his law-agents to the defenders, that he had "suffered severely both in his feelings and also in his interests in consequence of that erroneous insertion; and as he carries on an extensive foreign business, there is but too much reason to fear that he will yet suffer much loss ere the circulation of the error is effectually stopped; and seeing that you have even neglected the opportunity offered you of checking the extension of the evil, he feels that it is due to himself now to intimate that he holds you liable to him in damages for the injury he has sustained, or may yet suffer, and that failing an immediate adjustment of the matter, he will at once proceed to constitute his claim of damages by an action at law." A correction of the notice appeared in the Herald of the 28th May.

In June following this action of damages was raised in the Sheriff-court of Glasgow, concluding for L.500 as a *solatium*, and in name of "damages, and as a reparation to the pursuer of the injury, loss, damage, and effects sustained, or that may be sustained by the pursuer, by and through the defender's malicious and injurious, or, at all events, injurious, inaccurate, and erroneous conduct, all as before set forth." And the grounds of action were, that a public journalist quoting from an official gazette is bound to quote accurately; and where damage and injury has been sustained through omission, carelessness, neglect, or culpability of any kind, reparation is due; *Hall*, 23d June 1813, 1 Dow, 201.

In defence, the delay was explained to have been occasioned in consequence of the pursuer's communication not having been made to the proper functionary in the establishment; and it was pleaded that the notice in the Herald of 21st May having no reference to the pursuer—there being others in Glasgow to whom it might have equally well applied—either directly, or indirectly by implication, and being a correct abridgment of the Gazette notice of the 18th May, there were no grounds whatever for the present action; and that this action would have been irrelevant, even although there had been an error in the notice of 21st May, there having been no *animus injuriandi* on the part of the defenders, and no actual loss being alleged. *Craig v. Hunter and Company*, 29th June 1809, F. C. 14, p. 371.

Proof was led, and thereafter the Sheriff, holding that the case of *Craig* had ruled that *special* damage must be established, con-

sidered that special damage had been adequately instructed here, Feb. 27. 1852. for several witnesses had proved that in consequence of the pur-  
suer's name having appeared in the defenders' newspaper as a bankrupt, a report got up that he, the pursuer had failed; that in consequence his credit was shaken, and that if they had had transactions with him they would have stopped them. Such a shaking of credit the Sheriff held to be special damage to a mercantile man, and damage of such a kind as, in critical times, would lead at once to ruin. The very mental distress and anxiety consequent on such a report is itself no small damage, clearly entitling the party to a *solatium*. He, therefore, "finds damages due to, and established by the pursuer, modifies the same to L.20 sterling, for which sum decerns against the defenders, with interest as libelled. Finds the pursuer entitled to expenses, &c."

The defenders advocated the cause, and the Lord Ordinary (Wood) having found, in terms of the Sheriff's interlocutor, the defenders reclaimed.

*T. Mackenzie and Neaves* for the claimers (defenders.) The defenders are in the custom of printing a list of Scotch bankrupts and bankrupt examinations, and in no instance do the proprietors of the *Glasgow Herald* or of any other newspaper print complete excerpts from the *Edinburgh Gazette*. This notice was correctly abridged.

*Inglis and Penney* for the respondent (pursuer.)

**THE LORD PRESIDENT.** With regard to the alleged custom it cannot influence our judgment. What the defenders intended to do was to communicate to their readers the information contained in the *Gazette* as to Scotch bankrupts. Had they done so, there would have been no ground for damage. It is for not having done that which the *Gazette* alone authorised to be done, that they are liable. This case is distinguished from the case of *Hunter* in this respect, that a day of publication intervened between the pointing out of the error and the correcting of it. The proof in the Sheriff Court satisfactorily establishes injury to have been done to the pursuer's credit, and therefore I adhere to the Lord Ordinary's interlocutor.

**LORD FULLERTON.** I have no doubt that the principle of the Sheriff's interlocutor is perfectly sound. The *Gazette* contains the intimation of the sequestration of John Reid, wine and spirit merchant, 251. Gallowgate Street, Glasgow. This was quite proper, because there were other persons in Glasgow falling under the de-

Outram v.  
Reid.

Feb. 27. 1852. *Outram v. Reid.* Description of wine and spirit merchants. The addition of the residence of John Reid, the party really sequestered, was an essential part of his distinctive designation. Now, that being the case,

I think it clear that a newspaper proprietor choosing to insert the list of bankrupts, a piece of information given not from any obligation incumbent on such proprietor, but for his own purposes and emoluments, is bound to insert the description as given in the Gazette, and is not entitled to vary or abridge that description, when that abridgment has the effect of attaching the stigma of bankruptcy to a man different from him who was actually sequestered. He is bound to copy correctly, and if he does not, he must be liable for the consequences. As to the notion that a party in the situation of the pursuer must prove special damage, if by that is meant some special amount of loss in pounds, shillings, and pence, it seems to me utterly inadmissible. That would go the length of defending the proprietor of a newspaper from all claim of damages for announcing the bankruptcy of a trader, unless that trader can prove special damage. The answer is obvious. Proof of special damage may of course increase the amount of the injured party's claim, but the false announcement of the bankruptcy of a trader, or indeed of anybody, is obviously in itself a ground of action, and the foundation of a claim of damage, the amount of course left to the Jury, or the Court acting as a jury, in disposing of the claim. On that view I agree with the Lord Ordinary in thinking that there is no ground for altering the judgment of the Sheriff.

LORD CUNNINGHAME. I concur in the opinions that have been delivered, and must add that I should rather have expected an appeal from the pursuer as to the *quantum* of damage, than from the defenders denying their liability. The sum allowed by the learned Sheriff-depute I think the *minimum* that could have been thought of; and had it been double, I fairly state that I should have paused before reducing the modification.

I have in general great sympathy, and am disposed to deal gently with the press; but in some respects this case is of serious aspect, not, indeed, as affecting the respectable editor Mr Outram, who was never informed of the wrong, and is blameless, but against one or more of the reporters, for whom the proprietors are responsible. The defenders *admit*, that on the very day, 22d May, after the publication of the erroneous or defective extract from the Gazette, a clerk called at the office and pointed out the mistake; but it is added coolly, that that clerk omitted

*to state it to the proper functionary* in the establishment, in Feb. 27. 1852. consequence of which, the extract from the Gazette was not correctly inserted in the Herald till 28th May, a week after the publication of the mistated extract. This was a gross fault, and the proprietors of an extensively circulated newspaper must be answerable both for the original error and for the continued negligence of those in their service. The defenders endeavour generally to deny their responsibility for such omissions as here occurred; but they will do well not to rely upon that view of their duty.

LORD IVORY. This, though in the particular instance a case of little pecuniary importance to the parties, raises a very important general question as regards the right and duties of newspaper publishers. At first sight it is perhaps a somewhat narrow case, but on the whole matter I am disposed to adhere to the interlocutor. I am quite satisfied on the one hand that there was here no *malice* or *animus injuriandi*; but, on the other, though there may be no evidence of specific patrimonial loss measurable *in pecunia numerata*, I cannot help thinking that the proof as to general loss of credit, and that this must have been productive to some extent, be it more or less, of actual loss in trade, is sufficient to satisfy the legal requirements of proof of special injury, on which the case of *Craig* seems to have proceeded. Here the defender does not stand in the position of a privileged party. He was acting in the exercise neither of any legal right, nor of any legal duty. He was not called upon for any ends but his own to interpose himself at all in the matter out of which the case has arisen. The duty incumbent on him was to secure and observe, so far at least as the means were within his power, the most perfect accuracy in every thing touching the character and credit of others. So here, if he had done no more than implicitly adopt and follow the designation of the bankrupt as contained in the Gazette, the defender would have stood exonerated. But he chooses to act otherwise, he omits a part of the designation as given in the Gazette, and in so doing he takes the hazard connected with such a change entirely on himself. He says it is not usual to insert the street and number of the bankrupt's place of business. But if so, it should have occurred to him that there was some practical purpose in view in the fuller specification which was *de facto* given in this case in the Gazette—noticed as framed by all the parties more immediately concerned. There is no hardship in holding newspaper proprietors to the same measure of accuracy which the

Feb. 27. 1852. parties themselves deem incumbent on them. It is by setting at naught the *caution* which was thus held out to him by the very terms of the Gazette that the defendant has fallen into error.  
*Outram v. Reid.*

I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The COURT therefore refused the prayer of the reclaiming note, and adhered to the Lord Ordinary's interlocutor, and with additional expenses.

*Gibson-Craigs, Dalziel and Brodie, W.S., Pursuer's Agents.*  
*Campbell and Smith, W.S., Defenders' Agents.*

### FIRST DIVISION.

#### No. 221.

#### PETITION—PATRICK BOYLE.

*Factor loco tutoris—Special Powers—Expenditure—Purchasing of Books, &c.*

Feb. 28. 1852. This was an application for special powers by Mr Patrick Boyle, who was appointed factor *loco tutoris* to the Marquis of Hastings in May 1851. He had found it necessary to present a note to the Lord Ordinary in terms of the seventh section of the Pupil's Protection Act, praying for the sanction of the Court to certain expenditure which he proposed to make in improving the estates under his charge. Besides the more ordinary powers applied for, and which the Accountant of Court had recommended to be granted, Mr Boyle asked power to lay out a sum of L.1600 on behalf of the pupil in the purchase of the pictures and books in the castle of Lauder, the principal mansion-house of the family in Scotland, as well as of certain furniture which it contained. The pictures and library were described as property forming heir-looms in the family ; and it was further stated that the castle would be more likely to let, or, at all events, less likely to go to decay, if the furniture in question was allowed to remain in it. The whole property could also be purchased on very favourable terms from the pupil's mother, who was the executrix of his deceased brother, the immediately preceding Marquis, and from Colonel Borthwick, the present tenant of the castle.

In these circumstances, the Accountant of Court expressed a special opinion in the following terms :—“ Considering the position of the family and the preservation of the mansion in this particular case, the Accountant is of opinion that it would be for the benefit of the estate to grant the factor power to treat with the

Marchioness of Hastings and Colonel Borthwick as he has suggested." The Lord Ordinary directed extracts from the factor's report, and the opinion of the Accountant of the Court of Session to be printed and boxed for the Court; and he at the same-time reported the matter with a note, expressive of his opinion that the power craved by the factor should be granted, but calling the special attention of the Court to the proposed expenditure as "being of an unusual character."

Feb. 28. 1852.  
Pet. Boyle.

*Boyle* was for the petitioner.

On considering this report the COURT granted the power as craved by the tutor.

*Hunter, Blair & Cowan, W.S., Agents.*

### FIRST DIVISION.

SMITH v. HENDERSON.

No. 222.

*Bill Chamber—Suspension—Charge—Charger's Designation.*

This was a suspension, by Henderson, of a charge at the instance of Donald Smith, "as manager to, and for behoof of, the Western Bank of Scotland," upon a bill alleged to be due by Henderson to the Bank. Henderson denied the debt, and pleaded *inter alia*, that the charge is irregular and inept, in respect that the residence or place of business of the charger is not mentioned, and his designation is insufficient.

The Lord Ordinary (Cowan) before answer, allowed the complainer to put in a minute of reference, &c., which the complainant, accordingly did, "under reservation of the effect of the objection to the charger's title to sue." To this the charger objected that the suspender must admit the title of the charger before he can refer to the charger's oath: and the Lord Ordinary "repels the first plea in law stated for the suspender; and in respect that the said minute of reference is tendered only under reservation of the objection to the charger's title, refuses the note of suspension: Finds the suspenders liable in expenses," &c. His Lordship added a note, in which he stated that "the suspender's statements conclusively shew that no ambiguity, so far as he was concerned, was created with regard to the party charging for payment of his promissory note, by the residence of the manager, or the bank's place of business not having been set forth in the charge; and the Lord Ordinary cannot hold the technical

Feb. 28. 1852.  
Smith v. Hen-  
derson.

Feb. 28. 1852. *inaccuracy founded on so material as to render the charge altogether null and invalid, as maintained in the suspender's first plea in law."*

*The suspender reclaimed.*

*N. Campbell* for the claimer.

*Penney* for the respondent.

The COURT repelled the objection, and refused the reclaiming note, with additional expenses.

*Wotherspoon & Mack*, S.S.C., Suspender's Agents.

*Smith & Kinnear*, W.S., Charger's Agents.

### FIRST DIVISION.

#### No. 223. EWING v. THE AIRDRIE AND BATHGATE RAILWAY COMPANY.

*Railway Company—Shareholder—Contract—Implement—Damages—Title to Sue.*—Under the provisions of a statute two railway companies, on the requisition of one of them, entered into an arrangement and contract for the conveyance of the one line, or the right to make the same, to the other, which the company making the statutory requisition, in concert with certain of the directors of the other company, obstructed, and delayed to implement:—*Held* competent for a shareholder of the latter company to sue for implement of the contract alternatively with personal conclusions for damages against the directors in case of failure.

Feb. 28. 1852. This was an action to compel implement of a contract between the Airdrie and Bathgate Railway Company, and the Edinburgh and Glasgow Railway Company, under the 9th and 10th Vic., c. 377, intituled “An act for making a railway from Airdrie to Bathgate, with a branch to Whitburn and Blackburn, to be called ‘the Airdrie and Bathgate Junction Railway Act,’ or for damages against the directors of the latter company for failing to implement. The pursuer is a shareholder of the Airdrie and Bathgate Railway Company, and a proprietor of land through which the line was intended to pass. The summons in its narrative sets forth the preamble of the above statute, the incorporation of the Airdrie and Bathgate Junction Railway Company, the capital of the company, and the various powers and conditions under which an arrangement therein provided for was concluded. In particular, the summons set forth that by section 39 of the above statute it was enacted “That it shall be lawful for the Edinburgh and Glasgow Railway Company, by a requisition under the hands of any three directors, to call upon the Company hereby incorporated either before the execution or not

*Ewing v. Airdrie and Bathgate Railway Company.*

later than six months after the completion of the railway by this Feb. 28. 1852.  
Act authorised to be made, or any part thereof, to convey such rail-  
way and branch railways, or the right to form the same or any part <sup>Ewing v. Airdrie and Bath-</sup>  
thereof, to such first mentioned company ; and the company here-<sup>gate Railway Company.</sup>  
by incorporated shall, upon such requisition, be bound to convey  
and transfer, by a deed duly stamped, the said railway and branch  
railways, or the right to make the same to the Edinburgh and  
Glasgow Railway Company ;" and by section 40 it is enacted,  
that, in the manner therein set forth, it shall be lawful to call  
upon the Edinburgh and Glasgow Railway Company to purchase  
the said railways, or the right to form the same ; and the Edin-  
burgh and Glasgow Railway Company shall be bound to purchase  
and take a conveyance to the Airdrie and Bathgate Junction  
Railway Company, or the right to form the same ; and by section  
44, the Edinburgh and Glasgow Railway Company are required  
to create a stock to the amount of L.200,000, and to allot the same  
to shareholders of the other Company in lieu of their own stock ;  
and by section 50 it is enacted, "that in the event of such sale  
and transfer as aforesaid, before the execution of the works, the  
Edinburgh and Glasgow Railway Company shall, and are hereby  
required to complete the said main line of railway with a double  
line of rails, in a good and substantial manner, adapted for the  
traffic thereon, and agreeably to the said plan and section, and to  
have the same opened for said traffic within the period of three  
years after the passing of this Act, and thereafter to provide a  
good and sufficient plant, and locomotive engines for working, and  
to work the same for the conveyance of goods and passengers ;  
that section 45 provides, "that the Airdrie and Bathgate Railway  
Company shall receive from the Edinburgh and Glasgow Railway  
Company a dividend of six per cent. ;" and by section 46 it is en-  
acted, "that the Edinburgh and Glasgow Railway Company  
shall pay to the shareholders of the Airdrie and Bathgate Rail-  
way Company, out of the profits of the former, four per cent. on  
all calls or deposits paid or to be paid by the latter, and provision  
is further made for carrying into effect and completing the ar-  
rangement before set forth when the Airdrie and Bathgate Rail-  
way Company is declared to be dissolved. The summons pro-  
ceeds to libel that the Edinburgh and Glasgow Railway availed  
themselves of the right and privilege conferred upon them by the  
said Act of Parliament, and made the necessary statutory requi-  
sition, in consequence of which matters proceeded between the  
two companies with the view of carrying out the transaction.

Feb. 28. 1852. But differences and disputes having arisen, negotiations were suspended, and ultimately the Airdrie and Bathgate Junction Railway Company, and the pursuer, and various other parties, all individual partners or shareholders of that Company,

brought a summons of declarator, implement, and payment against the Edinburgh and Glasgow Railway Company, concluding, *inter alia*, that the Edinburgh and Glasgow Railway Company were bound to complete the main line of railway from Airdrie to Bathgate, and to accept the necessary contract and conveyance of said Railway and Branch Railway, or right to make the same, and to create stock to the amount of £200,000, and to allot the same to the shareholders; and in the event of the Edinburgh and Glasgow Railway Company failing in their obligation in this respect, that the said Airdrie and Bathgate Junction Railway Company should have the power of executing the work at the expense of the Edinburgh and Glasgow Railway Company, "reserving all claims for damages sustained, or to be sustained, by the said Airdrie and Bathgate Junction Railway Company, and the individual partners or shareholders of the said Company." That in this action the judgment of the Lord Ordinary (Cunningham) was in favour of the pursuer, and became final, and decree went out accordingly. The summons then goes on to libel, "That, with a view to defeat the conclusions of the said summons and the said decree, and to evade the obligations incumbent on them by theforesaid Act of Parliament, the said Edinburgh and Glasgow Railway Company, aided and abetted by the defenders after named, directors of the Airdrie and Bathgate Junction Railway, had practised a series of devices," by means of which the smaller company, the Airdrie and Bathgate Railway Company, was packed and unduly influenced by the larger, the Edinburgh and Glasgow Company, and that it was illegally agreed to discharge and abandon the agreement which the two Companies had made, without price or consideration. The summons sets forth the names of the directors of the Airdrie and Bathgate Junction Railway Company, who are made the immediate defenders in the present action, and concludes that they have fraudulently, or at least most culpably contravened or failed to perform the whole duties which were incumbent on them, to the great loss, injury, and damage of the pursuer; and "that as the Edinburgh and Glasgow Railway Company had failed to make the railway as aforesaid, or to implement the conditions on which alone they were eventually authorised to do so, and as their

failure to do so has been fraudulently, at least most culpably <sup>Feb. 28, 1852.</sup> concurred or acquiesced in by the said persons who are now directors of the said Airdrie and Bathgate Junction Railway Company, <sup>Ewing v. Airdrie and Bathgate Railway Company.</sup> these individuals have rendered themselves personally liable to the pursuers forthwith to make the said railways, in conformity with theforesaid statutes, and within the period therein prescribed ; and failing their doing so, these parties are liable to indemnify the pursuer for the loss and damage sustained, and to be sustained by him in the premises."

The defenders objected to the pursuer's title, and they also pleaded that under § 103 of the Company's Clauses Act, no directors shall be personally liable to be sued by any person whatever for any *lawful acts* done by them as directors. It is in consequence of their acts as directors that the defenders are here sued ; but there is no allegation in any part of this summons of any *unlawful act* done by them as directors, or in any other capacity. They are accused of certain devices, but there is no proper specification of these devices, or any allegation that either the things practised were unlawful, or that the objects for which they were practised were so. They therefore pleaded that the averments in the summons were not relevant to support its conclusions.

A similar action had been raised against the Edinburgh and Glasgow Railway Company, and was conjoined with the present process.

The Lord Ordinary (Dundrennan) reported the whole cause to the Court, adding a note, in which he stated that he inclined strongly to the opinion that the pursuer, as he had laid his actions, had no case against the directors personally.

The case was now heard before the First Division of the Court, and three Judges of the Second Division, on the question of the pursuer's title to sue, and on the relevancy of the summons.

*Broun and Marshall* were for the pursuer.

*Blackburn, Neaves, the Solicitor-General (Deas), and the Dean of Faculty (Anderson)*, for the defenders.

The COURT were of opinion that the summons was loosely framed and open to critical objection, but on the whole they considered it to be relevant, and pronounced the following interlocutor :—

"The Lords having heard the counsel for the parties, agreeably to the appointment made to that effect. . . . In conformity with

Feb. 28. 1852. the opinion of the majority of the seven Judges before whom the  
 Ewing v. Air-  
 drie and Bath. case was so heard, sustain the title and interest of the pursuers to  
 gate Railway Company. insist in the conjoined actions, repel the objections stated by the  
 defendants against the competency and relevancy of the summonses  
 in the said conjoined actions, and appoint the case to be enrolled  
 in order that an issue or issues proper for the trial of the same  
 may be adjusted."

*Thomas Sprot, W.S., Pursuer's Agent.*

*Clason and Clark, W.S.* } Defenders' Agents.  
*George Wedderburn, W.S.,* }

### FIRST DIVISION.

No. 224.

**AITKENHEAD v. AITKENHEAD.**

*Aliment—Younger Children—Intestacy—Moveable Estate Exhausted by  
 Debts—Obligation on Heirs.*

Mar. 2. 1852. This was an action for aliment at the instance of Margaret  
 Aitkenhead v. Aitkenhead and Others against their brother, William Aitkenhead,  
 Aitkenhead. son and heir of the deceased John Aitkenhead, farmer, Ruther-  
 glen, and Andrew M'Ewan, accountant in Glasgow, his *factor loco tutoris*.

John Aitkenhead died in February 1851, without having ex-  
 ecuted any settlement of his affairs, or made any nomination of  
 tutors and curators to his children. His wife predeceased him.  
 In May 1851, the Court appointed Andrew M'Ewan *factor loco  
 tutoris* to William Aitkenhead, and in November thereafter au-  
 thorised him to make up titles to the heritable property, and to  
 borrow £.1600 on the security thereof, for the purpose of discharg-  
 ing the debts due by the deceased. This has been done. But the  
 personal debts due by the deceased having greatly exceeded the  
 amount of the moveable estate, the pursuers, who are girls, and  
 all minors, are entitled to no part of their father's property, and  
 have no funds whatever for their maintenance and education.

In these circumstances a petition was presented to the Court  
 by the factor setting forth the above facts, and stating that, for  
 the present, the pupil's sisters are placed with friends who cannot  
 afford to keep them without remuneration, and, therefore, pray-  
 ing for special powers to make such reasonable payments out of  
 the rents of the real property as may seem proper for the main-  
 tenance of the pupil's sisters.

The Court considered that the proper course of procedure was

to bring an action of aliment, which was accordingly done; and a minute was also lodged by the factor approving of the conclusion of that action.

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Aitkenhead.

*Shaw* for the pursuers cited the case of *M' Rostie*, Baron Hume's Commentaries, p. 9, 21st February 1818, in which an application similar to the present had been sustained.

*Boyle* for the defenders.

The COURT "Conjoin the present action of aliment with the application for special powers brought by the said factor, Decern against the defenders for payment to the pursuers respectively of the sums aftermentioned, from 26th February 1851, the date of their father's death, viz., to the pursuer, Margaret Aitkenhead, for L.12 per annum for two years from said period." And to each of the other girls L.15 per annum, from the date of their father's death till they reach the age of eighteen, and L.12 for two years thereafter; "but Find that these allowances are to cease as to any one or more of the pursuers who may become able to support herself, or who may be married, and allow decree for the above sums to go out and be extracted *ad interim*."

*John W. Mackenzie*, W.S., Pursuer's Agent.

*John Patten*, W.S., Defender's Agent.

## SECOND DIVISION.

### PETITION—BLAIKIE BROTHERS v. ABERDEEN RAILWAY COMPANY.

No. 225.

*Process—Submission—Summary Petition to Sheriff to enforce production by havers in submission.*—The arbiter in a submission by an order authorised one of the parties to petition the Judge Ordinary for an order for diligence and examination of havers, in terms of a certain specification; a haver having refused to make production on the ground of confidentiality: *Held* competent, without authority from the arbiter, to apply by petition to the Sheriff to ordain the haver to produce the writings, and failing his doing so, to grant warrant to apprehend and incarcerate him.

The question here arose out of certain proceedings taken in a sub- mission between the Aberdeen Railway Company and the Messrs Blaikie. The arbiter, Mr Gibb, engineer, by an interlocutor, had allowed parties a proof. It is unnecessary for the point now raised to enter into any statement of the merits of the case before the arbiter, as maintained on either side In the course of taking

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Mar. 2. 1852. the proof, the Messrs Blaikie lodged a minute and relative specification of documents, which they proposed to recover under diligence; and the arbiter issued an order by which he authorises them to ‘ petition the Judge Ordinary, in terms of their note and specification, and the arbiter respectfully recommends his Lordship to grant the prayer of their petition—the proof and examination to commence in the arbiter’s office, &c.’ The Messrs Blaikie thereafter presented an application to the Sheriff of Aberdeenshire, who granted, in ordinary form, letters of diligence to appear before the arbiter, &c., “to abide and answer at the instance of the said complainers, and to bear leal and soothfast witnessing upon oath, in so far as they know, or it shall be asked at them, anent the points admitted to probation; and also to exhibit and produce, on oath, the foresaid books and papers, or otherwise to depone thereanent as in an exhibition, with certification, &c.”

In the course of executing the diligence thus granted them by the Sheriff, and while the agent of the Aberdeen Railway Company, Nathaniel Farquhar, was under examination as a haver, objections were taken to the production of certain documents falling under the specification, on the ground of confidentiality. The arbiter who took the proof overruled the objection and ordered production. The haver declined to produce—the Aberdeen Railway Company, in whose right the objection was stated, concurring in the objection. In these circumstances, the Messrs Blaikie presented an application to the Sheriff, praying for service upon the Aberdeen Railway Company, and Farquhar their agent, to appoint answers within a short space, and thereafter, with or without answers, to interpose his authority to the orders issued by the arbiter, quoting the particular orders made by the arbiter in overruling the objections—“ And to ordain the said Nathaniel Farquhar to implement the orders, and to produce the writings called for by the petitioners, and ordained by the arbiter, in his ordersforesaid, to be produced by him, and that within a short time; and failing production of the said writs, to grant warrant to apprehend and incarcerate the said Nathaniel Farquhar until he shall produce the same;” or to do otherwise as to his Lordship should seem just. The petition was followed by a statement of facts upon the part of the petitioner, and ultimately led to a record, which forms the subject of the present advocation. In their answers the Aberdeen Railway Company objected to the competency of the petition, in respect, that a decision of an arbiter cannot be enforced by a summary action,—*Murray v. Bisset*, 13th

May 1810, F.C.; and that the arbiter is not a party to the petition, and there is no recommendation by him to the Judge Ordinary to interpose his authority by granting warrant of imprisonment against the haver.

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The Sheriff, by interlocutor of 29th October 1851, confirming the opinion of the Sheriff-substitute of 18th October 1851, dismissed the petition; and the Messrs Blaikie advocated the cause.

The Lord Ordinary (Rutherford) remitted the cause to the Sheriff, with instructions to recall his interlocutors of the 18th and 29th October 1851; to find the petition competent; and to proceed to dispose thereof on the merits as accords of law, reserving all questions of expenses in the Sheriff Court, and finding the advocator entitled to expenses in the Court of Session.

In his note, referring to the objection that the arbiter had not specially recommended the Judge Ordinary to interpose his authority, he says—"The Lord Ordinary cannot concur in this. It may be very right that the Court, in granting diligence in the first instance, should require an express recommendation from the arbiter. Whether necessary or not, that has been usual. But there is no such question here. The point arises in the execution of diligence granted, and to which no objection is made. In the proper execution of that diligence thus granted, the parties before the arbiter have a clear and direct interest. The arbiter has sufficiently declared his opinion, by overruling the objection, and ordering the production. Is it necessary to have another recommendation from the arbiter, to remove this obstruction of the diligence, which, on his recommendation, has already been obtained? It would seem not, as at the best but an idle formality. Then, if the diligence be rightly granted, and the arbiter's express recommendation to enforce it be not necessary, the Lord Ordinary conceives that the party obstructed is entitled to come to the judge from whom the diligence proceeds, to shew that a witness under examination is acting in contempt of the diligence, and to ask him to enforce it, not *de plano*, but to pronounce his own order, with the proper certification, if it shall be disobeyed. There could be no better defence against the interposition of the judge, than that the judgment sought was to enforce an illegal order; but if that could not be stated, the Judge Ordinary is bound to see his own diligence enforced where he has legally granted it, whether the case depends before his own commissioner or before an arbiter. What is the meaning of a party holding diligence from a compe-

**Mar. 2. 1852.** tent court, competently granted, for recovery of documents, with certification as accords of law?"

**Pet. Blaikie v.  
Aberdeen  
Railway Co.** The Aberdeen Railway Company reclaimed.

*E. S. Gordon and Neaves* were for the reclaimers.  
*G. Young* was for the respondents.

The COURT adhered, with expenses.

*Lockhart, Morton, Whitehead and Greig*, W.S., Advocators' Agents.  
*Webster and Renny*, W.S., Reclaimers' Agents.

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### FIRST DIVISION.

This day, in presence of the whole Court, the Dean of Faculty, Adam Anderson, Esq., and John Inglis, Esq., presented their respective commissions, and were duly sworn in, as Lord Advocate and Solicitor-General, in room of James Moncreiff and George Deas, Esqs.

### FIRST DIVISION.

**No. 226.**

**GEORGE GUNN and ALEX. CLARK v. D. M. SMITH.**

*Bankruptcy—Trustee's Accounts.*—Question whether it is competent to appeal to the Sheriff from a judgment of the Commissioners pronounced in auditing the trustee's accounts, without first appealing to a general meeting of the creditors.

Before answer, an ordinary general meeting of the creditors appointed to be held, to consider and resolve anent those accounts, and the resolutions to be reported to the Court.

**Mar. 3. 1852.**

**Gunn &c. v.  
Smith.** This was an appeal from a judgment of the Sheriff of Sutherlandshire in the sequestration of Donald Macdonald, farmer and shipowner at Lochinver.

Donald McLeod Smith is trustee on the sequestered estate, and after realising the funds belonging to the bankrupt, he at various times submitted his accounts to the Commissioners to be audited. On 18th Feb. 1851 he laid his account and states before a meeting of the trustee and commissioners. The commissioners examined the accounts, and the majority of them came to certain resolutions disallowing various charges made by the trustee against the estate.

Against the judgment of the commissioners the trustee appealed

to the Sheriff, who partly affirmed and partly altered their deliver- Mar. 8. 1852.ance, and *quod ultra* remitted for farther explanation.

Against this judgment the commissioners appealed to the Court Gunn &c. v.  
Smith.of Session.

*P. Fraser* and *Solicitor-General* for appellant. The appeal to the Sheriff was incompetent, in respect that the trustee ought, in the first place, to have taken the opinion of the creditors, and only after getting their decision should the appeal have been made to the Sheriff. *Parlane v. Watson*, 28th June 1825; *Haston v. Chapman*, 1st March 1826, iv. S. 509; *Thomson v. Wight*, 31st May 1834. This was peculiarly necessary in the present case, because the charges made by the trustee were of that character that it was desirable in every view to have their judgment upon the subject, for the accounts presented the extraordinary fact of an expenditure by the trustee of L.742 : 2 : 2, while the whole sum realised from all this expenditure was only L.335. The particular items of these charges were also of such a character as to require investigation. Charges were made for a journey by the trustee to Edinburgh and Liverpool, at the same time that agents were paid for doing the same business in these cities. Large payments were also made for hotel bills, also to the trustee's gardener, and to his clerk—in other words, to the trustee himself; and a fee was also paid to Mr Sangster, one of the commissioners, contrary to law, for acting as judge of the roup at a sale of sequestrated effects. There were also charges made for payments of accounts for law agency to the trustee and his partners. The commissioners fairly audited these several accounts, and treated the trustee with liberality.

*Donaldson* and the *Lord Advocate* for the trustee. The appeal was competent to the Sheriff in respect that the commissioners had refused to audit the trustee's accounts, and, on the contrary, had proceeded to act contrary to the resolutions of a previous meeting of the creditors, at which a report from the trustee had been approved of, embodying all the items of the accounts objected to by the commissioners. The commissioners therefore having refused to do their duty, it was competent to appeal at once to the Sheriff.

**LORD PRESIDENT.** It is a very important question indeed, whether it be competent to bring at once into this Court, or before the Sheriff, every squabble between the trustee and commissioners, without going to the creditors in the first place. In the meantime,

Mar. 3. 1852. I do not wish to decide that point of competency before the facts are ascertained. I wish to know whether or not the general body of the creditors approve or not of these accounts; some of the charges in which certainly do require explanation. I will, however, give no opinion upon them until the resolution of the creditors is reported; and I propose that they should be directed to meet to consider the trustees' accounts, with the deliverances of the commissioners, and to report the result to this Court.

LORDS FULLERTON and CUNNINGHAME concurred.

LORD IVORY. This is an accounting with the trustee; and the Court, before deciding on it, ought to possess the authoritative judgment of the creditors. It is highly desirable to know what they have to say about the charges in these accounts. I say nothing as to the competency of the application to the Sheriff in the meantime.

Their Lordships, accordingly, "before answer, appoint a general meeting of the creditors to be held after due advertisement, for the purpose of taking into consideration the various accounts and proceedings which are the subject of dispute, and to report to the Court, with as little delay as possible after the date of said meeting, the opinions and resolutions of said meeting in regard to the said accounts and proceedings."

*L. Mackintosh, S.S.C., Appellants' Agent.  
Horne and Rose, W.S., Respondent's Agents.*

## SECOND DIVISION.

No. 227. Sir W. D. STEWART v. The SCOTTISH MIDLAND JUNCTION RAILWAY COMPANY and OTHERS.

*Process—Citation—Railway Company.*—In an action against a railway company the conclusions of the summons were directed against the "said defenders" without distinction; and the warrant to cite in the will of the summons charged "that on sight hereof ye pass and in our name and authority lawfully summon, warn, and charge the said defendants personally, or at their dwelling-places,"—*Held* that this was a good citation against the defendants personally and as a company.

Mar. 8. 1852. This was an action concluding alternatively that the defenders, directors of the Scottish Midland Junction Railway Company, should be ordained to complete a branch railway, called the Dun-Junction Rail-keld and Burnham Branch Railway, or that they should pay the pursuer the sum of £30,000 sterling, in name of damages for the

*Stewart v.*

*Scottish Mid-  
Junction Rail-  
way Co., &c.*

loss and injury sustained by reason of the said branch railway not Mar. 3. 1852.  
being made and completed.

The defenders *inter alia* pleaded the dilatory defence of no process, in respect of there having been no legal or competent service of the summons on the Company.

*Stewart v. Scottish Mid. Junction Railway Co., &c.*

The Lord Ordinary (Colonsay) "appoints the summons and defences to be printed and boxed with a view to being reported to the Second Division of the Court. Grants warrant to enrol."

His Lordship added the following note, which sufficiently explains the reasons and grounds of the plea of no process:—

"The summons is directed against the Scottish Midland Junction Railway Company, as a company incorporated by Act of Parliament, and against eleven individuals, as Chairman and Directors of that Company. The Company and these eleven persons are all called as *defenders*, and the conclusions are directed against '*the said defenders*,' without distinction. The warrant to cite, contained in the will of the summons, is in the following terms:—'Our will is herefore, and we charge you that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge *the said defenders personally, or at their respective dwelling-places*, to compear,' &c. The summons was executed by delivering copies personally to ten of the individual defenders, and by leaving for the eleventh individual defender (Lord Wharncliffe) a copy 'in the hands of a servant within his dwelling-house at Belmont Castle;' and it was executed against the Company 'by leaving for the said Scottish Midland Junction Railway Company, in the hands of Samuel Robert Ferguson, their secretary, within their principal office at the General Railway Terminus, near Perth, directed for their use,' a full double of the summons, and condescendence, and note of pleas. By the Companies' Clauses Scotland Act (8 Vict. c. 17, sec. 137) it is provided, that 'any summons, or notice, or any writ, or other proceeding at law or in equity, requiring to be served on the Company, may be served by the same being left at, or transmitted through, the post, directed to the principal office of the Company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the Company.'

"For the defenders it was contended—*First*, That, in the summons, there is no warrant for citing the Company; that when a Company and its individual partners are both to be cited, the law and practice is, that the will of the summons shall contain a war-

*Mar. 3. 1851.* *rant for citing the Company at its usual place of business, and for*  
*Stewart v.*  
*Scottish Mid.*  
*Junction Rail-*  
*way Co., &c.* *citing the individuals personally, or at their respective dwelling-*  
*places—and reference was made to the ‘ Juridical Styles ;’ but*  
*in the present case, the warrant for citing the Company had been*  
*omitted, and there was no warrant for citing it at its usual place*  
*of business, or for citing it at all ; that the words, ‘ said defenders,’*  
*in the will of the summons, could not apply to the Company, as*  
*it appeared from the context, that these words applied only to de-*  
*fenders who could be cited alternatively, either personally or at*  
*their respective dwelling-places, which the Company could not be.*  
*Second,* That, supposing the words in the will could be read so as  
*to comprehend all the defenders, including the Company, still the*  
*messenger, acting on that warrant, could adopt no mode of cita-*  
*tion other than one of those modes described in the will, which*  
*was his warrant ; that neither of the modes described in the will*  
*could be followed effectually in the case of a company ; and at all*  
*events, neither of them had been followed in the present case ;*  
*Third,* That a warrant to cite must describe the mode of citation ;  
*and that the citation must be in conformity with that description*  
*or direction in the warrant ; and consequently, although the will*  
*of the present summons could be read as comprehending the Com-*  
*pany in the authority to cite, but not comprehending the Company*  
*in the direction as to the mode of citation, it would be a defective*  
*and inoperative warrant, and no valid citation of the Company*  
*could proceed upon it ; Fourth,* That the Act of Sederunt, 8th  
*July 1831, to amend the style of the will of summonses, suspen-*  
*sions, and advocations, was not intended to regulate or affect the*  
*matter in question, but only to regulate the style of the will as*  
*regards the day of compearance.*

“ For the pursuer it was contended—*First*, That the Act of Sederunt, 8th July 1831, prescribed a form of will which was applicable to cases in which companies were defenders, as well as other cases, and that the will of the present summons was in conformity with that Act of Sederunt ; *Second*, The words ‘ that the said defenders,’ in the will of the summons, comprehended all the defenders, including the Company ; and that the succeeding words, ‘ personally or at their respective dwelling-places,’ were also not inapplicable, inasmuch as a company has a dwelling-place or domicile, especially for citation ; and inasmuch as one of the modes of service specified in the Companies’ Clauses Act is, by giving a copy ‘ personally to the secretary ;’ *Third*, That even if the words, ‘ personally or at their respective dwelling-places,’ should

be held inapplicable to the Company, the only result would be, *Mar. 3. 1852.*  
 that there was no special direction as to the mode of citing the <sup>Stewart v.</sup> Company, and that the messenger was therefore at liberty to fol- <sup>Scottish Mid.</sup>  
 low any mode by which a company could legally be cited, and he <sup>Junction Rail-</sup>  
<sup>way Co., &c.</sup> had done so, following the direction of the Act of Parliament as his legal guide and authority; *Fourth,* That the Legislature having, by Act of Parliament, declared that any summons requiring to be served on a company, may be served in a particular way, such service must be held good in law, and the party cannot be deprived of the benefit of the enactment, merely because the style of the will of summonses has not yet been altered; but such would be the effect of the defenders' plea, for neither the form in the 'Juridical Styles,' if that had been strictly followed, nor any other form of will of summonses hitherto in use, contains a direction for citation similar to that in the Act of Parliament.

"As the preliminary defence thus pleaded raises, in one view of it, important matter of practice, which it is desirable should be speedily settled authoritatively, and as the parties seemed to wish that the case should be reported to the Inner-House, the Lord Ordinary has thought it not improper to adopt that course.

"No argument was offered at the bar in support of the separate objection to the citation of Lord Wharncliffe."

*Penney* for the defenders, and in support of the plea, referred to *Mair*, 28th Feb. 1629, M. 3684; *Monteith*, M. 3685.

*Marshall, contra*, cited *Braco*, 22d July 1747, M. 3782.

**The LORD JUSTICE-CLERK.** I think the Company were properly cited under either expression. The phrase "their respective dwelling-places" means a domicile for citation. The summons was correctly served on the Company, and I think "personally" served.

The other Judges concurred.

The COURT repelled the dilatory defence of *no process* founded on the citation of the Company, and remitted to the Lord Ordinary to proceed accordingly, and found expenses due.

*James Bayne*, S.S.C. Agent for Pursuer.

*Graham & Webster*, W.S., Agents for Defenders.

## FIRST DIVISION.

No. 228.

**BALFOUR v. LAING AND OTHERS.**

*Bankruptcy—Competition—Bill of Lading—Preferable Title.*—A merchant in Riga bought and shipped flax for certain merchants in this country, in compliance with their order. To pay for this flax he borrowed L.1000 from a Riga firm, and in security of this advance, he placed in their hands bills drawn on his agents in London, and also endorsed to them the bill of lading. In a few days thereafter he died bankrupt. In favour of his London agents he had drawn bills on his constituents in this country for the price of the flax. These bills were paid when due; but his agents refused to honour the drafts in favour of the Riga firm: Circumstances in which *Held* in a competition between the drawees and the Riga firm as to the value of the cargo, that the indorsee of the bill of lading possessed a preferable title over the other creditors.

Mar. 3. 1852. This was a multiplepoinding brought by the owner and master of the *Hero* of Dundee, for the purpose of having it found that they are only liable "in once and single delivery of" a cargo shipped on board the vessel, in terms of a bill of lading, and of ascertaining to which of several competing parties they are bound to make such delivery. The action was originally raised in the Sheriff-Court of Dundee, and was advocated by Balfour whose interest was adverse to that of all the other parties in the competition.

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Balfour v.
Laing, &c.

In 1834, Luplau, a merchant in Riga, received from Baxter Brothers, and other respondents in this action, merchants in Dundee, certain orders for flax, in compliance with which he bought ninety-three bales of flax, and placed them on board the ship *Hero* of Dundee, which had been chartered by his agent at that place. On 6th April, James Norrie, the master of the vessel, signed a bill of lading for this flax, which was made deliverable at Dundee to Luplau's "order or assigns." To pay for the flax so purchased and shipped by him, Luplau obtained an advance of L.1000 from Messrs G. W. Schroeder & Co. of Riga. In security of this advance he placed in Schroeder & Co.'s hands bills for various sums, amounting in all to L.1000, drawn by him in their favour on Messrs Chalmers & Guthrie of London, and payable on 20th July 1834. They were duly accepted by Messrs Chalmers & Guthrie, the drawees, who refused to pay them when they fell due. On 5th April Luplau drew in favour of Chalmers & Guthrie a bill for L.1000 on the respondents, Baxter Brothers, and another bill for the same sum on the respondents, Holden & Clark. These were also payable on 20th July. The drawees duly accepted them on the faith of the expected shipment of flax,

and paid them to Chalmers & Guthrie when they fell due. There Mar. 8th 1852.
were thus placed in the hands of Chalmers & Guthrie funds to
the amount of L.2000 as a provision to meet the bills drawn by ^{Balfour v.} Laing, &c.
Luplau in favour of Schroeder & Co. *pro* L.1000, and bills for a
similar amount in favour of Messrs Wohrman, merchants in Riga,
but which did not enter into the present proceedings. The ex-
planation given by Messrs Chalmers & Guthrie of their refusal to
honour Luplau's drafts upon them was, that a heavy balance
(about L.4500) was due by him to them on general account, for
which they claimed and received a trifling dividend. By taking
payment of the bankrupt's drafts on Dundee, and refusing pay-
ment of his drafts on themselves, they could thus decrease their
loss to the extent of L.2000. Messrs Wohrmann declined this
arrangement, and accordingly their claims were liquidated; but
Messrs Schroeder & Co. forbore to enforce payment of theirs,
and proceeded to act upon the security of the bill of lading which
Luplau had endorsed to them.

A few days after the shipment of the flax on board the *Hero*,
Luplau was found drowned in a lake near Riga. He died a
bankrupt. He had previously, on 11th April, enclosed in a letter
to Schroeder & Co. the bill of lading endorsed by him, and with
the view of recovering the contents of the bill of lading, they en-
dorsed it to Wilson & Co., their agents in London, who trans-
ferred it to the advocate Balfour. The *Hero* arrived in Dundee
on the 23d of June 1834. Balfour immediately served upon the
master a notice "not to deliver to any person or persons whom-
soever the said ninety-three bales of flax, but that you hold the
same, and every part thereof at my order and disposal." Duff,
one of the respondents, who had accepted a draft of Luplau on
the faith of an expected shipment of flax, also took immediate
measures to obtain possession of the cargo. He presented a peti-
tion to the Sheriff for delivery to him, and for interdict against
delivery to any one else. In these circumstances this action was
raised. The cargo was subsequently landed and judicially sold.
The proceeds were, after payment of freight and sound dues, con-
signed in the hands of Court, and now form the fund *in medio*.

A preference upon this fund, to the exclusion of every other
competitor, is claimed by Schroeder & Co., through their agent
Balfour. This claim of preference rests upon the bill of lading of
6th April 1834. The advocate maintains that it vests him with
a real right of ownership in the flax, for which it was granted by
the shipmaster. The respondents, as onerous creditors of Lup-

Mar. 3. 1852. Balfour v. Lau, maintain that this bill is a void title of preference in competition with them, and that the fund is therefore liable to be distributed in satisfaction of their claims. The representatives of Luplau were duly cited to this process, but no appearance and no claim is made for them in the present competition. No appearance was made for Chalmers & Guthrie.

A long course of procedure took place in the Inferior Court. In 1836 a proof was allowed the parties of their respective averments; and thereafter a proof was taken in Riga, in London, and in Dundee. In 1844 the Sheriff-substitute (Henderson) found it proved that Schroeder & Co. had received payment from Chalmers & Co. of a sum equal to the amount of the bills held by them, that Alexander Balfour is the mere indorsee of the bill of lading, and, as such, cannot, in the circumstances in which he holds the same, be held as an onerous holder thereof in a competition with the other claimants (Luplau's onerous creditors) for whose behoof the common agent acts. He therefore "repelled the claim of the said Alexander Balfour, and decerns accordingly: Finds said claimant liable in the expenses of process," &c. To this interlocutor the Sheriff (L'Amy) adhered on appeal, adding in a note, that, "under the whole circumstances of the case, as admitted and proved, the bill of lading must now be considered as held for the behoof of the parties who ordered and paid for the flax, and cannot be used as a means of enabling Messrs Chalmers & Guthrie to make good their claims against Luplau's estate on transactions totally unconnected with the flax in question, which is substantially the object here."

Balfour presented a note of advocation against the Sheriff's judgment, and the Lord Ordinary (Ivory,) on 20th July 1847, "Finds, that the advocator, Mr Balfour, is the only party in this competition who has exhibited any title in his person to any portion of the cargo of flax, which forms the subject in dispute; and finds that the said title, which is duly constituted by bill of lading, regularly endorsed in his favour, (so long as the same stands unopposed by a conflicting and preferable title, and is not reduced or set aside at the instance of some party duly connecting himself with the said flax, as having a right of property or other radical right therein,) is *prima instantia* and on the face of it, such as to have entitled the said advocator, at the date of raising this multiple-poinding, to insist against all concerned for instant delivery of the said flax, as being habile and effectually carried to and vested in him by virtue thereof: Finds that each and all of the other competing parties were, at the date of said multiplepoinding, and are

still wholly without right or title of any kind connecting them Mar. 8. 1852. with the said flax, and that they stand confessedly at this moment ^{Balfour v.} in no closer relation towards it than as mere general creditors of Laing, &c. Mr Luplau, the original shipper thereof, and the first indorser of the bill of lading, now held by the advicator: Finds that, in this situation, none of these parties were, at the date of raising the said multiplepoinding, *in titulo*, either to demand delivery of the said flax in their own favour, or to call in question the advicator's title thereto, even assuming it to have been otherwise competent in the shape of multiplepoinding, and in an Inferior Court to bring under challenge the right conferred upon the advicator by the indorsed bill of lading: Therefore, without going further, or at all entering upon any question connected with the proof (which, on the above view of the case, ought never to have been allowed,) advocates the cause: Finds, that delivery of the flax to the advicator was at first unduly obstructed and postponed by bringing the multiplepoinding, and now prefers the advicator as having sole and exclusive right to the whole proceeds of the said flax, which (having been realised in course of the proceedings) now practically form the fund *in medio*: Repels the claim of all the competing parties, and decerns: Finds the advicator entitled to expenses, both in this Court and the Court below," &c.

Against this interlocutor the respondents reclaimed, and the Court remitted "the case back to the Lord Ordinary to hear parties farther, with power to recal his interlocutor, and do further as he shall see cause," &c.

His Lordship appointed parties to prepare and lodge cases arguing the whole cause, requiring each of the claimants (opposed to Balfour) to explain the precise grounds upon which he maintains his own individual right to be preferred upon the fund *in medio*, as distinguished from that of his competitors.

The claimants argued that the multiplepoinding was competent, and that arrestments *ad fund. jurisdict.* were unnecessary, *Mansfield*, M. 2595, *Miller v. Ure*, June 23. 1838. Balfour's title is not sufficient *per se* to exclude all the other competitors. A bill of lading does not so represent the cargo that in all circumstances the endorsement of the one is equivalent to delivery of the other. *Lickbarrow v. Mason*, 2 Term. Rep. 75; 1 Bell's Commentaries, 198. A bill of lading held without value is no title of property in the cargo, *Coxe v. Harden*, 4 East 211; *Waring v. Cox*, 1 Campbell's Rep., 370. The respondents have a sufficient title as general creditors of Luplau. No objection being made by Luplau's representatives after due citation, it follows that if

Mar. 8. 1852. Balfour v. Laing, &c. there had been no bill of lading the respondents would have been entitled to payment out of the fund *in medio*, and this is sufficient for procedure to set aside a title interposed as an obstacle to payment. *Mackenzie*, M. 16099; *Couper*, M. 3203, 3 Ersk. 8, 100. Chalmers & Guthrie had no *jus quaesitum* in the bill of lading, no transaction respecting it having ever taken place between them and Luplau. *Gray v. Ross*, M. 7724; *Baird v. Murray*, M. 7737.

For Balfour it was argued that *ex facie* the bill of lading is a complete title to demand delivery of the cargo, 1 Bell, 198, 546. The respondents were not *in titulo* to compete with him. *Brown v. Brown*, June 24. 1709, Dict. 16101; *Rodger v. Darroch and others*, June 2. 1831, 9. S., p. 671.

The Lord Ordinary having resumed consideration of the process and advised the cases for the parties, made *avizandum* with the cause to their Lordships of the First Division.

The case was called to-day.

Hallard and the *Lord Advocate* for the reclaimers.

Cook and Neaves for the respondent (advocator.)

The LORD PRESIDENT, Lords FULLERTON and IVORY, agreed that the bill of lading having been validly transferred to Balfour, his title was preferable to all others in a competition with Luplau's general creditors.

LORD CUNINGHAME also concurred. He held that, if it were clearly proved who retired the bills in security of which the bill of lading was endorsed, the person who took up those bills would be preferable on the cargo as a collateral security. But on this point the parties are at variance as to the fact. Nothing is proved to shew that Schroeder and Company, who advanced to Luplau, the first indorser of the bill of lading, have been repaid the bills they discounted, and as Balfour represents them, no claim is preferable to Schroeder and Company in this competition. The other parties have hitherto instructed no title in any respect equal to Balfour's. The following interlocutor was pronounced:—

“ Having resumed consideration of the cause, with the revised cases for the parties, find that it is admitted on the record that the bill of lading was obtained from Luplau by endorsement and delivery before his death, and with this additional finding, recur and adhere to the Lord Ordinary's interlocutor of 20th July 1847, find additional expenses due.

Lockhart, Morton, Whitehead & Greig, W.S., Advocator's Agents.

William Miller, S.S.C., Respondent's Agent.

SECOND DIVISION.

MARSHALL v. THE OMOA AND CLELAND IRON AND COAL COMPANY.

No. 229.

Process—Jury Trial—Master and Servant—Liability of Master for Injuries to Servant—Culpability of Servant.—(1.) *Held*, under special circumstances, that the proprietor of a coal pit is not liable for injuries received by his workmen when not engaged in proper service, although caused by a defect in the construction of the shaft: (2.) *Held* unnecessary to make the fact of the workman being improperly occupied at the time of receiving the injury the subject of a special plea in law or counter issue, in order to enable the defender to take advantage of it, on its emerging at the trial on the pursuer's proof.

(Sequel of case reported *ante*, p. 146.)

At the trial evidence was led for both parties in support of their Mar. 3. 1852. averments, and from which it further appeared, that at the time of receiving the fatal injury Marshall had been leaving the pit, in company with the other workmen, for the purpose of making some complaint against Craig, who was also the under ground manager, and at a time other than the usual time for leaving their work. On the other hand it was proved that the men all wrought by piece work. Craig was one of the defenders' witnesses, and was admitted, on the defenders' counsel engaging to discharge him from any liability which he might be under to relieve the defender, in the event of being found to have been a contractor to uphold the works. The other facts will sufficiently appear from the finding of the jury and the subsequent argument.

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The Lord Justice-Clerk left the case to the jury under the following directions:—

1. That if they were satisfied, in point of fact, that on the morning of the 11th January 1849, the men left the mine without working, from no apprehension of danger, but of their own accord, for a purpose of their own, against their employer's interest, and in a body, in order to make some complaint tell more effectually with the manager or the defender, and not in the ordinary course of their occupations,—then, in point of law, the defender is not answerable for a casualty caused by a single stone falling at that particular moment when the men were so leaving, and that the jury must, if so satisfied in point of fact, find for the defender, and state their ground for doing so—even if they should be satisfied that the death was caused by that stone, or other substance, falling on the deceased, through some insufficiency in the planking.

Mar. 8. 1852. 2. That in case the Court should differ as to this point of law, *Marshall v. the jury would go on to consider whether the death was caused in Omoa and Cle- the manner contended for by the pursuers, in consequence of the land Iron and shaft being in an unsafe and insufficient state; and if the jury Coal Co.*

think that the death was not caused by the shaft being in such state, then they will find so in their verdict. If the jury think that the death was caused by the unsafe and insufficient state of the shaft, then they will so find, and find damages to be due, as settled by minute of the parties, as the defender, in point of law, is responsible for the death, if so caused, and if not relieved on the first ground.

3. In the last view of the case, if the jury think the death was caused by the shaft being in an unsafe and insufficient state, then the jury will further consider and find whether John Craig was, in point of fact, properly a contractor, or truly a servant, paid for his labour, in regard to the lining of the shank, in a particular manner, convenient for his master.

And the Lord Justice-Clerk, as arranged with the counsel, informed the jury, that he reserved to the pursuers, in the event of the verdict being adverse to them on the first point, but in their favour on the second, to move the Court to enter up the verdict for them, for the amount of damages agreed on, on the ground that the direction on the first point was wrong in point of law, and that the defender was not relieved from his responsibility in respect of the facts referred to in that direction.

And he reserved to the defender, in the event of the verdict being unfavourable to him on the second point, to argue to the Court, that the question whether John Craig was to be considered, for the purpose of this issue, as a contractor, or properly as a servant, was a question of law for the Court, on which the Court is to pronounce judgment, notwithstanding the finding of the jury, if they consider it a point of law; and we also reserved to the defender to contend, that on the evidence he is not responsible for neglect in matters falling within the contract or duty of Craig, whether he is to be taken as a contractor or as a servant, and to move the Court to enter the verdict as one in his favour, if he prevails on that ground, in point of law.

The jury returned the following verdict:—"On the first point they find for the defender, and that the men had no proper cause for leaving their work. On the second point, they find that the pit was not in a safe or sufficient state, and that the death arose from injuries thereby caused, and in terms of the joint minute

lodged for the parties they assess the damages at L.150, being L.100 for the widow and L.50 for the children. On the third point, they find that Craig was not a proper contractor, but properly a servant of the defender."

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In consequence of this verdict, and in terms of the reservation in the Judge's directions, the pursuers now moved to have judgment entered up in their favour; the defender also moved that judgment be entered up for him, on the first part of the verdict, as being one for them.

Wood and Dean of Faculty for pursuers. The point as to whether any thing in Marshall's own conduct relieved the defenders of their liability in consequence of his death ought not to have been made the subject of any direction to the jury, or of their consideration at all. The question does not fall within the issue, nor was there in the record any plea in law on which an issue to such effect might have been founded. But although the question had legitimately come under the jury's notice, still the direction in law is unsound. It is the master's duty to provide safe modes of transport to and from the place of employment, and it cannot be held that this is only limited to the stated hours, especially where, as here, the men were working by the piece, and therefore were their own masters as to hours. There are many cases in which the fact of the sufferers having been in an illegal situation has been found no defence to the owners of the places in which they meet with injury. *Whitelaw*, 27th Dec. 1849; *Black v. Cadell*, 9th Feb. 1804; *Mack v. Allam*, 17th Feb. 1832, 10 S. 349; *Histlop v. Sir P. Durham*, 14th March 1842, 4 D. 1468; *Greenland v. Chapman*, 8th May 1850. Law Journal Rep., p. 293; Exchequer.

Macfarlane and Inglis for defender. In the first finding the Jury gave a verdict for the defender on every point contained in the first direction of the Judge, to which they refer, and they add further, that the men had no proper cause for leaving their work. As to their master, they were therefore engaged in an unlawful act. The objection that the defence of their unlawful conduct is not made the subject of a plea in law, or a counter issue, is untenable. A defender is not bound to state negative pleas. Nor is it necessary to state pleas in anticipation of the facts which might be proved by the pursuer's own witnesses. No counter issue is necessary to let in such proof. In *Whitelaw's* case, the boy was actually working in his master's service; and it is therefore totally different from this. The other cases were where open coal-pits

Mar. 8. 1852. or cellars were left unfenced close to footpaths or streets, and into which it could scarcely be called an illegal trespass, if a passer-by were to stray.

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LORD JUSTICE-CLERK. I wish to make some preliminary remarks. When a special plea is raised by either party on the evidence at a trial, the Judge must consider both whether it is truly raised by the facts, and whether it is well founded in law. If he thinks the facts do not raise the point, he tells the Jury to lay it out of view; and this opinion is subject to the review of the Court afterwards. If he thinks they do not raise the point, then if a verdict is to be got at all, he must go on to instruct the Jury what facts it is necessary they should consider, and what legal effect these facts will have in their verdict, if they shall think them proved. The direction, therefore, must be judged of apart from the subsequent verdict, nothing in which can support it if it were unsound, nor invalidate it if it were good in law, and to which, in judging of that, it is incompetent and illogical to refer. As to the first objection by the pursuers, that no question as to Marshall's culpability could be raised in consequence of a want of plea and issue to that effect, I think it inadmissible now. It was not raised at the trial, and no point is better fixed than that such an obligation, if not specially made at the trial, when the circumstances first arise to which it applies, cannot be listened to afterwards. But even if we could have now considered it I should have held it unsound. I think the defence within the record and within the issue. And there are many lines of defence competent at a trial, though they have not been pleaded in the record. The pursuer must always prove his own case, and cannot get over any difficulty which his own proof may lead him into by the allegation that there is no plea of the defender by which it can be taken advantage of. I do not think any of the cases cited go against the soundness of the direction. In *Whitelaw's*, the boy was only a few feet distant from his proper place, was engaged in his proper work, and received his injury from a *continuing* source of danger, a defective chain. All the facts in this case are different. In the other cases the parties injured were all strangers, and hence no question of liability as between master and servant arose. Moreover, in all of them there was a failure on the part of the defender in the duty he owed to the *public*, and hence he could not plead any *individual's* fault or negligence as a defence. But although not ruled by any previous case, I thought, and still think, the question raised here, how far the special circumstances relieve the de-

fender of his ordinary liability for the consequence of such a casualty, a very nice and doubtful one. On the whole, I have come to think that the direction lays down the law in the most safe and correct way. But this is only with reference to the special facts of this case.

LORD MEDWYN. I think the course taken at the trial in giving the directions now under consideration was the most proper that could have been adopted, with a view to prevent the possibility of a new trial being required. The jury, by their first finding, affirm the facts set forth in the first direction, in which the fact that the death was occasioned by a single stone is contained. And they further find that Marshall had no business at the time to be where that stone fell. I must hold that this relieved the defender of his liability in the event of an accident occurring. I think that the severe responsibility imposed on the master is limited by the obligation on the workmen not to incur further risk than their duty to their employer involved. And where they acted against that duty, I think they liberated the master from his obligation to insure their safety. None of the cases cited are applicable, or contain any principle adverse to this. I do not think the statement that the men were employed by piece work material, for regular hours were still proper, and the jury have expressly found that the work ought not to have been left. By leaving it the men lost the character and the rights of servants, and became mere strangers, so far as the master was concerned; and it cannot be said that a master, though he may be bound to give a stranger the means of egress, is under any responsibility for the safety of these means. I do not think the want of any express plea or issue as to Marshall's culpable conduct a bar to giving it effect when established on the proof.

LORD COCKBURN.—In judging of the soundness of the directions (which I think were a competent and most proper course for raising the questions now to be decided,) we must adhere *strictly and exclusively* to the exact facts on which the jury were told that the law depended. We have no business with the questions which were discussed on both sides at the bar, whether the men had gone down on the day of the accident with the intention or not of working, and were entitled or not to have work when they choose. If we could have gone into these points, I certainly can see nothing in the proof to establish that they did not go down to work, so that as working by the piece, they might not leave off when it suited them, or that the purpose for which they came up

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Mar. 8. 1852. was improper. But taking the facts in the direction as confirmed by the jury we find only that (for all that appears) having gone down the pit lawfully they left it for a purpose of their own. But Marshall v. Omoa and Cleland Iron and Coal Co.

this purpose might be one perfectly justifiable, and if it was so, it is not pretended in the direction that by such an act they freed the master from his responsibility is sound. But if the direction was unsound we have no sound verdict. It is preposterous to found on the further finding in the verdict that the purpose was improper, to justify the direction which said nothing about its impropriety. But even granting that the purpose had been illegal, I do not think it would have relieved the master of his obligations. The authorities cited are decisive of the principle. It cannot be maintained that the duty of carefulness need only be practised in favour of such of the lieges as are acting with strict legal correctness. Poachers would have little to say against spring-guns on this principle, drunkards against open pits, trespassers against ferocious dogs, or wild bulls. A master is bound to keep the stair of his house in a condition consistent with the safety of his domestic servants. One of them is killed coming down. Is it any answer to a claim of damages that the servant was leaving the house, not merely in disobedience, but with a design of breaking his contract, and not returning. This was a *purpose of his own, against his master's interest*; but still he was not obliged to submit to be tumbled over a broken stair. Marshall may have been wrong in not staying in this pit a few hours longer than he did; but I have no idea that this justified his master in killing him. I am therefore of opinion that judgment should be given for the pursuers.

LORD MURRAY concurred with the Lord Justice-Clerk and Lord Medwyn.

The COURT refuse the motion for the pursuers on the question reserved for them, viz., to move on the ground that the direction on the first point was wrong in point of law, that the verdict should, on that ground, be entered up for them on the second branch of the verdict, namely, as a verdict for damages in their favour; and on the motion of the defender find, in respect of the said deliverance, that the verdict must be entered up on the first part of the verdict as one for the defender, and therefore assoilzie the defender from the conclusions of the action, and decern.

Scott and Gillespie, W.S., Pursuer's Agents.

Gibson-Craigs, Dalziel and Brodie, W.S., Defenders' Agents.

COURT OF EXCHEQUER.

No. 230.

The ADVOCATE-GENERAL v. SMITH.

Legacy Duty—Trust Settlement—Codicil.—Where duty was claimed on a sum of money as part of the clear residue of the funds arising from the sale, or other disposition of real estate, directed by testamentary instruments to be sold or otherwise disposed of:—*Held*, that such duty was not due; that from the terms and provisions of the testamentary instruments, the power did not import a direction to realise; and that the balance of the proceeds of the heritable debt, after paying debts and legacies, so reinvested, was not moneys arising from the sale or disposition of real estate, within the meaning of the Acts 55 Geo. III. c. 184, sch. part iii., and 8 and 9 Vict. c. 76, § 4:—*Held*, that a cancelled codicil might be looked at for interpreting the terms used in the trust-deed.

This was an information for legacy duty on a part of the re- Mar. 1. 1852.
sidue of the estate of Jean Watson, deceased, in regard to which ^{Advocate-}
a special verdict had been returned. ^{General v.}
^{Smith.}

The information set forth, that on 2d September 1850, the defendant was due her Majesty the sum of L.600; for that the testatrix gave, by her testamentary instruments, to the Rev. William Dutby, the clear residue of the moneys to arise from the sale and other disposition of certain real and heritable estate, directed by her testamentary instruments to be sold and otherwise disposed of. That the defendant was a trustee, to whom the said real and heritable estate, out of the moneys to arise from the sale and other disposition of which the said clear residue was to be paid and satisfied, was devised, and being such trustee, he had retained for the said William Dutby L.6000, *part* of the said clear residue, and that the duty which was due and chargeable for said part was L.600; and that the defendant did not, before so retaining the said part of the said clear residue, first pay the said duty.

The special verdict found the facts of the case. It contained the testamentary instruments of the testatrix, which consisted of a general disposition to trustees, and three holograph codicils.

By the trust-disposition she conveyed her heritable and moveable estate to the trustees, and directed them to pay debts, lay out sums to secure certain annuities, and provide certain liferents and fees, and to pay various special legacies, among which is a legacy of L.200 to the residuary legatee: “And *lastly*, I direct my said trustees to *pay* the whole residue of the said trust-estate and effects, heritable and moveable, to the Rev. William Dutby, one of their number, whom I hereby appoint my residuary legatee, or to his

Mar. 1. 1852. heirs and executors whomsoever." Then follow ample powers to the trustees for carrying out the trust, among which are—"with power to the said trustees to enter into the possession of the said trust-estate and effects, to call and sue for, uplift and receive the rents, maills and duties, interests and annual profits of the same, and to grant discharges thereof, which shall be as valid and effectual to the receivers, as if granted by myself; as also, with power to out-put and in-put tenants, and to grant tacks or leases of the lands and heritages hereby conveyed, for such periods, at such rents, and on such conditions, as to them shall seem proper, with power also to the said trustees to appoint one of their number, or such person or persons as they shall think proper, to be a factor or factors under them, for the management of the said trust-estate, and to allow such factor a suitable gratification for his trouble; and with special power to the said trustees to compound, transact, and agree, or to submit and refer any questions or difficulties that may arise between them and any other persons, in relation to the said trust-estate and effects, or any debts or claims which any persons may have, or charge against me or my said estate; all which transactions and submissions, with the decrees-arbitral to follow thereupon, shall be valid and effectual. And also, with power to the said trustees to alter or vary such funds, stocks or securities, in or upon which I shall have placed my funds, or upon which they shall have lent or placed out the moneys coming into their hands, in virtue of the present trust for other securities, when and so often as it shall seem to them expedient; with power also to the said trustees to sue for, uplift and receive the principal sums of the debts, heritable and moveable, hereby conveyed, to discharge and assign the same, and renounce or dispone the securities held therefor: As also, to sell and dispose of all or any part of the said trust-estate and effects."

The codicils, which were in the shape of holograph letters addressed to the trustees, contained numerous special legacies. The only reference to the residue of the estate is in the first one, which is revoked by the third, and another letter substituted for it. By that cancelled codicil it was provided:—"If upon winding up this trust, at whatever period appears most suitable to you, it shall be found that the *sum* falling to the residuary legatee, the Rev. William Duthy, shall exceed L.2000 sterling, then and in that case I leave and bequeath the surplus funds, to be equally divided betwixt his brothers and sisters, or to their representatives."

The special verdict then found—

Advocate-
General v.
Smith.

That the personal estate of the testatrix amounted to L.4203, Mar. 1. 1852.
15s. 3d., and that she had a debt of L.16,000 belonging to her at
the time of her death, heritably secured over the estate of Lauri-
ston, in the county of Kincardine, of which the defendant, on 15th
May 1847, obtained payment by transferring it to a new lender.

Advocate-
Smith.
That on the 18th August 1847, special legacies to the amount
of L 10,000 and upwards, were paid, and L.3500 of undischarged
burdens remained upon the estate; and to enable the defendant to
pay these legacies, he had to use upwards of L.6000 of the heritable
debt of L.16,000; and to settle the undischarged burdens upwards
of L.3000 further of the said heritable debt was required.

That at the 2d September 1850, there was in the hands of the
defendant, as trusteeforesaid, a bond and disposition in security
of the value and amount of L.6000, dated 10th August 1848,
granted by Donald Smith, Esq., in favour of the said David
Smith and others, as trustees of the testatrix; which sum, so in-
vested as aforesaid, formed a part of the residue of the testatrix's
estate; and that the said William Duthy, as residuary legatee
foresaid, had, on the 2d September 1850, the sole and exclusive
right to the said residue.

The case was argued before Lords Cuninghame and Ruther-
furd, on 15th December 1851; and again, in presence of Lords
Fullerton, Cuninghame, Murray, Robertson, and Rutherford, on
the 26th January 1852. The Court took time to consider, and
Lord Rutherford delivered the judgment of the Court on the 1st
March 1852.

*The Lord Advocate (Moncrieff), the Solicitor-General (Deas,) and
Donaldson for the crown.*

The Dean of Faculty (Anderson), and Inglis for the defendant.

LORD RUTHERFURD. The question is, Whether the Rev.
William Duthy is liable in residue duty, in respect of that sum of
L.6000—the amount of the duty, if any is due, being L.600, as
he is not within the degree of relationship that entitles him to take
at a smaller amount of duty?

This question, which arises under 55 Geo. III., imposing duty
upon ‘the clear residue to arise from the sale, mortgage or other
disposition of any real or heritable estate, directed to be sold, mort-
gaged, or otherwise disposed of by any will or testamentary in-
strument,’ must in every view be decided upon the terms of the
testamentary instruments, recited in the special verdict, considered
in their result and as a whole. Even where it may be competent to
refer to the mode in which the testator's trustees may have actually

*Advocate-General v.
Smith.*

Mar. 1. 1852. dealt with property in the execution of the will, the term of the will itself must still ultimately furnish the grounds of decision. In this case, the testamentary instruments contain no words of positive direction to sell the heritable estate or realize the heritable debt. Such direction, however, is not necessary to make the duty attach. For where, as here, there is a power to sell lands or realize heritable debt, the requirements of the statute will be satisfied, if, from the whole scope of the instrument, it appears that the testator intended sale, and that he gave the power in circumstances which implied its execution. So, accordingly, it has been found in a variety of cases, such as those of *Williamson* and *Blackburn's* trustees—the former decided in this Court on the 23d of January 1840, and the latter on the 3d of April 1847. The same doctrine has been repeatedly recognised in the English Courts.

In proceeding to the construction of the will, which contains not directions, but power to sell, the Court is in this case without the circumstances which have hitherto been relied upon as supporting the inference of direction. The residue is given to one person only; and, by partially exercising the power of realizing the property, effect can be clearly given to the residuary bequest as well as to the legacies. Then it is very important to observe that the testatrix is dealing with an heritable bond, which though no doubt real estate by the law of Scotland, is very different from an estate in land, when a question is raised as to the expediency or necessity of a partial or absolute sale.

The points relied upon by the Crown are reduced to a narrow compass. The first purpose of the trust is plainly unimportant. But there is a power of sale, and the trustees are directed to pay the whole residue of the estate, heritable and moveable, to one residuary legatee; and in the codicil of 18th May 1842, the testatrix speaks of the residue as the sum falling to the residuary legatee, and after limiting his bequest to L.2000, disposes of the rest as surplus funds. Holding it competent to refer to the cancelled codicil as explanatory of the testatrix's language, it still leaves the case materially where it stood, under the direction to pay the whole residue of my estate, heritable and moveable, to one party, the residuary legatee.

After the best consideration we have been able to give the case, we are of opinion, that this expression, as applied to residue, arising out of heritable debt, and giving that residue to one person, affords too slight a foundation for construing a power of sale into a direction to sell. And here, it is not immaterial to observe, that the power of sale is itself included in general powers of manage-

ment, and is not granted with *any special reference to the execution of the ultimate purposes of the trust*. On the whole, therefore, we are of opinion, that the terms of the deed and testamentary instruments, considered in themselves, do not, in this case, support the demand for duty, or satisfy the requirements of the statute, assuming that direction to sell may, in many instances, be construed from a power of sale.

But the liability for duty was put upon another ground, arising from the actings of the trustees, in the execution of the deed, combined with the power of sale. We, however, apprehend it to be involved as a principle, that what the trustees do, if their dealing be founded on, shall be done by them in the necessary or at least plain and natural course of their execution of the trust. For if the trustee sell, *not* in execution of the trust—*not* in obedience to the testator's will, their actings have no relevancy. In like manner, if the trustees shall change an investment merely from one form to another, simply in ordinary management, and for better preservation of the estate, that change of investment cannot be considered as a part of the execution of the trust, nor can the circumstance of a temporary alteration of the investment of the estate into money, not for ultimate distribution, be held to have changed a conditional into an absolute direction. We think this is eminently the case here. The trustees no doubt found it convenient to realize the whole bond for L.16,000. They might have found it difficult to raise L.10,000 of it, leaving the rest on the original investment; but though it was in their hands in the shape of money, till they could find a new investment, they did, in point of fact, and within a year, reinvest it upon real security; and it stood in their names as trustees, under an investment of the same nature with that heritable investment under which they received it. They can now, without further change of investment, execute the purposes of the trust, by assigning the heritable bond, as they might have assigned so much money in the stocks. We do not, therefore, find in this alternative view, any more than in the former, sufficient ground for the imposition of duty.

This is the unanimous opinion of the Judges who heard the argument, and as it has been considered and approved of by them, and as they concur in the judgment, and the reasons assigned for it, we have not thought it necessary to request their attendance, which would have been only *pro forma*.

Our judgment, therefore, upon the special verdict, is for the defendant, in whose favour the verdict must be recorded.

The Solicitor of Inland Revenue for the Crown.

R. Ainslie, W.S., Attorney for Defendant.

FIRST DIVISION.

No. 231.

THOMSON'S TRUSTEES v. ALEXANDER and OTHERS.

Testament—Construction.—Terms of a holograph will and relative documents which were held sufficient to confer right to an annuity for life of a specified amount on the persons benefited by the deed, but insufficient to carry the capital or fee of the estate.

Sequel of case reported *ante*, p. 197.

Mar. 4. 1852. This case now came to be disposed of on the merits. The question to be considered was the effect to be given to the holograph will, by which the testator directed that the whole of his landed property, money, goods, and personal effects was to be vested in certain trustees named in the deed as trustees for his whole property, "and the interest of the whole I give towards the support of my daughter, Mary Ann Thomson, or as much as my trustees may think proper to allow her for her support. The first year after my death I will allow her L.70 sterling per annum, and the like sum each year afterwards, during the time she remains unmarried; but if you consider this sum too small to make her comfortable, you, of course, can add such sum to the former as you may think proper, so as to make her comfortable in circumstances. If she marry and have children, you may then allow her L.100 sterling per annum for her support and children, and L.10 additional for each year afterwards, until it amount to L.150 per annum, and that sum is the full allowance for both her and her children during her lifetime; and the like sum to be continued afterwards to her children yearly for their support and education during their minority. '*If she marry,*' her husband is not to have any control whatever or management of the money left to her and to her children."

After bequeathing certain specific legacies to other relations, the deed provided that whatever money was over after paying the annual allowance to the daughter of the testator should be laid out at interest, on bond or mortgage, to be secured on freehold property, and there to remain for ten years; but in case the daughter should die and leave no children, then the whole income was directed to be so laid out; and at the end of the period specified a piece of ground was to be purchased or feu'd for the purpose of building a school-house and dwelling-house for the master. The testator added, that at present he could not fix where the school-house was to be built, until he reached Scotland, when he

would fix on the spot and inform his trustees of it, and at the same time fix the schoolmaster's salary. No spot was ever feued for this purpose.

*Thomson's
Trustees v.
Alexander &c.*

On the 27th June, being the day previous to the execution of the will, the testator addressed to the trustees named in that deed, and who were then resident in Scotland, a letter enclosing a bill of exchange for L.3000 in favour of his daughter. This, it was added, "I merely leave with you in case anything happen to me on the passage home, or after I arrive. This bill is for the purpose of securing to her a livelihood in case the law or some others may try to prevent her inheriting my property according to my will left in your possession." The above sum was declared to be settled "on her and her children only, if she marry, and to be paid the interest of it yearly;" and failing her or her family it was directed to go according to the testator's last will.

E. S. Gordon and Solicitor-General (Inglis), for the claimant, James Alexander, the grandson of the testator, agreed that the true import of the deed was to confer on him a right to the fee of the property, or at all events to entitle him to an annuity of L.150 during his life. The legal presumption was against intestacy; and, on the other hand, there was a presumption in favour of the daughter and her children, the former being evidently the *persona predilecta*. No doubt, she was an illegitimate daughter; but while the ordinary presumptions of law may not apply so strongly in her case, still it is in the power of the testator to import these presumptions into her settlement. The will may be read so as to dispose of the whole estate in a manner consistent with the views of the testator, and natural under the circumstances. Looking to what is said in the settlement as to the disposal of any money that shall be over, it is not to be supposed that the testator should direct his affairs to be so managed, if the obvious result were that he would die intestate. There was plainly a beneficial interest in some one, and if implication were ever to be admitted, there could not be a stronger case for its admission. At all events, there was no ground for limiting the duration of the annuity to the minority of the grandchildren. *Douglas v. Douglas*, 21st Dec. 1843, vi. D.B.M., 318; *Wedderburn v. Scrimgeour*, 18th July 1666, M. 6587; *Anderson v. Anderson*, 18th July 1729, M. 6590.

Ross and Christison, for the next of kin. Taking the will as a whole, and construing it fairly, it bears that, during the life of the daughter of the testator, she was then allowed an income which was in no case to exceed L.150, and on her death a like sum, or

Mar. 4. 1852. such sum not exceeding this amount, as the trustees should see fit,
Thomson's
Trustees v.
Alexander &c. was to be allotted to the maintenance of the children during their minority. The payments came to an end in one case by the death of the daughter, and in the other by the majority of the children.

The clear meaning of the will is, that during the life of the daughter the income was to be applied in the manner directed, and only the surplus, if any, was to be laid out on mortgage; but if there were no children, then the whole was to be so laid out.

THE LORD PRESIDENT. In coming to a decision as to what the will of this gentleman really was; and in endeavouring to arrive at a right conclusion as to his intentions, it does not appear to me that we can lay much stress on the opinion of English counsel obtained in this case. We must exercise our own powers in endeavouring to construe it properly. This seems to me the only natural construction to be put upon the interlocutor of the Court already pronounced. The whole matter is entirely open for us to say what is the true meaning of the deed, and in doing so we must take the will as a whole, and are not precluded from availing ourselves of collateral evidences also—not for the purpose of making a will for the testator, but in order to make out his real intentions. With this view we may look also at the letter, and the bill to which that letter refers. But even then I do not think we have sufficient proof that there is any disposition of the capital or fee of the property. The will provides, that during the lifetime of Miss Charlotte Mary Ann Thomson, she is to have an annuity of £150; and no doubt she is treated as the *persona predilecta*, and although it has been said that she was not a legitimate daughter, and as such not fully entitled to the benefit of these legal presumptions, which operate in favour of legitimate children, still there are also the claims of her legitimate children to be considered. We are therefore justified in making the will, so far as she is concerned, a subject of favourable construction, especially when we look to the fact that the letter to which reference has been made, expresses strongly the testator's will to benefit his daughter. While, therefore, I do not think that there is here any conveyance of the fee, I think that the daughter is entitled to the full annuity during her lifetime, and that her children are entitled to the same.

LORD FULLERTON: I am very much of the same opinion, although it is not unimportant to keep in view what is the true import of the decision of the Court on the question formerly before us. I do not understand that the effect of that decision was to

throw the question loose altogether. Sir John Romilly had given Mar. 4. 1852. a certain opinion as to the points of law supposed to be involved in the case, and his opinion as to the law of England is conclusive; but he was also of opinion that the present was not a case where any English law came into play. The parties here will not gain very much by the letter. At one stage of the case it was pleaded as being a good testamentary conveyance, but this plea is now out of the case, and in the present discussion they have not gone so far as to found on it as a conveyance but merely as evidence of intention on the part of the testator. Perhaps this gentleman might have been able to explain his own will but it is remarkable that those who are most anxious to exclude all legal questions generally leave their wills the most mazy and inextricable. I conceive that here there is a good and valid bequest to the extent of the annuity of £150, but there is no disposal of the fee.

LORD CUNNINGHAME. I confess I think there are grounds, from the terms of this will, to find the only surviving child of Mrs Charlotte Alexander entitled to the fee of the whole residue, according to what I conceive to be the real meaning of the testator, in the confused will written by himself, now under consideration. It was probably from the clause in which the testator makes over his property to the trustees, that Sir John Romilly declared in his first opinion that the residue of the trust estate, after paying debts and legacies, passed as *personality* to the next of kin, if there was an intestacy. And this is agreeable to our law, as declared in the cases of *Grierson*, Feb. 25. 1780, M. 759, and *Angus*, Dec. 6. 1825, 4 Shaw, 279. The will proceeds, in another place, to give Charlotte Mary Ann Thomson an allowance in the shape of an annuity for her life of £150 yearly. If the will stopped here I should concur with your Lordships in thinking that the free annuity of £150 passed to Mrs Charlotte Alexander's lawful child for his whole life. But I confess I think that the daughter's child here has a larger claim under the subsequent clauses of the will. After the provision of sundry special legacies there occurs a clause as to the disposal of the residue. That clause is palpably vague and indistinct, and much is left by implication; but it undoubtedly means that the gross fund should be burthened with much more than Charlotte's annual allowance—thus the debts, and the special legacies, and the expenses of management, were to be paid, and the *residue* was to be stocked and lent out for ten years for behoof of the daughter; and failing them, the whole residue was to be

Mar. 4. 1852. applied to the erection of a school and dwelling-house. In my humble opinion this was equivalent to a bequest of the whole residue in the first instance to Charlotte Thomson and her children, and failing them, for the establishment of a school; and I think that no other interpretation will make sense of the will. Where a testator reduces his effects into a residue, and declares, by a sort of elliptical clause, that failing his daughter and her children the residue shall go to establish a school, is not that *ex vi verborum* equivalent to a primary and preferable bequest to the daughter and her children? The next of kin are excluded by the school, and the school has no claim, as being excluded by the daughter. I confess I see no answer to this. The same reasoning would have applied if there had been a conditional bequest to the next of kin themselves. No doubt the bequest here is not direct, but the reference is obvious and necessary from the terms used; the bequest must be sustained; the meaning of the testator is as clear in the one case as in the other. This principle holds in the law of England. Swintoun on Wills, vol. i., p. 20 and 352. Lovelass on Wills, p. 287, § 9. On these grounds I should have been disposed, with all deference, to prefer the testator's grandson to the whole free residue now *in medio*, but of course I give way to the opposite opinions of your Lordships. I have only to add that this construction of the will is confirmed by other clauses of the same instrument and aided by its whole tenor and scope, and were the case also more doubtful than I conceive it to be, the holograph letter of the testator is complete evidence, under the hand of the testator, that he believed he had made the daughter and her lawful children, through her, heirs of the residue of his trust-estate.

LORD IVORY was of opinion that whether the letter and will were to be taken together or not, there was no conveyance of the fee, and he therefore concurred with the majority of the Court.

The COURT therefore found, that on a sound construction of the last will and testament of John Thomson, the child or children of Charlotte Mary Ann Thomson are not entitled, either under the will or under the bill and letter referred to on record, to the whole or any part of the capital or fee of his estate, and to that extent repel the claim of James Alexander, now her only surviving child, and of his father, Walter Alexander, as his administrator-in-law, but find that the children of the said Charlotte Mary Ann Thomson are entitled to an annuity from the income or interest of the testator's means and estate, to the extent of £.150 *per annum*, without the

same being subject to any discretion on the part of the trustees, such Mar. 4. 1852.
 annuity to commence on the day of the death of the said Charlotte ^{Thomson's}
 Mary Ann Thomson, and to continue during the lifetime of the ^{Trustees v.}
 children, and of the survivor of them, with interest on each year's ^{Alexander &c.}
 annuity from the end of the year until payment, and find that the
 claimant, James Alexander, is entitled in his own right to one-
 half of the said annuity during the period between the death of
 his mother and the death of his brother, John Thomson Alex-
 ander, and that he is entitled to the said annuity during all the
 years of his life after the date of his brother's death, subject to
 deduction of all sums paid to account. To the above extent sus-
 tain, rank and prefer the claim of the said James Alexander upon
 the fund *in medio*, but repel his claim for the income of the trust
 fund beyond said annuity: Reserving to the said James Alex-
 ander his claim as representative of his brother, John Thomson
 Alexander, for the unpaid portion of said annuity, due prior to the
 death of his said brother; farther, in respect the bygone litiga-
 tion has been caused by the ambiguous terms of the testator's set-
 tlement, find the several claimants entitled to payment from the
 trust funds of the expenses hitherto incurred by them respectively,
 and remit the account thereof, when lodged, to the Auditor to tax
 and to report *quoad ultra*, remit the case to the Lord Ordinary
 to proceed as shall be just, and with power to dispose of the
 Auditor's report and decern.

Gibson-Craig, Dalziel & Brodie, W.S., Reclaimer's Agents.

Horne & Rose, W.S., Agents for Raisers.

Tod & Romanes, W.S., } Agents for Next of Kin.
Campbell & Smith, W.S., }

FIRST DIVISION.

GAIR or MACKINTOSH and GAIR v. GAIR'S TRUSTEE.

No. 232.

Mercantile Sequestration—Competency—Ranking.—Where a claim had been rejected by a trustee as prescribed, but, on appeal, the Court had found that prescription did not apply to the case, and had allowed a proof of the amount of the claim, and in a reference to arbiters, a larger sum was found due than was claimed, the Court ordered the trustee to rank the creditor for the amount, though larger than the original claim.

Process—Final Interlocutor—Competency.—An interlocutor of the Court silent on certain claims, cannot be pleaded as having negatived those demands, when the Court are satisfied, on a review of the circumstances, that the particular claims in question were not within the view of the parties or the Court at the time.

Mar. 5. 1852. The estates of Alexander Gair, banker in Tain, having been sequestered in May 1848, Mrs Mackintosh and Miss Gair, sisters of the bankrupt, lodged a joint claim with the trustee, amounting to L.399 : 9 : 7. Of this aggregate sum the trustee rejected a portion, amounting to L.111 : 8 : 5, which was claimed as disbursements in laying down crop 1828 of the farm of Plaids, to which the bankrupt had succeeded as his father's heir, and to which disbursements the claimants had right, as their father's executrices. The trustee also rejected another part of their claim, amounting to L.16, 15s. 7d., the value of certain quantities of oat and rye meal, alleged to have been furnished by the claimants as their father's executrices, for the use of the bankrupt's servants, after their father's decease. These claims were rejected, on the ground that they were cut down by prescription, either the triennial or quinquennial.

On appeal, the Court, on 4th July 1849, found, "that prescription does not apply to the case; and before farther answer, remit to the Sheriff of Ross, to allow the claimants to produce any further evidence they can adduce in support of their claim, reserving all questions of expenses."

Instead of proceeding with a proof before the Sheriff, the claimants and the trustee, on the footing, apparently that the claim for the value of the meal would no longer be disputed, entered into a minute of reference to arbiters mutually chosen, confined to the question of the expense of laying down the crop on the farm for the crop and year in question. The arbiters found the expense when fairly stated would be L.125 : 3 : 9, being a sum considerably greater than the parties had asked in their claim.

The claimants then presented a note to the Court, praying their Lordships to ordain the trustee to rank them for the sum so found due by the arbiters, and to find them entitled to expenses generally.

After discussion, in which the trustee contended that any order upon him to rank a party for a sum larger than had been claimed, was unprecedented and anomalous, the following interlocutor was pronounced, July 18, 1850:—"The Lords ordain the trustee to rank the claimants for the sum of L.125, 3s. 9d., in addition to the sum for which he had previously ranked them, find the claimants entitled to expenses incurred prior to the remit by the Court to the Sheriff of Ross on 4th July 1849." When this interlocutor came to be applied in the ranking, the trustee, on the ground that it was silent on the subject of the claim for the meal, and also did

not allow interest on the sum found due by the arbiters for laying Mar. 5. 1852.
down the crop, refused to sustain the claim on these points, and
stated that the claimants had already received a larger sum of di-
vends than they were entitled to, and threatened to insist on their
refunding the sum of L.84, the alleged amount of such over pay-
ments.

Gair v. Gair's
Trustee.

The claimants presented a note, craving the Court to resume consideration of the appeal, and *first*, to ordain the trustee to sustain the sum awarded by the arbiter, with legal interest from 15th May 1828 to 8th May 1848 (the date of the sequestration); and *second*, to sustain the claim of L.16, 15s. 7d., for the meal for the same period, with interest, and to find the trustee liable in the expenses of the application.

Shand and *Lord-Advocate* (Anderson) for the creditors. The justice of the case is plainly with the claimants. The correspondence and whole proceedings shew that after the plea of prescription was repelled by the Court, the claim for the meal was admitted by the trustee. It is only at this late stage that he attempts to refuse a ranking for this sum and the interest fairly due upon it, and to allow credit for the interest on the sum awarded by the arbiters for laying down the crop, on the narrow and untenable ground, that the last interlocutor of the Court does not expressly allow those claims.

Gordon and *Deas contra*. This case is truly out of Court by final interlocutor, and the present is an attempt to make the Court go back upon its former proceedings. The duty of the trustee to the body of creditors made it necessary that he should resist those demands. He has not as yet judicially claimed any repetition of dividends as overpaid, and should he do so, it will then be time enough for the claimants to state their pleas.

LORD FULLERTON. We have already allowed a ranking for the larger sum found due by the arbiters, and with that part of the case we have nothing now to do. The grounds on which the trustee puts his case on the other points are, in my opinion, quite untenable. The claimants have, I think, shewn what the true meaning and understanding of the parties really were, with regard to those matters now in dispute, and to say that an interlocutor is exclusive of claims with regard to which it is merely silent, is going a great deal too far. We must look at what the position of the case will fairly warrant us in supposing was really in the mind of the parties and the Court at the time, and at the real justice of

Mar. 5. 1852. the case. It is said that the trustee has not raised a suit against those claimants for repetition, but I see in the voluminous correspondence to which this dispute has given rise, that when those ladies asked to be allowed to participate in a third dividend, they were met with the statement that they had been overpaid.

Gairs v. Gair's Trustee.

LORD IVORY. I was not present at the previous discussions in this case, and consequently I am not so well acquainted with it as your Lordships. So far as I am able to judge of the situation of parties, I think the prayer of this note is both competent and reasonable.

The other Judges concurred.

Decree pronounced in terms of the note, with the expenses of the application.

L. Mackintosh, S.S.C., Agent for Claimants.

Jas. Burness, S.S.C., Agent for Trustee.

FIRST DIVISION.

No. 233.

CAIRNS v. DRUMMOND.

Brokerage—Railway Shares—Liability—Relief—Right to sell.—A broker purchased certain railway shares in terms of his instructions. His constituent allowed the settling day to pass without a remittance, and afterwards communicated the name of a third party as the principal in the transaction:—*Held* that the broker was entitled to sell the shares for his own relief, and that the party who actually employed him was liable in the balance of the price.

Mar. 5. 1852. This was an action for payment of £.57, 16s. 6d., as an alleged balance due on certain transactions in regard to railway shares between the pursuer and the defender. The pursuer is a member of the Glasgow Stock Exchange; and in 1846 he agreed to buy and sell stocks, shares, and scrip for the defender, who also had formerly been a member of the Glasgow Stock Exchange, but having been sequestrated had ceased to be so. This agreement the defender alleged proceeded on the footing that the purchases, &c., were to be for his (the defender's) constituents; and that the commission thereon was to be equally divided between the pursuer and the defender. But the pursuer denied this, and maintained that it was for the defender alone, and on his responsibility that he (the pursuer) so acted.

Cairns v. Drummond.

Various transactions took place between the parties, and, on 20th May 1846, the pursuer bought, by the instructions of the defender,

100 shares of the East India Railway at 20s. 6d. per share, and intimated to the defender that he had done so. The settling day for these shares was the 28th May. On 6th June, the following letter was addressed by the defender to the pursuer :—“ The party that ought to have lifted from you on Thursday last 100 East Indies at 20s. 6d. is Mr William Murdoch, late of Mein's Coach Office, Tron-gate. He assures me that he has done everything to get the money, but without success, and that he is at present unable to pay the difference in the event of your selling as threatened. He desires me to request that you will have a little patience with him in the hope of their rising to something near the price he bought at.” On 10th June, the pursuer addressed a letter to the defender in these terms :—“ I beg to intimate that, in consequence of your having failed to take delivery of, and pay for the 100 shares East Indian Railway, bought for you on the 20th May, I have this day sold these shares at 9s. 4½d. per share, cash, holding you responsible for the loss arising thereon.”

This action was therefore brought in the Sheriff Court of Glasgow to recover the difference between the original sum, 20s. 6d., paid for the shares, and the price, 9s. 4½d., at which they were sold ; and the grounds upon which the pursuer rested his claim was, that having acted upon the orders of the defender himself, the pursuer is entitled to hold the defender responsible, and the subsequent nomination of a real or alleged principal will not discharge that responsibility. The sale was valid, both in respect of intimations previously made by the pursuer, and in respect the same is warranted under such circumstances by the rules of the Exchange.

The defender maintained that the pursuer did not tender him the scrip on the settling day, and that, until he so tendered it, he (the defender) was not bound to settle with him for the shares, and he pleaded, that, having disclosed to the pursuer the name of the party on whose account the sale was made, he (the defender) was discharged of all liability, and that no sale of the shares could be effectual against him without his consent or without a legal warrant. He also pleaded that in any event, the pursuer was bound to have disposed of the shares at the highest market price of the day, after the scrip had not been taken up on the settling day ; and if he did not do so, the pursuer alone must be the sufferer. There is no evidence that the shares were sold at the price stated.

Proof was led, and the Sheriff-substitute (Skene) held that the pursuer, as the purchasing broker, was not bound to advance the

Mar. 5. 1852.
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Drummond.

Mar. 5. 1852. money to the selling broker, and consequently could not have the scrip to give the defender unless the defender had previously put him in funds to uplift it; and with regard to the sale he held that there was sufficient evidence that the pursuer had acted in conformity with the general practice of the Stock Exchange. As to the division of the brokerage, the defender had not proved this or any of his other averments. He therefore decerned against the defender, and found him liable in expenses.

To this interlocutor the Sheriff (Alison) adhered, and the defender advocated.

The Lord Ordinary having found in terms of the Sheriff's interlocutor, the advocator reclaimed.

P. Fraser and Deas for the reclaimer (defender). This sale could not competently have been effected without the advocator's consent or judicial warrant; *Pollock v. Stables*, 12 Queen's Bench Reports, 765; *Jackson v. Taylor*, 20th June 1848.

Wood and Macfarlane for the respondent. The competency of the sale is supported by numerous decisions; *Wilson v. Watson*, 21st January 1841, 3 D. 424.

The LORD PRESIDENT was of opinion that the broker was quite warranted under the circumstances in acting as he did.

LORD CUNINGHAME. I am of opinion that the defender is liable both according to the rules of the Stock Exchange and of the common law in transactions between merchant and merchant. The defender employed the pursuer as a broker to purchase 100 shares of the Indian Railway for the alleged behoof of a third party not named. The shares were bought at the price libelled on 20th May and duly notified to the defender. The defender did not send any answer in due time to the intimation; he did not in course, or within a reasonable time, disclose any friend's name as purchaser, he allowed the settling day to pass *without remittance*, and at last, after a delay of seventeen days, the defender wrote the pursuer communicating the name of a person *insolvent* as the purchaser under him of the shares in question. It has been clearly shewn that this was contrary to the rules and usage of the Stock Exchange, which the defender was bound to know and conform to; and it was equally contrary to the defender's duty at common law as a merchant. He was also bound to have answered in course, or by the next post, the pursuer's communication as to the purchase on his mandate, if he had any objection to it, agreeably to the law delivered in the case of

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Serrays v. Watt, 12th February 1817, F.C., and other cases to Mar. 5. 1852.
 the same effect, where it was laid down by President Hope, with
 the approbation of the Court,—“if a man does not answer a letter of business addressed to him, he is held to concur in the communication.” In every view the case is clear and requires no further discussion.

Cairns v.
Drummond.

LORD IVORY. I am also quite satisfied both as regards the proof and the general principle of law. A commission-agent is entitled to sell to secure himself. Such is the usage of trade. The case of a share-broker is in a more favourable situation than that of an ordinary agent, for his salvation depends on the rapidity of his sales, and, as in a case like the present, is he not entitled to sell to protect himself? The usage of the Stock Exchange is illustrated by the case of *Dixon v. Henderson*, 11th Dec. 1849.

LORD FULLERTON was absent.

The COURT therefore refused the reclaiming note with additional expenses.

John Robertson, S.S.C., Reclaimer's Agent.
 Alexander Casels, W.S., Respondent's Agent.

SECOND DIVISION.

M'GIBBON v. M'GIBBON.

No. 234.

Parent and Child—Minor—Transaction—Homologation—Acrection.—A disposition was executed by a mother of property, the right of succession to which had opened to her, but in which she had not completed a feudal title, in favour of her three sons equally in fee, under burden of certain liserent rights in favour of herself and the father (from whom she had been divorced). By a subsequent deed, to which she and the father were parties, as well as the three sons, one of whom was in minority and another in pupillarity, a new conveyance was executed (after the mother's title had been completed) in favour of the same parties, but with certain variations, and particularly giving a power of distribution of the fee among the three sons to the father:—*Held*, (1.) That the former of these conveyances was irrevocable and valid and sufficient to vest the fee in the sons equally without any reserved power of distribution in the parents, and that certain deeds, bearing to be founded on the power of distribution in the latter of the conveyances, were accordingly reducible after the lapse of thirty years, at the instance of the representatives of the two sons, who were under age at its date; *Held*, (2.) That reduction was not, in the circumstances, barred by the plea of homologation or transaction, or by the expiry of the *quadriennium utile*.

Mar 5. 1852. Alexander M'Gibbon, senior, was married to Mrs Gordon Pringle, by whom he had three sons, Alexander, David, and John. The marriage was afterwards dissolved by the divorce of the lady. Thereafter the succession to the lands of Crawhill and others opened to Mrs Pringle who was one of two heiresses-portioners to them, and she entered into an agreement with her late husband, by which he undertook to be at the expense of proving and making up her title to the lands; and she agreed to execute a conveyance in the terms and to the effect to be now mentioned. Accordingly, in December 1817, she, on the narrative of the above agreement, and for the love, favour, and affection which she had for her three sons, executed a disposition containing authority to her husband to make up her titles, and by which "these things being done, and now as then," she disposed the lands to herself in liferent for one just and equal third part, "and to the said Alexander M'Gibbon senior in liferent, for another just and equal third part, and to the said Alexander M'Gibbon junior, and David and John M'Gibbon, my sons, equally among them in liferent, for the other just and equal third part; for my own and their respective liferent rights and use allenarily; and to my said three sons Alexander, David, and John M'Gibbon, equally among them, their heirs and assignees in fee, for the whole fee thereof, with all right, title, and possession" which she then had or might have. Infestment was taken in favour of the disponees for their respective rights of liferent and fee. Thereafter, it having been ascertained that the succession belonged to her and Mrs Clark as heiresses portioners, they completed their titles in March and April 1818, by special service, precept, and sasine, and the lands were divided between them by arbiters.

In order to give effect to the division, a mutual disposition was executed in July and August 1819, to which the parties were Mrs Pringle and her late husband "as trustee for her," their three sons, "and he for himself, and as tutor, curator, and administrator-in-law for his three sons," and Mrs Clark. By this deed the parties disposed the lands allotted to Mrs Clark, while those allotted to Mrs Pringle were disposed to Alexander M'Gibbon, the father, in liferent, to the extent of two third parts, and the other third part to the sons in liferent, and the whole fee to them, but subject to a power in favour of the father to divide the same "in such shares as he, the said Alexander M'Gibbon senior, may appoint by a writing under his hand. Infestment was taken on this deed.

At the date of this latter deed the son David was about seventeen, and John under fourteen years of age. David sometime afterwards went to Canada, where he died in August 1826. A decree of declarator of marriage between the pursuer's father and Margaret Forrester, and of legitimacy of the pursuer, the fruit of that marriage, was pronounced in 1835. Mar. 5. 1852.

Previously to this decree, namely on the 29th November 1826, about three months after his father's death, and when the pursuer was only about twelve months old, an agreement was entered into between his grandfather Alexander M'Gibbon senior, his uncle Alexander, his mother, and her father, "in behalf of David M'Gibbon, the infant son of the said Margaret Forrester, and the now deceased David M'Gibbon," to the effect—1st, That the pursuer's grandfather and his son Alexander should dispone two-third parts of the lands to the grandfather, and one-third part thereof to Alexander the son in liferent; and the fee of one-half to the latter and the heirs of his body; whom failing to the pursuer and the heirs of his body; whom failing to the grandfather, his heirs and assignees in fee. And, 2d, That they should dispone the other half to the grandfather in liferent, and the fee to the pursuer, and the heirs of his body; whom failing to Alexander the son, and the heirs of his body; whom also failing to the grandfather, his heirs and assignees, in fee. Alexander the son died in 1831, leaving two children, the defenders Alexander Gordon Pringle M'Gibbon, and John Meek M'Gibbon. And on the 20th of November 1841, their grandfather executed two dispositions, by which, on the narrative of the mutual disposition of 1819, the power of division therein contained, and the agreement of 1826, he disponed the lands in the terms and proportions set forth in that document. On these two dispositions sasines were taken and recorded. Alexander M'Gibbon senior died in 1846.

The present action was raised by the pursuer in 1849 to reduce the disposition of 1819; the agreement of 1826 and the dispositions of 1841, with the sasines following on these respective documents, on the ground, generally—1. That under the disposition and sasine of 1817, a right to the fee of one-third *pro indiviso* of the lands was vested in each of David, the pursuer's father, and John his uncle; and the deed being expressly declared to be irrevocable, it was not in the power of the grantors to execute the deed of 1819. Farther, 2. That Alexander M'Gibbon senior, having concurred in, and granted, the deed of 1819, as guardian for his sons David and John during the minority of the

Mar. 5. 1852. former and pupillarity of the latter, the power of division taken in his favour and to their prejudice was null and void, and, consequently, the dispositions of 1841 were inept as flowing from a *non habente potestatem*; and, 3. That the agreement of 1826 having been made while the pursuer was an infant and without guardians, was not binding on him.

By the defender it was maintained, that the object of the deed of 1817, and of the prior relative agreement, was to secure to Alexander M'Gibbon senior the control of the disposal of any part of the lands; that although, in so far as he was concerned, it was onerous, it was purely gratuitous, as to his three sons; and being of the nature of a family arrangement, it was competent for the parties to readjust their rights, which they did by the deed of 1819; 2. That at the time when the deed of 1817 was granted, Mrs Pringle was not vested in the lands, and she was not so till she granted the deed of 1819, and therefore it was competent for her to disregard the deed of 1817, which conferred no lawful title on the children, and to which the investiture subsequently completed in her person could not accresce, because accretion was founded on warrantice express or implied which did not exist in the circumstances of the case under the deed 1817; 3. That the power of division conferred by the deed of 1819 was, under the circumstances, perfectly legal and competent, and it had not been challenged during the *quadriennium utile* of David and John; 4. That the agreement of 1826 was truly a transaction for the purpose of recognising the legitimacy of the pursuer, against which there were good objections, and on which the decree of declarator of his legitimacy was founded, and was not entitled to probate and reprobate that agreement; and, 5. That the pursuer by his acts had homologated the deeds of 1841, which were revised by two successive agents on his behalf, who had the whole titles, including the deed 1817, before them, and which were executed on the express requisition of the pursuer and his guardians when he was upwards of sixteen years of age, and were otherwise homologated by him after his majority.

The pursuer answered—1. That the deed of 1817 was rendered complete and effectual by accretion, titles having been made up subsequent thereto by Mrs Pringle; and it was not relevant to allege that it was gratuitous, but in fact it was onerous, on the principle *jus quae situm tertio*; 2. That the power of division in the deed 1819 taken by the father in his own person, whereby the fee vested in the sons by the deed of 1817 was made defeasible

by him, was a nullity, on the principle that a guardian cannot be *auctor in rem suam*, and one of the sons was a pupil; 3. That it was incompetent to allege that the pursuer's status was made the subject of an agreement, and the document of 1826 was as to him of no validity; and, 4. That all the acts on which the plea of homologation was founded, even although in themselves of any force, were done during the pursuer's minority, and not by himself but by alleged agents, and his guardians, and it was not averred that they or he was in the knowledge of his legal rights.

The Lord Ordinary (Cowan) after allowing the defender to lodge issues as to the plea of homologation, pronounced this interlocutor: —“*Primo*, Finds that by the disposition of 1817, on which infestment followed, Mrs Gordon Pringle conveyed *inter alia* her whole right, title, and interest in and to the fee of the lands of Crawhill, &c. to and in favour of her three sons, Alexander, John, and David M'Gibbon equally among them, their heirs and assignees; that at the date of said disposition, the succession to the said lands and others had opened to her and Mrs Clark as heirs-portioners *pro indiviso*, although no feudal title thereto had been completed in the person of Mrs Gordon Pringle; that the right of Mrs Pringle and Mrs Clark as heirs-portioners having been judicially ascertained, their title *inter alia* to the subjects above specified was completed in their persons *pro indiviso* in the months of March and April 1818; and that the title thus subsequently completed by the grantor of said disposition 1817, accrued to the donees under that deed, and rendered complete the feudal title in their persons respectively to one equal third each of the said subjects; *Secundo*, Finds that neither by the terms of said disposition 1817, nor by implication in law from the nature of the deed, or from the circumstances in which it was granted, was there reserved to or conferred on the said Mrs Gordon Pringle or the said Alexander M'Gibbon, the power of revoking or altering to any extent or effect the rights conferred upon their three sons by the said disposition and the infestment following thereon; that no power of distribution was possessed by them or either of them, according to the sound construction and legal import and effect of the said deed; and that in this situation the deed of 1819 and the subsequent deeds of 1826 and 1841 under reduction were *ultra vires* of the said Mrs Gordon Pringle and the said Alexander M'Gibbon, and are open to be set aside and reduced: *Tertio*, Finds that the deed 1819 and the subsequent deeds of 1826 and 1841 are not protected from being set aside and reduced at the

Mar. 5. 1852. instance of the pursuer as heir served and retoured to his father
 David M'Gibbon, and to his uncle John M'Gibbon, two of the
 M'Gibbon v.
 M'Gibbon. disponees under the deed of 1817, on the ground of the said David
 and John M'Gibbon being *ex facie* of the deed of 1819 parties
 granters thereof, in respect that at the date of the said deed
 the said John M'Gibbon was in pupillarity and the said David
 M'Gibbon was in minority, and their father, the said Alexander
 M'Gibbon, as their administrator-in-law, had no power to alter
 and affect the rights and interests of his children, or to confer
 upon himself powers under the exercise of which those rights and
 interests might thereafter be altered or affected to their prejudice :
Quarto, Finds that the pursuer is not barred from insisting in this
 action by the lapse of the *quadriennium utile*; and that there are
 no relevant or sufficient statements set forth in the record to entitle
 the defenders to have the issues, or either of them, now proposed
 in support of the special defences of homologation, adoption,
 and personal bar, or of probate and reprobate, pleaded in
 exclusion of the pursuer's grounds of reduction : Therefore re-
 duces in terms of the libel," &c.

The matter principally argued before the Lord Ordinary was the applicability of the plea of accretion to the circumstances of this case. It was not disputed that if the plea could be sustained, there were *termini habiles* in the state of the title for holding the rights conferred by the deed of 1817 to have been rendered feudally complete by and through the subsequently completed feudal title of the granter Mrs Gordon Pringle. But the argument maintained by the defenders, was, that the deed of 1817 having been gratuitous as regarded the children, and there being contained in the deed no obligation of warrandice, accretion in respect of the granter's subsequently completed title was inapplicable, and could not be pleaded in support of the rights conferred by its terms on the sons of the granter and their heirs. The Lord Ordinary considers that this argument is untenable. The disposition bears to proceed upon an obligation undertaken by Alexander M'Gibbon, the father of the said disponees, to be at the expense of vindicating and completing the right and title of Mrs Gordon Pringle to the said succession, as well as in consideration of her love, favour, and affection for her said sons, and for other weighty causes. There seems no doubt, therefore, that accretion might be pleaded in support of Alexander M'Gibbon's liferent rights under the deed; and, if so, it is difficult to see how, as regards mere formality of the title, (the question of revocable or not, being an entirely

different matter) the right of the heirs under the same deed can Mar. 5. 1852. be held to stand in a different predicament. But, farther, the ^{~~~~~} grantor was at the time in right of the subjects although her title ^{M'Gibbon v.} M'Gibbon. as heir was not complete; and the deed contains certain obligations on her part as to the completion of the title of the disponees, and expressly bears to convey "all right, title, interest, claim of right, property, and possession" which the grantor, her predecessors and authors, heirs and successors, had, have, or could claim thereto. Such being its nature and terms, the deed appears to the Lord Ordinary to fall within the class of deeds to which, according to the authorities founded on by the pursuer, the plea of accretion is applicable.

Supposing accretion to apply to the case,—the next question is whether the rights of the three sons under the deed 1817 have been effectually altered by the subsequent deeds or any of them? The deeds of 1826 and 1842 are alleged to be objectionable mainly on the ground of the power to grant them being dependent on the validity of the deed of 1819, and which deed the pursuer contends was *ultra vires* of the grantors, and invalid. It is manifest that to whatever other objections those deeds of 1826 and 1841 may be exposed, it must be fatal to their validity if the deed of 1819 be set aside in terms of the findings in the preceding interlocutor. The terms of those findings explain the grounds on which the Lord Ordinary has given effect to the pleas of the pursuer on this branch of the case.

The rights of fee conferred by the deed 1817 appear to him to have become absolute rights in the persons of the three sons respectively, and irrevocable by the grantor, Mrs Gordon Pringle, after infestation had been expedite on the deed. Farther, it is apprehended that to have retained in the grantor, even of a family deed of this kind, a power of division or distribution, or the faculty of conferring upon another party such power, it was indispensable to have reserved such power or faculty in express terms. But if the grantor of the deed 1817 possessed no such power or faculty, then the deed of 1819 is left to depend for its validity upon the alleged concurrence of the disponees themselves, and (as regards the parties represented by the pursuer) of their father as their administrator-in-law. Now, one of the sons, John, was at the date of the deed 1819 in pupillarity, and the other son, David, was in minority; and this being the case, it is considered that the father could not by his own act, or by his concurrence with his minor son, legally confer on himself powers whereby the pupil or the

Mar. 5. 1852. minor might be afterwards prejudiced, and that the deed of 1819,
in this view of it, is intrinsically null.

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The lapse of the *quadriennium utile* is pleaded as a bar to the action; but this is no good defence on the supposition (as the Lord Ordinary has held) of the deed being void to the full extent pleaded by the pursuer. This nullity of the deed 1819 may indeed be thought not so clear in regard to the minor son David's rights under the deed 1817 as in regard to the rights of John who alone was in *pupillarity* when the deed of 1819 was granted. But in the *first* place, the nullity of the deed as to John's rights appears sufficient to expose it to challenge *in toto* after the *quadriennium utile*; and, in the *second* place, if, as regards the minor son David, the deed were viewed rather as reducible than as absolutely void, still in a case, as this is, between the parties to the deed, or those representing them, it is thought, having regard to the grounds on which it is challenged, that the lapse of the four years can be no bar to the pursuer's action.

"Special defences to the conclusions of the action are stated, in respect (1.) of the deeds having been granted in pursuance of an alleged transaction between the parties; (2.) of alleged homologation and adoption of the deeds by the pursuer, or one or other of the parties whom he represents; or, (3.) more generally of the pursuer being personally debarred from insisting in this action. At the debate it was not made very apparent on which of these grounds the defenders' counsel relied. Thereafter, in compliance with an appointment by the Lord Ordinary, draft issues under which the defenders proposed the case should be tried, were lodged in process. The first issue is one of alleged homologation by the *pursuer* of the several deeds under reduction. This appears to be inadmissible, both because of the nature of the grounds of challenge which impugn the deeds, at least the radical deed of 1819, as intrinsically null and void, and because of there being no sufficient case of homologation alleged in the record. The other issues are directed to establish alleged matters of fact, not relevant, in the Lord Ordinary's opinion, as substantive grounds of defence to the action although proved to be true. There is this plain defect in the defenders' statements, that in no part of the record, whether applicable to homologation, acquiescence, or taking benefit, is it alleged that the pursuer, in acting as averred, was aware of his rights under the deed 1817, and of the reducibility of the deed 1819, and the deeds following on it."

The defenders reclaimed.

Horn and G. G. Bell for the claimers.

Mar. 5. 1852.

Shaw and Marshall for the respondent.

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LORD JUSTICE-CLERK. The case of the defenders is unsound in every stage. Under the deed of 1817 there was constituted a valid and irrevocable fee in the children. I think that deed was onerous to its full extent, but onerosity was not necessary. At the date of that deed the grantor had right of succession as heir-apparent of investiture. After its date her title was completed and her investiture was complete. I cannot understand on what principle it can be said that accretion does not apply. While the children are in minority or pupillarity the father takes a conveyance in his own favour from them with the concurrence of the mother. As to the pupil this deed was unquestionably a nullity as being from a pupil. What the father took from the other son, the minor, was also null as being in his own favour. The plea of *quadriennium utile*, therefore, does not apply. As to the deed of 1826, granted when the pursuer was an infant, it is an entire nullity. The deed of 1841 was indeed called for by the minor's curators in furtherance of what they believed the minor was entitled to. But is it possible to hold that this can bar the minor from challenging this deed? If this view were to be entertained, I can scarcely conceive how any act of curators done in minority could be challenged. But it is said the pursuer is barred by the doctrine of probate and reprobate. This is founded on the circumstance that the deed of 1826 is founded on in the declarator of legitimacy. We cannot listen to such a plea. As to homologation, I agree with the Lord Ordinary that there is no relevant case averred for allowing a proof on this point. I do not think that knowledge in minority is to be held as sufficient to instruct knowledge after he attained majority.

LORD MEDWYN. I concur with the Lord Ordinary. I think the deed of 1817 gave an irrecoverable fee, and I cannot see why accretion should not apply.

LORDS COCKBURN and MURRAY ncurred.

The COURT adhered, and found the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor, reserving all questions as to previous expenses, and remitted the case to the Lord Ordinary to proceed farther, &c.

Andrew Smith, W.S., Agent for Pursuer.

John Ross, S.S.C., Agent for Defender.

FIRST DIVISION.

No. 235.

PETITION, THE EARL OF STAIR.

*Entail Act, 11 and 12 Vict., c. 36—Authority to grant a feu right—Infest-
ment.*

Mar. 6. 1852.
 Earl of Stair,
 Petitioner.

The petitioner in this case prayed for authority to grant a feu-right in terms of the provisions of the 24th section of the 11 and 12 Vict., c. 36. The petition set forth that Lord Stair is heir of entail in possession of the Stair entailed estates, comprehending various lands and baronies, and others, in the counties of Ayr and Wigton, under two deeds of entail, and that the petitioner is infest in certain parts of the same, and *inter alia* in the five merk land of Ochtrelaw, and half-merk land of Clannoch or Clenoch, of which the ground proposed to be feued was part.

The Lord Ordinary (Cowan) in reporting the case, brought under notice of the Court a specialty in the case. By section 33 of the statute, it is enacted that petitions to the Court of this nature "shall set forth the tailzie under which *such estate* is held, and the date of the petitioner's infestment therein, if any be," &c. Here the infestment, although covering the lands of which the feu-right proposed to be given was a part, did not apply to the whole estate.

Dundas for the petitioner submitted that that was not necessary, and that it was sufficient to set forth the infestment in the particular lands in reference to which the power to feu was sought.

The COURT were of this opinion, and pronounced the following interlocutor:—"The Lords, on the report of Lord Cowan, Ordinary, interpose their authority to the transaction stated in the petition, approve of the petitioner's granting feu as prayed for agreeably to the 24th section of the statute, and decern, approve of the proposed feu-charter as revised, and remit to the Lord Ordinary to see the same executed, and to report."

Dundas and Wilson, C.S., Petitioner's Agents.

FIRST DIVISION.

No. 236.

BAIRD v. GRAHAM.

Damages—Landlord and Tenant—Tacit relocation.—Circumstances in which *Held* that a tenant by tacit relocation, could not claim damages against his landlord for the deprivation of land alleged to have been let to him under his written lease.

Damages—Master and Servant—Liability.—*Held* that a claim of Mar. 6. 1852. damages was relevant against the master of a servant, who, in the performance of his duty, put a horse affected with glanders in the pursuer's stable, by which his cattle were infected with the disease, and died; and that it was not essential to the relevancy of the claim, that the pursuer establish knowledge on the part of the master, that the horse was diseased. *Baird v. Graham.*

This case came before the Court for the adjustment of issues. The action concludes for payment to the pursuer of the sum of £450 sterling, "as the loss or damage which the pursuer has sustained by being deprived of the use or occupancy of 50 acres, or thereabouts, of the farm of Gallingad, occupied by him under the defender as landlord thereof, and for the loss of bestial by death, in consequence of infection caught from a horse belonging to the defender, which was ill of the disease called the glanders." There were thus two separate grounds of damage libelled:

(1.) For alleged deprivation of land. The facts founded on were these: In 1839 the pursuer made offer for the farm of Gallingad for seven years, at the yearly rent of £92, 10s. This offer was accepted, and after the expiry of his written lease in 1846, he continued for four years as tenant of the farm by tacit relocation. Soon after the expiry of his written lease, a neighbouring proprietor laid claim to certain muir land which the pursuer alleges had been let to and occupied by him under his written missive, and when the latter sent his cattle to graze on the ground they were driven off, and the pursuer has been since deprived of the use of that ground. He alleges that the defender has denied him all redress, and the loss and damage sustained by him in consequence of being so deprived of the ground he estimates at L.150 sterling..

In defence, it was stated that after the circumstance complained of, the pursuer continued as tenant till 1850, when, being in arrear of rent, sequestration was obtained against him. During the subsequent proceedings in the Sheriff-court, this claim was advanced by him. It was pleaded that no relevant averment was made in the summons that the pursuer, during his occupancy of the farm of Gallingad, was deprived of any part of the land let to him by the defender, and that even if he had been so deprived, the pursuer, being a yearly tenant, could claim compensation for the loss of one year's possession only.

The Lord Ordinary (Cowan) held that "there are facts averred relevant and sufficient to permit of an issue being taken by the pursuer; but in respect that parties do not agree as to the terms in

Mar. 6. 1852. which the issue for the trial of this part of the cause should be adjusted, reports the matter to the Lords of the First Division of the Court, in terms of the 38 sec. of the 13 and 14 Vict., cap. 36," &c.

Baird v.
Graham.

Pyper for the pursuer.

Patton (with whom *Wilson*) for the defender, cited the case of *Butter, v. Lock*, January 28. 1830, 8. *Shaw*, 408.

The LORD PRESIDENT was of opinion that this was not a case which ought to go to a Jury.

LORD CUNINGHAME. It appears to me that the title under which the pursuer possessed the farm, and his conduct subsequent to the alleged encroachment, alike exclude his claim, and prove it untenable. For four years he possessed the farm on tacit relocation, when from his pecuniary difficulties he could no longer continue. But if dissatisfied, he might have removed in any year he chose. Instead of that *he paid the rent*, shewing that he would rather retain the farm at the old rent than give it up on account of a piece of muir perhaps not worth a shilling an acre. He cannot, under the circumstances, bring forward *ex intervallo* a claim of damage on this head.

LORD IVORY. I am of the same opinion. When the alleged deprivation took place, the written contract was at an end; and thereafter being no longer tenant but by tacit relocation, he continues to pay his full rent. There is here a degree of *mora* and acquiescence on the part of the pursuer sufficient to bar his claim.

The COURT, therefore, held that there was not sufficient relevancy to sustain this claim of damages.

(2.) In the autumn of 1849 the defender, with a view of disposing of a horse belonging to him, sent the horse under charge of his foreman to Balloch fair. On his way the man obtained accommodation for himself and the horse at the pursuer's farm. The pursuer alleges that the horse was then afflicted with glanders, that this was known to the defender and to his foreman, and that the disease was communicated to other cattle in the stable, by which he sustained a loss to the extent of upwards of L.200.

The defender pleaded that the averments were not relevant to warrant the conclusions of the action; and he denied that the disease had been communicated by the horse to the bestial of the pursuer.

The following issue was proposed : "It being admitted that the defender's foreman on his way to Balloch fair, in September 1849, stopped at the farm of Gallingad, and obtained accommodation

from the pursuer there for a night for himself and a horse belonging to the defender. Mar. 6. 1852.
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Graham.

I. Whether the defender's said horse was then infected and diseased with the disease called glanders, and was known by the defender, or by his said foreman, for whom he was responsible, to be so? And whether the said horse was upon said occasion by the defender's said foreman wrongfully put, or caused to be put, into the pursuer's stable at Gallingad, within which there were three mares belonging to the pursuer, whereby the said mares were infected with the said disease, and the said infection was afterwards communicated to a cow and two queys, also belonging to the pursuer; and whether the said mares and other cattle, or any of them, died, or were properly destroyed, as being incurable and dangerous in consequence of the disease so produced, to the loss, injury, and damage of the pursuer, as specified in the annexed schedule, or any and what part thereof?

The Lord Ordinary (Cowan) found "that it is essential to the relevancy of the claim for such damage that the pursuer undertake to establish *knowledge on the part of the defender personally*, that the horse put by his servant into the pursuer's stable at the time, and in the circumstances libelled, was affected with the disease called glanders;" and that although such knowledge is averred in the record, the issue proposed by the pursuer is so expressed as to exclude the necessity of proof that the defender personally did know of the horse being diseased: therefore he disallows "the issue proposed by the pursuer."

Against this interlocutor the pursuer reclaimed.

Pyper for the reclamer. A servant in the performance of duty, committed to him by his master, having committed a wrong, to the effect of doing injury to a third party, the question is, whether the master is not liable in damages, *Drummond v. Brown*, 26th Feb. 1813, F. C., 232; *Baird v. Hamilton*, 4th July 1826. See also *Conolly v. Robertson*, 25th Feb. 1851, *ante*, p. 104.

Patton and Wilson for the respondents.

LORD CUNINGHAME. I cannot assent to the doctrine laid down by the Lord Ordinary as to the relevancy of this claim. If sanctioned it would go to overturn the law in a class of cases of great importance with reference to the indemnity of individuals, and to the maintenance of public police. I have always understood it as a rule, well settled in law, that masters are not liable

Mar. 6. 1852. for acts of their servants *extraneous* to their employment, as if a servant, sent a message on horseback, committed a highway robbery, or inflicted any act of injury on a third party, foreign to and at a distance from the course of his employment. But when a servant acting *within the scope of his master's business*, therein causes loss and injury to third parties, by his negligence or misconduct, or ignorance, the master, in all such cases, is liable in reparation, *Brown*, F. C., 26th Feb. 1813. This rule is daily enforced in the numerous cases where stage coachmen and railway companies are subjected for damages done by their servants by improper driving or collision of trucks, and the like. In all of these cases the proprietors are innocent, but they are liable for the fault of their servants. The present case clearly falls within the same category. The servant, in applying for up-put at the pursuer's stable, was unquestionably *within the line of his duty*. He was in the direct route to market with the horse. If he truly did not *know* of the disease of the horse, then no verdict returned under the issue, as framed, will affect the defender. But if he *knew* and *concealed* the disease from the pursuer, his master must be liable, though the latter was ignorant of the fact. It was a great fault in the servant not to have told his master; but the latter and not the public must suffer from his neglect to give his master the necessary information. I see no ground on which the master can escape from reparation, if the issue as framed be found in the affirmative.

LORD IVORY. I am of the same opinion. I think there are cases in our books sufficient to rule this case without going to the English authorities at all; but if we do go to them I read out of them the same principle. *Law Magazine*, (1845,) vol. iii., N. S., p. 228; *Schwyn's Nisi Prius*, under Master and Servant. It appears to me that this is a case where the master is liable to suffer from the want of skill on the part of his servant. This is not a case of *tort* in which the act of the servant can be separated from that of the master. In such a case the master does not originate the act. But here the act of the servant and the act of the master cannot be separated at all. The order is given. The servant is executing that order. I am therefore of opinion that the master is here clearly liable for the acts of his servant.

THE LORD PRESIDENT. This is a case of nicety; but I am of opinion that there is here relevant matter to go to a jury. It was necessary for the servant to do as he did; therefore he was in

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the performance of his duty when what is complained of takes place. There was gross negligence on his part; but is the master responsible or not for his servant's acts? The servant is merely ordered to sell the horse, and knowing that the horse was diseased he chooses to put him in this stable; but if any one had asked him why he put him in there, he would have said he was doing his duty. There is here a performance of an act of negligence for which both master and servant are responsible; but the master's liability in the first instance remains.

LORD FULLERTON was absent.

The COURT therefore sustained the relevancy of the claim, and approved of the issue.

*Alexander Hamilton, W.S., Pursuer's Agent
A. and A. Campbell, W.S., Defender's Agents.*

FIRST DIVISION.

FINDLAY'S TRUSTEES v. M'COKIE.

No. 237.

Trust—Factor—Factor's Fee—Law Agency—Professional Charges.—A law agent appointed, in a trust-settlement, factor under the trust, and also a trustee along with others, may, on the employment of his co-trustees, competently act as law-agent in the conduct of judicial proceedings, arising out of the trust, and, besides factor's fee and commission, is entitled to professional charges for such judicial business.

The question which arose in this case related to the power of the factor under a trust-disposition and settlement to make charges as law-agent against the trust estate. By the trust-disposition and settlement of the late William Findlay, merchant in Dundee, he appointed David Borrie and Mr Thomas Walker, writer in Dundee, to be his trustees; and he also appointed Walker "to be factor under my said trustees, with power to call, sue for, uplift and receive the rents, interests and annual profits arising from the said trust-estate and effects, for which he shall be paid or allowed such commission as shall be thought reasonable." In virtue of this appointment Walker acted as factor; he also acted as law agent in the general management of the trust affairs. An action of multiplepoinding and exoneration was raised, in which Findlay's trustees were the nominal raisers. In this action they lodged a note of the business accounts incurred by them, which accounts included Mr Walker's charges as law agent. Certain of the beneficiaries under the trust objected, *inter alia*, that Mr Walker, being one of two trustees accepting and acting under

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Trustees v.
M'Combie.*

Mar. 6. 1852. a testamentary deed, which is an office or appointment of a gratuitous character, is not legally entitled to charge any fee or reward for his pains or trouble in the trust management. They also objected to the competency of certain judicial proceedings engaged in by the trustees, and the expenses of which were included in these accounts.

Findlay's
Trustees v.
M'Comie.

The Lord Ordinary (Colonsay) before answer remitted to the Auditor "to report as to what, in his opinion would, in the circumstances of this case, be a fair and reasonable amount of factor's fee and commission to be allowed to Mr Walker as factor, and that in two views, viz., 1st, On the footing of Mr Walker's right to get payment of his business accounts as taxed being sustained; and, 2d, On the footing of Mr Walker being found not entitled to make any professional charges against the estate on which he was a trustee, for agency, personal trouble, time or correspondence, but only for outlay, including therein payment to clerks." The Auditor recommended L.52, 10s., as a fair and reasonable amount of factor's fee and commission, and "he did not see that the amount of this allowance can be held as at all dependent on the question whether Mr Walker is or is not legally entitled to make the usual professional charges in his capacity of law agent. If Mr Walker is not entitled to remuneration in the ordinary way, for business done as an agent, it would seem to be incompetent for him to demand remuneration for the doing of such business in another form, viz., by increasing the usual allowance for a totally different kind of work." A note of objections to this report was lodged by the factor both as regards the amount reported as being inadequate, and also the principle of the report. The Lord Ordinary approved of the sum of L.52, 10s. as the amount of the factor's fee, but "Finds that Mr Walker is not entitled to make charges as law-agent against the trust-estate for his own profit or emolument, in respect of trouble in the general management of the trust affairs, and to that extent and effect sustains the first of the objections stated for Alexander M'Comie and others." His Lordship held that for such professional charges the trust-deed contained no authority, and in several recent cases it has been recognised as a general rule that such a trustee is not to make profit or emolument from his office. *Rennie v. Morrison*, 26th April 1849. House of Lords, *Bon Accord Marine Insurance Company v. Souter's Trustees*, 13th June 1850, 12. D. 1010.

Against this interlocutor the trustees reclaimed, and also Walker for himself individually; both as to the amount of the factor's fee and the right to take credit for the professional charges.

Mar. 6. 1852.

When the case was called,

Neaves, for the claimant, stated that he departed from the prayer of the note so far as it referred to the right to charge for the general management of the trust, and restricted it to the judicial proceedings in which the trustees had been involved.

The Court ordered an account of the expenses of such proceedings to be lodged, which was done.

The case was again called to-day.

Donaldson and *Neaves* for the claimant cited the case of *Cradock v. Piper*, Hall and Twell's Chancery Cases, vol. i., p. 617; *Lincoln v. Windsor*, 15 English Jurist, 765, 9th July 1851.

Patton, Buchanan, and the *Lord Advocate* for the respondents.

THE LORD PRESIDENT. I am of opinion that we cannot allow these professional profits claimed by Walker. He gets a full allowance as factor's fee and commission. The question therefore comes to be, whether with reference to business of another description he is to be entitled to more than has been allowed him by the Lord Ordinary. The rule laid down in the case of *Souter* is equally applicable here; and, unless we go in the face of that decision, we must disallow this part of the factor's charge.

LORD IVORY. I am of a different opinion. The cases cited do not appear to me to rule this case, for the charges there made were not for judicial proceedings. Here Walker is employed as law agent in certain judicial proceedings. He does not employ himself. The trustees employ him; and he has properly managed the business committed to him. I think there is neither principle nor equity in withholding payment of this charge.

LORD CUNINGHAME. I hold the present case to be essentially distinguished from the cases cited to us. The whole question here is, what is a reasonable remuneration for the business that Mr Walker did as factor? On that point I think he has been dealt with in rather a niggardly manner. He has got what is called a commission of L.52 : 10s., but his law account for business, which I must consider beneficially necessary for the estate, as the Auditor states no objection to it, is disallowed to the amount of L.86 : 14 : 5. I cannot, as a Judge of Equity, pronounce that to be a reasonable modification, looking to the terms of the trust and factory under which Mr Walker acted. I put great weight on the specialty that the trustee himself made Mr Walker the factor, under the trust, and appointed him to get a reasonable commission. He knew this gentleman to be a *writer*. When, therefore, he give him an unlimited intromission as to his extensive money affairs, can we doubt that he also meant him, under his factory, to

Mar. 6. 1852. do any law business which was useful and necessary, and which he considered him to be well qualified for? I think the confidence reposed in him by the trustee comprehended law business with his other duties; and the practice of factors throughout the country is, that when *writers* are named factors, they, as a matter of course, act as law agents in the local courts, which is often necessary under their factories. I cannot think that a Court of Equity, in such a case as the present, is bound to proceed with the rigour assumed in the Auditor's report. If this factor has saved the trust-estate the expense of an agent, I cannot conceive any ground on which this consideration should not enter as an element in fixing the factor's allowance.

The COURT adhered to the Lord Ordinary's interlocutor, on the footing that it "is not to be understood as extending to or affecting any question between the parties as to the right of the said Thomas Walker and David Borrie, as co-trustee, to claim the expenses incurred in their joint names and for their joint behoof, connected with the judicial proceedings under dispute;" and also, that it reserves "to the Lord Ordinary (*inter alia*) to consider and dispose of the said question as to the judicial expenses incurred by the trustees: Remit the cause back to the Lord Ordinary to be disposed of, and exhausted by him as regards the said question, as well as all other questions, if any, between the parties, reserving *hinc inde* all questions of expenses."

William Miller, S.S.C., Reclaimers' Agent.

John Cullen, W.S.,
Walker and Melville, W.S., } Respondent's Agents.

SECOND DIVISION.

No. 238.

SCEALES v. WIGHTON.

Cash Credit—Discharge.—A mercantile firm obtained from a bank a cash credit, in which the father and uncle of the partners were cautioners. The firm having subsequently become insolvent, their whole estate was made over to a trustee for their creditors. In the trust-deed a clause was inserted by which the cautioners became bound to relieve the trust-estate of all claims on account of the debt due under the cash-credit bond:—*Held*, under the circumstances, that this operated as a discharge not only of the proper company debt, but of all claim against the subsequent *acquirenda* of the partners.

Mar. 6. 1852. This was an action of reduction at the instance of Andrew Sceales, sole surviving partner of the late firm of John and Andrew Sceales, wine and spirit merchants in Leith. The object

~~~~~  
*Sceales v.  
Wighton*

of the action was the reduction of a decree in absence obtained by Mar. 6. 1852. the defender, Wighton, the trustee on the sequestered estate of Sceales v. John Sceales, senior, the father of the individual partners of the Wighton. said firm. Under the decree the trustee was entitled to recover payment from the pursuer, of a sum of L.335, being the proportion paid by Mr Sceales, senior, on a cash-account for which he was cautioner along with Robert Cleghorn, and also of a sum of L.200 alleged to have been advanced by Sceales for behoof of the firm.

The facts of the case are fully set forth in the interlocutor of the Court. The principal question involved had reference to the legal effect to be given to the discharge contained in the trust-deed of John and Andrew Sceales there mentioned, and which, *inter alia*, contained the following stipulation, "and we, the said John Sceales and Robert Cleghorn, hereby bind and oblige ourselves, our heirs and successors, to free and relieve the means and estate above conveyed of theforesaid debt of L.700 due to the Bank of Scotland, so that neither the bank, ourselves, nor any other person shall rank on or burthen the said means and estate with the same or any part thereof, and I the said John Sceales, moreover hereby engage and bind and oblige myself not to rank a claim for any debt due by the said John and Andrew Sceales against the said trust funds or estate, and if the said bank, or any one on their behalf, do in the contrary, then we, the said John Sceales and Robert Cleghorn bind and oblige ourselves, our heirs, executors, and successors, to free and relieve the said trust-estate therefrom and to pay the same ourselves." The pursuer in the present action maintained that the true meaning and import of the clause, and of the terms of the trust-deed generally, must be held to operate as a discharge not only of the debts properly due to the firm, but of the debts of the individual partners, and of all claim against the subsequent *acquirenda*.

The Lord Ordinary (Robertson), on the 20th December 1851, pronounced an interlocutor, in which, after a number of separate findings as to matters of fact, he found that under all the "circumstances the trust-deed is so expressed that it must in law operate as a discharge of the advances made under the said bond to the bank, and of the said advances of L.200, and therefore that the decree in absence must be set aside, and reduces, decerns, and declares in terms of the libel."

Wighton reclaimed.

Pattison and Penny were for the reclaimer.

Moir and Solicitor-General Inglis, for the respondents.

Mar. 6. 1852.

Sceales v.  
Wighton.

The COURT pronounced the following interlocutor :—

“ The Lords having considered the reclaiming note, and heard counsel, and having considered the closed record and trust deed founded on, and whole process, recall the interlocutor of the Lord Ordinary ; Find that in the year 1834 the firm of John and Andrew Sceales obtained a cash credit with the bank of Scotland at Leith, to the extent of £700, in which bond their father the late John Sceales senior, and Robert Cleghorn, were cautioners ; Find that in the year 1836, the said firm having become insolvent after having drawn out the full amount of the said credit, it was arranged that the whole estate of the firm should be given over to their creditors under a private trust, in place of a sequestration, the creditors taking the said estate in full of their claims, and discharging their debts : Find that under the trust-deed entered into, of date 19th May 1836, the said John Sceales, senior, and Robert Cleghorn, on the condition of the creditors granting such discharge, agreed to free and relieve, and did free and relieve the means and estate of the said firm of John and Andrew Sceales of the said debt due to the bank, and to pay the same themselves, and the said John Sceales, senior, did also agree to free and relieve the means and estate of the said firm, of a sum stated to be advanced by him to the said firm, to the extent of £200, but the amount of which was not ascertained or admitted : Find that both the claims of the said John Sceales senior, and Robert Cleghorn, and of the said John Sceales senior, individually, were claims against the said firm, for and on account of proper company debts and obligations : Find that in respect thereof, the creditors did accept the means and estate of the said firm in full of their debts, and did recover and discharge the said John and Andrew Sceales, of the respective debts and obligations incumbent on them : Find that it is not averred, that the said John and Andrew Sceales had individually, at the date of the said trust-deed, any means and estate other than the means of the said firm, and that the object of the said onerous transaction was, by the sacrifice made by their nearest relations, to obtain for them a final discharge, and to free their *acquirenda* from liability from their existing debts : Find that the said John Sceales senior, and the said Robert Cleghorn, did agree that any surplus of the means and estate of the said firm after payment of the debts of the other creditors, should be conveyed and handed over to the said John and Andrew Sceales, individually, as their own proper funds : Find that the said John Sceales senior, and the said Robert

Cleghorn, did not reserve any claim against such surplus, if any Mar. 6. 1852.  
 did exist, towards payment of the several claims which they had <sup>Sceales v.</sup>  
 had against the said firm: Find that according to the true import Wighton.  
 and effect of the said trust-deed, no claim was reserved by the  
 said John Sceales senior, and the said Robert Cleghorn, or by  
 the said John Sceales senior, against the said John and Andrew  
 Sceales, the individual members of the said firm, personally, and  
 their respective means and estates, and subsequent *acquirenda*,  
 and that consistently with the sound construction of the said trust-  
 deed, no such claims of debt did thereafter subsist or could be in-  
 sisted in against the said John Sceales and Andrew Sceales, and  
 their separate means and effects, until payment of the same at any  
 period thereafter, however remote. Therefore, find that the claim  
 given effect to by the decree in absence now under reduction, is  
 excluded by the legal effect of the said trust-deed. Therefore,  
 of new reduce, decern and declare in terms of the libel. Of new  
 find the pursuer entitled to expenses," &c.

*John Murray, jun., S.S.C., Reclaimer's Agent.*

*John Murdoch, S.S.C., Pursuer's Agent.*

## SECOND DIVISION.

ROWAND v. THORBURN AND TRUEMAN.

No. 239.

*Process—Bill-Chamber—Promissory Note—Specification.*—Suspension Mar. 6. 1852.  
 of a charge on a promissory note in part payment of a purchase in iron,  
 on the allegation, 1st, That the person in whose favour it was granted  
 had agreed to keep the grantee free of all cash advances; and, 2d, On  
 the ground that the subject sold had not been properly set apart and  
 rendered specific as the property of the purchaser—refused.

In this case, which was a suspension of a charge on a promis- Mar. 6. 1852.  
 sory note, the complainer, Alexander Rowand, merchant in Glas- <sup>Rowand v.</sup>  
 gow, had authorised Messrs Thorburn and Trueman, metal-<sup>Thorburn, &c.</sup>  
 brokers there, to purchase for him on speculation, a large quantity  
 of iron, amounting to about 13,000 tons, and of the value, as prices  
 then stood, of upwards of L.30,000. A small proportion of the  
 price was paid in cash, besides which the complainer, Rowand, on  
 the 13th April 1850, granted a promissory note for L.350, in  
 favour of the respondents. This note after being several times  
 renewed, ultimately fell due on the 22d August, when it was pro-

Mar. 6. 1852. tested for non-payment. On the 13th Jan. 1852 Rowand was charged to make payment thereof.  
*Rowand v. Thorburn, &c.* This charge he suspended on the allegation, 1st, that by the terms of the transaction with Thorburn and Truetman, the latter had agreed to free him from all cash advances in respect of the purchase ; and, 2d, that they had failed to separate and set apart the iron purchased for the complainer from other parcels of the same material, so as to make it specific, and so place it entirely under the control of the purchaser, on whom, in consequence of the subsequent depreciation in the price, the whole risk and loss now fell.

The Lord Ordinary on the Bills (Cowan) passed the note on caution.

Thorburn and Truetman reclaimed.

*Penney* was for the claimer.

*Young* for the suspender.

LORD JUSTICE-CLERK. It is very probable that this person may be anxious to prevent the iron being unduly sold or sold at too low a price, or he may be anxious to prevent all risk of its being seized by the creditors of the brokers ; but in such a case he has his remedy in a petition to the Sheriff so as to have the subject sequestrated, or he may in some way interpell the warehouse keeper from parting with it. This however cannot enter into the question whether or not he is to pay the bill which he has granted. As to the argument that the iron should have been set aside as being the property of the suspender, it is to be considered that there was a necessity on the part of the broker to have some security for repayment of his own expenses and advances. The bill bears, in the usual form, to be for value received, and he cannot be entitled to suspend the charge given upon it when it becomes due.

LORD MEDWYN. As to what is alleged here that Rowand was not to be liable for cash advances, it is clear that he gave the bill just because he could not give cash ; and this bill after having been discounted by the bank, and the proceeds applied in payment of the price of the iron purchased, he refuses to pay. It is quite impossible to sustain his plea.

The other Judges concurred.

The COURT remitted to the Lord Ordinary to refuse the note.

*T. Mackenzie* for the suspender. It will still be competent for us to tender a reference to oath.

**LORD JUSTICE-CLERK.** You may put in a *caveat* to stay ex-<sup>Mar. 6. 1852.</sup> tract till you have lodged your minute of reference to oath.

*W. A. G. & R. Ellis, W.S., Reclaimer's Agents.*  
*Hill & Robertson, W.S., Suspenders' Agents.*

*Rowand v.  
Thorburn, &c.*

### SECOND DIVISION.

Sir W. C. ANSTRUTHER, Petitioner.

No. 240.

*Entailed Estate—Improvements—11 and 12 Vict., c. 36.—In order to obtain the benefit of the statute, the nature of the improvements, the expense of which is sought to be charged against the estate, must be distinctly specified in the petition.*

In this case, which was a petition for authority to borrow the sum of L.1969, 8s. 10d., expended on improvements under the statute—the reporter stated that L.380 of the sum proposed to be charged against the estate was for plantations, which, although within the provisions of the statute, were not specified in that part of the petition which narrated the particular nature of the improvements, the expense of which was proposed to be charged.

*Donaldson* for the petitioner.

**LORD JUSTICE-CLERK,** the particular improvements must be specified.

**LORD MEDWYN.** You must tell the other heirs of what sort the improvements are.

The COURT therefore refused *hoc statu* to entertain the application so far as respected the L.380, and pronounced an interlocutor, by which they granted warrant to the petitioner to charge the estates in the following manner, viz.: If the said improvements were to be constituted a burden on the estates by bond of annual rent, said bond to be for the sum of L.1172, 1s. 7*½*d., (being three-fourths of the L.1969, 8s. 10d., less the L.380); or if the same were to be constituted by a bond and disposition in security, the same to be for the sum of L.794, 14s. 5d., (two-thirds of the L.1969, less the L.380) all as provided by the statute, 11 and 12 Vict. c. 36, founded on in the petition.

*J. F. Wilkie, S.S.C., Agent.*

### SECOND DIVISION.

*Hall v. Whillis.*

No. 241.

*Process—Senior Counsel—Fees—Memorial.—Objection to an auditor's report sustaining a charge for fees to senior counsel for revising defences repelled; 2d, Objection sustained to a charge for a memorial to counsel*

which was almost entirely a copy of a reclaiming petition in the Inferior Court, which had also been drawn by counsel.

Mar. 6. 1852.  
Hall v. Whillis. In this case, the facts of which have been already detailed, (*ante*, p. 265) objection was taken by the pursuers to that part of the Auditor's report which sustained a charge for fees to senior counsel for revising the defences.

*G. Ross*, for the pursuer, maintained that, as a general rule, fees for revision of the defences by senior counsel were not allowed. In the present case, Sir John Hall, the pursuer, brought a declarator of his right to gather limpets on the sea-shore; the defence was a very simple one, viz., 1st, a denial that the pursuer had any such right; and, 2d, that the public had exercised that right for forty years and upwards; a party who chooses to employ senior counsel in such cases *ob majorem cautelam* must pay for the greater security thereby obtained. Act of Sederunt, 17th July 1841.

*Wood* for defenders. The Act of Sederunt merely provides that no expenses shall be charged against the losing party but what are fair and reasonable; here there was only one fee to senior counsel during the preparation of the case, and no other till the record was closed and the case was ready for debate, in fact, the single reference to senior counsel prevented the necessity of their being employed at other stages of the case.

The COURT repelled the objection and allowed the charge.

*Ross* for the pursuer then objected to the expense of a memorial to counsel, which was in fact a mere manuscript of a reclaiming petition in the Inferior Court process which had been drawn by counsel.

*Wood*. The memorial was necessary to explain the position of matters, but in its form it is much shorter than would otherwise have been necessary. In the reclaiming petition the authorities are mentioned.

The LORD JUSTICE-CLERK. It is quite impossible to sustain this charge for a copy of pleadings containing references to authorities which counsel is bound to know or to find out for himself. Papers in the Inferior Courts are permitted to be drawn by counsel as there is no *copia peritorum*, but here, where there is no such reason, we cannot allow a charge for copies of Inferior Court pleadings.

The COURT disallowed this charge.

*Tod & Romanes*, W.S., Pursuer's Agents.

*Sang & Adam*, W.S., Defender's Agents.

## FIRST DIVISION.

BROWN v. CAMPBELL.

No. 242.

*Inhibition—Loosing of Arrestment—Caution.*—In considering a petition for loosing arrestments which had been used on the dependence of an action of count and reckoning, in which defences had not yet been lodged, the Court will look to the nature and probability of the claim in the action, so as to enable them to determine the amount of caution to be found by the petitioner.

The question here was, what amount of caution should be found under a petition for loosing arrestments. In 1833 Campbell Mar. 9. 1852. executed a trust deed in favour of Brown and other persons there-  
in named, for certain purposes, in connection with their management of his farm. In 1848 Campbell's estate was sequestrated, and Brown was appointed trustee. The sequestration has been brought to a close, and Brown has obtained his discharge as trustee, and Campbell the bankrupt has also been discharged. An action of count and reckoning has since been raised by Campbell against Brown and another trustee, in respect, *inter alia*, of mismanagement of the farm, and concluding for L.4000, in respect of alleged intromissions by them with the pursuer's estate, during the years from 1834 to 1837. On the dependence of this action inhibition had been used by Campbell against Brown, who is a merchant in Glasgow, and was directed against the whole of Brown's available funds in the hands of his bankers, and of upwards of twenty-two of his customers in Glasgow.

Brown v.  
Campbell.

In these circumstances Brown offered extrajudicially to find caution, to the extent of L.300, on condition of Campbell immediately departing from the diligence in question. This was refused; and a petition for loosing arrestments was accordingly presented to the Court. To this petition answers were lodged by Campbell, and the amount of caution to be found by the petitioner now formed the subject of consideration.

*J. Shaw* for the respondent (pursuer.) The action of count and reckoning has only now been raised, and defences have not yet been lodged. The merits have not therefore been discussed. We aver that the conclusions of that action are correct in point of fact, and therefore the diligence used should only be recalled on Brown finding caution to an extent in some degree equal to the amount concluded for.

*Mure* and the *Solicitor-General*. This party has not been re-

Mar. 9. 1852. Brown v. Campbell. processsed, and therefore there is this objection to his title to sue. The extrajudicial offer was in the circumstances reasonable. This is an abuse of diligence, and moderate caution is sufficient to warrant recal of this inhibition.

The LORD PRESIDENT. We are in the dark as to the merits of this case in judging whether there are any grounds for refusing the prayer of this petition, but surely we are entitled to look to the origin of this claim; and when we see that the highest surplus rent of the pursuer's farm under the trust management was L.150, and that this claim arises within a period of four years, I should have thought, had it not been for this voluntary offer of L.300, that, had the pursuer asked for caution to that amount he would have been asking too much. I think that the inhibition and arrestments should be recalled *in toto*, under caution of L.300, which is a higher amount than I would otherwise have proposed.

LORD CUNINGHAME. I agree: and I would further remark, that if there had been a fund anything like L.4000, the creditors would not have allowed it to go for nothing. This course is the proper one to take.

LORD IVORY. I am of same opinion. Without more explanation, and looking to the general complexion of the case, I think what the Lord President proposes is highly reasonable.

The COURT, therefore, recalled the inhibition and arrestments, on caution being found to the extent of L.300.

*Robert Anderson, S.S.C., Petitioner's Agent.*

*John Murray junior, S.S.C., Respondent's Agent.*

#### FIRST DIVISION.

No. 243.

LAUDER v. WINGATE.

*Contract of Copartnery—Submission Clause—Action of Reparation and Implement.*—*Held* that a submission clause in a contract of copartnery, referring "all differences" between the partners to arbitration, did not apply to an action for reparation and implement of the contract at the instance of the one partner against the other.

Mar. 9. 1852. Lauder v. Wingate. This was an action of reparation and damages laid on an alleged breach of duty by the defender as the pursuer's partner. The action sets forth a series of acts on the part of the defender, as alleged, to get quit of the copartnership; and in particular that "in illegal, fraudulent, and malicious violation and breach of his contract

duty, the defender attempted to create a fictitious bankruptcy of Mar. 9. 1852. the concern, and thus to destroy the partnership by wrongously applying for and obtaining a sequestration of the company's estates, whereby grievous loss and injury have been inflicted on and suffered by the pursuer."

The defender pleaded *inter alia*, that this action was incompetent, in respect it relates entirely to partnership differences, and all such questions fall to be determined by arbitration, as provided for by the following clause in the contract of copartnery : " If any difference shall arise between the partners themselves, or in the event of death or bankruptcy, between the surviving and solvent partner, and the representatives and creditors of the other, all such are hereby submitted and referred to John Williamson," &c.

The Lord Ordinary (Cowan) repelled the defence, holding that it was only by enlarging the scope of the submission clause so as to hold the words "any difference" not applicable merely to matters with which the deed of partnership proposes to deal, but tantamount to any breach of duty, or any cause of action or claim for damage emerging to either of the partners against the other, in relation to the partnership, even through wanton and malicious acts, that the conclusion can be reached that the arbiters have been constituted the exclusive judges of a claim like the present.

The defender reclaimed.

*Macfarlane* for the claimer.

*Buchanan* and *Deas* for the respondent.

**THE LORD PRESIDENT.**—It appears to me that the Lord Ordinary has taken a most correct and sound view of this matter. The Court will not interfere in the management of the affairs of the copartnery ; but where there is a malignant conspiracy, as alleged here, to ruin a copartner, I do think, without any difficulty, that the Lord Ordinary has put a fair construction on this submission clause, that it does not give the least countenance to the idea that it was intended to embrace such a proceeding as this.

**LORD CUNINGHAME.** I entirely agree. The complaint is not for proceedings arising in the fair course of the company's business, but alleged to have been done by the defender with the view of obstructing and extinguishing it. An injury of that kind was not within the reference, any more than if the defender had committed a criminal assault on the pursuer on the highway.

**LORD IVORY.** I am of the same opinion. I cannot read that

*Mar. 9. 1852.* clause as referring to a proposal to bring the partnership to a close. I am clearly of opinion for adhering to the Lord Ordinary's interlocutor.

*Lauder v.  
Wingate.*

The COURT therefore "adhered to the interlocutor reclaimed against: Find the defendant liable in additional expenses."

*William Wotherspoon, S.S.C., Pursuer's Agent.*

*John Rutherford, W.S., Defender's Agent.*

### FIRST DIVISION.

No. 244.

CUNYNGHAM v. CUNYNGHAM.

*Entail Amendment Act—11 and 12 Vict., c. 86, sec. 43—Act 1685—Order of Succession—Defect in Irritancy.*—An entail defective in the irritancy applicable to altering the order of succession, but properly fenced as to alienation and sale, Held to be a defective entail under the Act 1685, and therefore ineffectual as regards all its prohibitions.

The word "deeds" in the latter part of the entail held to be restricted in its meaning by the sense in which it is employed in a previous clause.

*Mar. 9. 1852.* This was an action of declarator at the instance of Sir William Hanmer Dick Cunyngham, heir of entail in possession of the entailed estate of Prestonfield and others, and was instituted for the purpose of having it found and declared that the prohibition against the alteration of the order of succession is invalid, and that therefore the entail must be held ineffectual as regards all its prohibitions, in terms of the 11th and 12th Vict., c. 36, § 43.

*Cunyngham v.  
Cunyngham.*

Several deeds of entail were narrated in the summons, but all of them, as regards the fencing clauses, are expressed in the same terms with the leading deed dated in 1720. In that deed there are first inserted prohibitions against alienations and contraction of debt, and these prohibitions are duly fenced with irritant and resolutive clauses, which are unexceptionable. Provisions are then inserted as to the redemption of adjudications, the assumption of the name and arms of the family, the exclusion of the right of courtesy, and the extent to which jointures, by way of locality, may be granted by the heirs; and these provisions are protected by a declaration that in the event of the premises being contravened by any of the heirs, the right to the estate shall be forfeited and lost. There then follows the clause containing the prohibition against alterations of the order of succession thus expressed:—"And it is also provided and declared that it shall not be in the

power of my said heirs-male, or any of the substitutes, to sett tacks Mar. 9. 1852.  
 of the lands, baronys, and others above written for any longer space Cunyngham v.  
 than their own lifetime, nor to invert or alter the order of succes- Cunyngham.  
 sion herein appointed, and that it shall be competent to the poste-  
 rior heir to raise and use declarators or inhibitions against any pre-  
 ceding heirs, and that as well as if their names were expressed  
 herein." Following this clause there are provisions directed to  
 the preservation of the succession to the estates of Prestonfield  
 and Caprington separate and distinct. There is then inserted  
 the following provision and declaration :—" And without prejudice  
 of the specialties above written, it is expressly provided and de-  
 clared that my said heir-male and haill substitutes, by their accep-  
 tation hereof, shall be obliged and astricted to keep and fulfil the  
 haill conditions and provisions above written respective, and that  
 the contraveening of any of the same shall not only infer the loss  
 and amitting of the right and haill benefit of thir presents to the  
 said contraveeners and all descending of them, but likewise that  
 all the said dispositions, alienations, securities, debts, deeds, facts  
 civil or criminal, seditions, rebellions, or in any sense illegal, *contra* to, and in prejudice of these presents, shall be *ipso facto* null  
 and void to all intents and purposes, as if the contraveeners had  
 not been comprehended in thir presents, and that without any  
 process or declarator ; and it shall be lawful and competent to the  
 next substitutes not contraveening to pass by the contraveener  
 and to serve heir to the person immediately preceding." The  
 summons concludes that the irritancy which here occurs is not  
 expressed in terms sufficiently comprehensive to embrace altera-  
 tions of the order of succession.

Defences were lodged for certain of the heirs of tailzie, main-  
 taining generally that the irritant clause was sufficiently com-  
 prehensive. The word "deed," occurring at the close of the irritant  
 clause is not coupled with any qualifying terms, and must be con-  
 strued to cover any deed done in violation of the prohibition  
 against the order of succession.

The Lord Ordinary (Cowan) found, "that by the several  
 deeds of entail libelled, the prohibition against alterations of the  
 order of succession is not properly fenced by the necessary irri-  
 tant clause ; and that the said several deeds of entail are, conse-  
 quently, not valid and effectual in terms of the Act 1685 ; there-  
 fore finds and declares in terms of the conclusions of the libel ;  
 finds no expenses due, and decerns." His Lordship, in his note,  
 referred to the case of *Dick v. Drysdale*, 14th Jan. 1812, which had

Mar. 9. 1852. reference to the irritant clause of this entail—"the question there being whether it was sufficiently comprehensive to embrace leases of longer endurance than the grantor's lifetime. The Court held the clause insufficient, on the ground that it was not so expressed as generally to apply to or comprehend each and all of the acts prohibited in the deed of entail; and that being *enumerative* the words employed were so restrictive as to confine their operation merely to the same prohibited acts with those enumerated in the *special* irritant clause, attached to and protective of the prohibitions against alienation and contraction of debt. The expressions employed in the clauses will be found upon comparing them to be all but the same, and hence the generality of the word "deeds" in the latter clause (on which reliance was placed for reduction of the lease) was held to be controlled, and the meaning of the term to be determined by the limited and restrictive sense in which it was employed in the special irritant clause in the first part of the deed, and in the prohibitions thereby protected. The irritancy inserted in the latter part of the deed was on these grounds expressly held not to apply to the prohibition against the setting of tacks for a longer space than the grantor's lifetime; and the inevitable consequence, in the Lord Ordinary's apprehension, is, that the irritancy cannot be held to apply to and include deeds of alteration, which are the subject of and are comprehended within the same prohibitory clause. . . . : The views upon which the decision proceeds, and the principles which it recognises, appear to him well founded in themselves, and to have repeatedly received judicial sanction in other entail cases."

Against this interlocutor the defenders reclaimed; and it having been suggested that the pleas in defence as they stood on the record were insufficient for the proper argument of the case, the following plea was allowed to be added:

"Even assuming the prohibition against altering the order of succession not to be fenced by an irritant and resolutive clause the entail was valid and effectual antecedent to the late Act with regard to all the prohibitions, and the late statute is therefore inapplicable."

*Wood and Neaves* for the reclaimers. There is here a good prohibition against sale and alienation. Prohibitions against alteration do not require irritant and resolutive clauses; *Carrick v. Buchanan*, 30th May 1842, 1 Bell's Ap. Cases, p. 368. Therefore, although the irritancy here be defective, the entail remains

effectual: the late statute does not apply. In the case of *Menzies* Mar. 9. 1852. v. *Menzies*, ante, p. 486, this point was raised, but there the statute was held to apply because the deed was defective as regards <sup>Cunningham v.</sup> <sub>Cunningham.</sub> alienations, which is not the case here. When a word of flexible meaning occurs in a clause of an entail, but has been used in a decided sense in a former part of the deed, it must receive the meaning attached to it in the ruling part of the deed; *Knight* v. *Knight*, Dec. 1. 1842.

*Duff* and the *Lord-Advocate* were for the respondent (pursuer.)

**The LORD PRESIDENT.** This decision of 1812 in *Dick* v. *Drysdale* appears to me to be an authority from which we cannot depart. It is clear on what grounds the judgment of the Court rested; and the meaning of the word "Deeds" is sufficiently determined. That judgment is applicable to the clause in question; and it would be hazardous to depart from it. And as to the objection that the late statute does not apply to this case, I am of opinion that the object of that statute was to remove all doubts and difficulties on the subject of defective entails, and to put an end to all questions that might be raised on any of the clauses of an entail. I think it applies to this case, and I am therefore for adhering to the interlocutor of the Lord Ordinary.

**LORD CUNNINGHAME.** I am of opinion that the present entail would have been found ineffectual, whether tried upon the Act 1685, or by the recent statute passed in 1846. The Act 1685 requires that all the three branches of prohibition should be fortified with irritant and resolute clauses. The words are express and unequivocal, requiring all the prohibitions to be fenced; and I believe the understanding and practice of the profession generally has been universal, to hold prohibitions against alterations of succession, unfenced with irritant and resolute clauses, as rendering the whole entail null and ineffectual. In the case of *Buchanan* and *Carrick* it was no doubt found that a *mortis causa* gratuitous deed was ineffectual upon the prohibition alone without an irritancy. It was obviously unnecessary to go farther in that case, as the settlement there was clearly gratuitous, and only to take effect on the *death* of the granter, and so, according to established law, was challengeable by the heir of destination, holding a title with a *simple prohibition* without entail. But it must also be kept in view that alterations of the order of succession may often be the foundation of alienations *not* gratuitous, and so require the aid of the other fencing clauses to render the entail secure.

Mar. 9. 1852. The interpretation which the term "Deed" received in the case of *Dick v. Drysdale*, is agreeable to the subsequent decisions in *Cunningham v. Cunningham*, *Henderson*, F. C., 21st November 1818; in the later case of *Lang*, in 1839, M'Lean and Robertson's Reports, p. 871, and in many others.

I consider the validity of the entail to be struck at by the late Entail Act. I cannot read sec. 43 without holding that it was founded on the narrative and assumption that the said three heads of prohibition required each to be fenced with irritant and resolute clauses in order to be effectual; and if so, that they shall be feasible as to all the prohibitions, as much as if the estate were held by the heir in possession in fee-simple. This view of the clause requires no argument or comment, and therefore I have no hesitation in approving of the interlocutor of the Lord Ordinary.

LORD IVORY. I have little or no difficulty as to the effect to be given to the judgment in the previous case of *Dick* in 1812. That is decisive as to the construction to be put on the term "Deeds," though, if this had been an open question, I should have had great hesitation as to the soundness of that judgment. As to the other branch of the case, I have very serious doubts, and am rather inclined to differ from the opinions that have been expressed. This is an important question indeed; and the conclusions of the action which raises it are peculiar. When we are asked to declare that this entail is invalid, because this prohibition against alteration is not properly fenced, this is, I think, asking a great deal too much. The recent enactment, in respect of which we are called on to do so, is in regard to prohibitions against alienations and contraction of debt, and alteration of the order of succession. Now, in the first place, I cannot enter into the view that the meaning of the 43d clause was to clear away any doubt as to the defective entails. It was meant for the purpose of giving particular effect to an entail which was defective in any one of its prohibitions. Now the use of the word "prohibition" is the first thing I would remark on. The statute does not say "ill fenced" or "defective in its resolute clauses;" but defective as to its "prohibitions." Now it can only be so where the prohibition is such as cannot be valid and effectual without the resolute clause, and it is in this respect that this case seems to be quite different from the case of *Menzies*, for there the argument was that the prohibition was good in itself, but the answer was that the prohibition was not effectual, in respect the right of the contravener of the prohibition was not annulled. Now it is an important consideration that the statute was not

passed for the purpose of creating any new invalidity in entails, Mar. 9. 1852. but for the purpose of enlarging the effect of invalidity under the old law. If under the old law an entail was invalid as to one of the prohibitions, under the new law it shall be invalid as to all. But this raises the question, whether previous to the recent statute this party could have brought a declarator concluding that this was a prohibition which under the Act 1685 was invalid and ineffectual against the heir in possession, and the other heirs of entail. Now I put this question to the Lord Advocate, and he confessed that he was not prepared to say that this could be maintained. This was a good entail under the Act 1685. It could not have been defeated by such a declarator as the present. It is not invalid and ineffectual as regards any of its prohibitions. The prohibition against altering the order of succession did not require an irritant clause to make it effectual against the heir in possession, and therefore, in a question between him and the other heirs of entail this party could not have said, this is a bad entail. And as the new law does not speak of any new invalidity, but refers only to the invalidity which existed under the previous law, I do not think that this is a case to which the recent statute applies.

LORD FULLERTON was absent.

The COURT therefore, by a majority, "having considered the reclaiming note, No. 52 of process, together with the additional plea now allowed to be added to the record, refuse the prayer of the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary."

*Scott and Gillespie, W.S., Pursuer's Agents.  
John Hamilton, W.S., Defender's Agent.*

#### SECOND DIVISION.

LATTA v. MACRAE.

No. 245.

*Submission—Hearing Parties—Skilled Arbitrator.*—In a reference to a person of skill in the subject of the reference, it is not essential that the arbiter should lead evidence or hear parties, if he is satisfied by personal inspection, and from his own knowledge of the subject.

The pursuer in this action was tenant of Bruntsfield Park, near Edinburgh, for the season 1850, under a lease from Sir John War-rander, at a rent of L.315. The missives of lease, dated 15th Mar. 9. 1852. *Latta v. Macrae.*

Mar. 9. 1852. March 1850, contained the following stipulation :—“ And it having been mentioned to me that the National Association of Archers purpose to hold, during the ensuing summer, a meeting for the performance and public display of archery, I agree to give them permission and liberty to hold said meeting in the parks hereby let, at such place as may be agreed on, with power to admit the public thereto, due arrangements being made for that purpose, and at least fourteen days' notice being given to me of their intention to hold the meeting, payment being to be made to me for such damage and inconvenience as may be thereby occasioned, as the same shall be agreed on or fixed by two arbiters, one to be chosen by them and the other by me.” Thereafter on the 22d July 1850, the pursuer on the one part, and the defender on the other, as taking burthen on him for the National Association of Archers, entered into a minute of reference by which, on the recital of the above clause in the pursuer's lease, and upon the statement that the meeting for the performance and public display of archery then contemplated had been fixed to take place in the park on Wednesday and Thursday the 24th and 25th days of July then current, and upon the farther narrative that “ instead of appointing two arbiters the said parties have agreed to nominate William Fletcher, keeper of the city meadows, Edinburgh, as sole arbiter in the premises,” they submitted to his amicable decision, final sentence, and decreet-arbitral, “ the amount of the sum to be paid to the said Mrs Margaret Latta, in terms of the above recited stipulations, in the said recited minutes of lease, and whatever sum the said arbiter shall award in the premises, the defender taking burthen as aforesaid, bound himself to make immediate payment to the said Margaret Latta.” This reference was accepted of by the arbiter on 23d July 1850.

In the proceedings under the reference, the arbiter proceeded on his own knowledge as a person skilled in the matter referred to his determination. No claim or pleading of any kind was lodged with him, and no witnesses were examined, nor were parties heard; but before issuing a regular decreet-arbitral, he, on the 29th July 1850, issued a document stating his opinion as to the damage done and the sum to be awarded. In this document the referee sets forth that he had visited the ground repeatedly, both during the days of the meeting of the archers, as also before and subsequently, and had carefully examined the state of the pasture, and taken into account the various circumstances which he narrates; a particular sum is then stated as a fair compensation for the estimated

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damage on each of the three days during which the meeting was Mar. 9. 1852. held, and a sum for other damage before and after the days of meeting. The total sum thus brought out as due to the pursuer <sup>Latta v.</sup> Macrae. was L.60. A copy of this document was transmitted by the clerk to the reference to both of the parties, but no notice was taken of it by the defender. Afterwards two letters were addressed by the pursuer's son to the defender, inquiring whether the amount at which the damage had been estimated by the arbiter would be paid. These letters were dated respectively 31st July and 6th August, and no answer having been received to them, a note was lodged with the arbiter on 4th September moving for decreet-arbitral; some farther proceedings ensued, and the defender having taken no notice of the communication addressed to him, the decreet-arbitral was issued on 4th October 1850.

An action having been brought by Mrs Latta founding on the submission and relative decreet-arbitral, the defender stated various pleas in defence of the action; but that principally relied on, and the only one which was urged in the discussion on the reclaiming note, was that embodied in the defender's first plea in law, that the decreet-arbitral was irregular and informal, and not binding on the defender, in respect, it was pronounced without hearing parties, or at least the defender, or giving the defender an opportunity of being heard.

The Lord Ordinary (Cowan) repelled the defences and decerned in terms of the libel.

The defender reclaimed.

*Duff* and *Solicitor-General (Inglis)* for claimer. The award here is *ex facie* extravagant, and there has been a substantial evasion of justice in the proceedings. This is a question of damage, and the defender was entitled to lead evidence; no opportunity of doing so has been afforded by the arbiter. No decree can be valid which is pronounced *parte inaudita*. *Sloan v. Langmuir*, 21st May 1840. *M'Gregor v. Stevenson*, 20th May 1847.

*E. F. Maitland* and *Deas* for the respondent. This is a reference to a man of skill of a matter of which he is personally cognisant. It is not essential that the defender should be heard, but he had numerous opportunities for being heard, and *sibi imputet* if he did not avail himself of these opportunities.

**LORD JUSTICE-CLERK.** I have no difficulty in this case. I am

Mar. 9. 1852. very sorry to see such objections brought forward. I think this a good and valid decree, and one to which the Court is bound to give effect. In this case an examination has been made by an arbiter who was skilled in the matter of the reference, of the injury done, by inspection previously to, during, and subsequently to the alleged damage being done. He then issues these notes of his opinion, announcing that opinion very decidedly, no doubt; but it is to be kept in view that he was personally qualified and selected by the parties. Then subsequently he transmits a copy of his opinion to the defender, who makes no objection, and expresses no wish to be heard. Then notice is given that the decree arbitral would be issued; and, finally, a draft copy of the decree arbitral is sent, of which the defender takes no notice. I consider this a valid, regular, effectual, decree arbitral, and one against which no valid objection can be stated. As to the amount awarded I shall say nothing, except that had I been in the pursuer's place I should not have allowed this use to be made of my field for a considerably larger sum.

LORD MEDWYN. I am entirely of the same opinion. The parties here provide against damage, which was then prospective, although it was known that it would arise, and, accordingly, the reference is arranged while the damage was still prospective, and the arbiter was fixed on, in order that he might see during the whole time the nature of the damage done. The knowledge of the arbiter was sufficient, and I think that no other evidence was originally contemplated. He does not say that he would listen to the representations on the part of the defenders, nor was any dissatisfaction expressed; he was therefore entitled to say that before a certain day he would issue his decree, and the defender is now too late in objecting.

LORD COCKBURN. I am sorry that I cannot concur in the views that have been expressed. It is said that this was a matter involving an exercise of skill; and this, no doubt, is perfectly true. But in itself the case is as narrow as can possibly be. There is a regular deed of submission as to the damage, but nothing is said in it as to the arbiter being entitled to look to the amount of injury done without hearing parties. It is admitted that he did not hear parties. This course is undoubtedly one very irritating to parties, and extremely prejudicial as regards the mind of the arbiter himself. I think the party on seeing the award is entitled to say, I withdraw. You have decided the case without hearing me, and I have nothing more to say. There is no vestige of

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authority for the contrary opinion, most certainly none in the cases cited by the Lord Ordinary. In one of these it is laid down that it is not merely the duty of the arbiter to hear parties, but that he is bound to give them an opportunity of being heard. He is bound, in fact, to enrol the cause. The case of *M'Gregor* was not a case of this sort, and related to certain farm buildings. The principle is a general one, that no arbiter shall decide or even declare his opinion without hearing parties. This case is no doubt a trifling one, but I much fear that we are injuring the law by applying to a case of L.60 principles which we would not apply to one involving L.600, or L.6000.

**LORD MURRAY.** In this case I have no doubt that the Lord Ordinary's interlocutor is perfectly right under the circumstances. And if we do not affirm this judgment we must set aside the case of *M'Gregor*. Neither do we in the smallest degree detract from the decision in the case of *Longmuir*, which comprehends a class of cases of which this is one of the strongest, where the arbiter is himself considered the best judge. In the present case it was contemplated to have two arbiters, but latterly it was considered better to have only one—he required no witnesses—he saw the condition of the field before, during, and after the meeting, and no witness could tell him anything that he might not see with his own eyes. In every litigated case where the facts are disputed, the arbiter must hear the parties, but we should be injuring the principle were we to apply it to a case like the present, where a person is chosen arbiter on account of his skill in the matter referred to him.

The COURT adhered to the interlocutor of the Lord Ordinary.

*William Skinner, W.S., Pursuer's Agent.*

*Scott and Gillespie, W.S., Defender's Agents.*

### FIRST DIVISION.

ANDREW YOUNG & SON v. LIDDELL, BROWNLIE & Co.

No. 246.

**Brokerage—Principal and Agent—Sale—Compensation.**—Where a broker transacted with two different firms, and in the course of these transactions furnished to the one firm goods supplied by the other firm on his order: Held that he could not be considered as the creditor for these goods as regards the firm to whom they were furnished, so as to entitle that firm to plead compensation, but that the firm that actually supplied the goods were the real sellers and the creditors of the receiving firm.

Mar. 10. 1852. This action was originally raised in the Sheriff-Court of Glasgow; and was brought at the instance of Andrew Young and Brownlie, &c. Company, merchants in Glasgow, for L.158 : 8 : 2, as the price of certain yarns alleged to have been furnished by them to Liddel, Brownlie and Company, through the pursuers' agents, Charles Shanks and Company, commission agents in Glasgow, in December 1843, and January and February 1844.

The defence was that the defenders had transacted with *Shanks and Company*, the commission agents, since 1842, under an agreement or contract, whereby, on the one hand, the defenders engaged to manufacture goods for Shanks and Company, and, on the other hand, Shanks and Company engaged to supply the defenders with cotton yarn out of or with which the goods were to be manufactured. A balance was due the defenders by Shanks and Company on these transactions. The yarns received by the defenders were furnished to them under contract with Shanks and Company, and to them or with them alone are the defenders bound to account for the furnishings so made.

It appeared that the furnishings sent to the defenders by Shanks and Company were accompanied by 'receive-notes.' These were originally in the following terms:—"Messrs Liddell, Brownlie & Co., receive of Andrew Young & Son." The defenders complained of this form of receive notes, and they were afterwards changed as follows:—"Messrs Liddell, Brownlie & Co., receive of Andrew Young & Son, on account of C. J. Shanks & Co." This change, the defenders maintain, was meant to absolve them from all claim at the instance of Young and Son, the real sellers of the yarn, and to place them, the defenders, in all respects in the same situation as if they had bought the yarn directly and solely from Shanks the brokers. The pursuers, on the other hand, allege that the alteration in the style of the notes was made to correct and identify the purchase of yarn made by the defenders through Shanks and Company, and that they were authorised to receive payment for the yarn.

Proof was led by both parties.

"Charles Shanks, the commission agent, deponed, *inter alia*: After the yarns referred to in receive-notes, Nos. 6/1 . . . were furnished to the defenders by the pursuers on my order, I remember of one of the defender's firm . . . calling upon me, and at his request I accompanied him to the pursuers', and I think we then saw both Mr Young senior, and Mr Young junior. The subject of conversation which then took place was the form in

which said receive-notes had been made out. The said defender Mar. 10. 1852. objected to the way in which the receive-notes, Nos. 6/1 to 6/11 inclusive, were made out, and he objected that they were made out as if the yarn were delivered by the pursuers from themselves, and stated that he wished the receive-notes to be made to bear that the yarns were delivered as having come from my firm. . . . I do not think I remained till the end of the conference; but my impression was that they came to an amicable arrangement of the matter in dispute. The said defender stated, on said occasion, that the defenders were not to be held liable to the pursuers for the price of the yarns which the pursuers might deliver to the defenders on my order; and this was the ground of the objection he made to the form of the receive-notes." The receive-notes were then altered in consequence, as the witness understood, of that interview — the pursuers continuing, on the witness' order, to furnish yarns to the defenders, in the months of February, March, July, and August 1843. "The prices of the yarns so delivered were settled betwixt the defenders and my firm, and there was no settlement for any of them made betwixt the pursuers and the defenders. . . . Throughout my negotiations with the defenders they never made any stipulations as to when, and from what quarter, I was to get the yarns I was to furnish them with. . . . The next delivery of yarns was in December 1843, and January and February 1844, being the yarns in dispute. My understanding as to the settlement of these yarns was, that they were to be settled by bill, which bill was to be handed over to the pursuers. Interrogated—"Was it your duty as commission-agent to obtain settlement for the price of the yarn referred to in these account sales, and to hand it over to the pursuer?" "I depone it was." And as to the particular yarns in question, "I never have obtained a settlement for said yarns until the present day." "My transactions with the defenders commenced in December 1842. The nature of these transactions was, that on the one hand I gave them orders for manufactured cotton goods, and I furnished them with yarns, and this continued to be the character of our business transactions until they terminated. There was no express bargain between us on this subject. "I sold their (the defender's) goods on commission, and I rendered account sales to them, charging my commission. I also rendered them accounts current. . . I see by that account that there was a balance of L.104 : 0 : 4 due by me to the defenders, payable in cash on the 30th November 1843. I did not pay that balance when due. I believe

Mar. 10. 1852. I was present at some interviews between the pursuers and defenders  
Young, &c. v. Brownlie, &c. on the subject of settling for the yarns furnished in December 1843,  
and January and February 1844. I think the only particular interview which I remember was in the pursuers' place of business,  
about a month or two ago, as far as I recollect, after the sale of  
the yarns in question. So far as I remember, the defender, Mr Liddell, stated that he had got the yarns in payment of his  
account. The pursuer, Mr Young, stated that he had not ; that  
the yarns had gone direct from the pursuers."

The Sheriff (Alison) adhering to the interlocutor of the Sheriff-substitute, (Skene), found for the pursuer.

The defenders advocated, and the Lord Ordinary (Ivory) "recalls the interlocutor submitted to review; finds that the advocates at the date of purchasing the yarns in dispute had such a knowledge of Shanks & Co.'s general relation towards said yarns as agents for the respondents, as well as of the fact that said yarns were the actual property of the respondents, as must in ordinary circumstances have excluded them from pleading, by way of compensation against the respondents' claim for the yet unpaid price, any debt due to them only *proprio nomine* by Shanks & Co.: But finds, on the other hand, sufficient evidence in the testimony of Charles Shanks, as confirmed by the whole circumstances of the case, and particularly by the coincident change which appears on express application by the advocates, to have taken place, and been agreed to by all concerned, in the terms of the receive notes under which delivery was made to the advocates, on which to hold the respondents, from and after February 1843, and particularly as regards the parcels of yarns now in dispute, as having specially consented to the advocate transacting and dealing with Shanks and Co. on the footing that Shanks and Co. alone were to be considered as their direct and proper creditors for the price of said yarns, the respondents, on their part, taking Shanks and Co. for their proper debtors and being to have no direct claim against the advocates for said price; and therefore, and in respect of this specialty, finds the advocates entitled, in the present action, to compensate and set off as against the respondents' demand the general balance (if any) due to them in the account proper between them and Shanks and Co.: But as the respondents dispute that any such balance is truly due by Shanks & Co. to the advocates (as to which no discussion has hitherto taken place) appoints the cause to be enrolled, that this part of the case may now be proceeded in; Meanwhile reserves all questions of expenses."

Against this interlocutor the respondents (pursuers) reclaimed. Mar. 10. 1852.  
*Logan and Deas* for the reclaimers (pursuers).  
*Penney* for the respondents (defenders and advocates).

Young, &c. n.  
Brownlie, &c.

**The LORD PRESIDENT.** I have not been able to satisfy my mind that there is sufficient proof to sustain the findings of this interlocutor. The respondents knew that the party with whom they were dealing was an intermediate hand. Therefore what does the case come to? That notwithstanding the general rule of law to the contrary, this intermediate party shall be held to be then sole creditor. I desiderate sufficient evidence of an agreement to that effect. The evidence of Shanks establishes that the mode of transacting business was by bill. If after the alteration in the receive-notes, the system of conducting the business altogether had been changed, I would have given weight to this plea; but, under the circumstances, I cannot agree with the interlocutor of the Lord Ordinary.

**LORD CUNINGHAME.** I agree. It does not appear to me that Shanks's parole testimony is decisive of this question. He does not swear that the pursuers agreed to the arrangement proposed by the defender at the conference with Mr Young. On the contrary, he says that they came to an amicable arrangement, which, as far as can be gathered from what is reasonable and probable, was that the notes should bear the name of Shanks and Company, to denote that they were the commission agents through whom the sale had been effected, (who were not specified in the first orders), and that they were authorised to receive payment for the yarn. But my opinion is also formed on this, that Liddell, Brownlie and Co., the defenders, never made any payment specifically of the yarns in dispute even to the brokers. This is distinctly sworn to by Shanks. The defenders' plea comes to this, that they are entitled to set off and compensate the price of the yarns furnished by the pursuers to them in January and February 1844 through a broker, by a balance of an old account settled between them and the broker on other transactions in November 1843. I think there is nothing in the case that sanctions such a plea, or that can lead one to suppose that any of the defenders even at the interview described by Shanks, explained the nature of their proposition and their pretension to the pursuers. They did not say they had large transactions with Shanks, as a purchaser of their goods, and would pay and compensate the pursuers' price of the yarn with the price of muslins previously sold by the defenders to Shanks. Giving due effect to all the circumstances, I am unable to find

Mar. 10. 1852. that the altered style of the delivery orders imported an entire change of the rights of the parties and of the character in which Young, &c. v. Brownlie, &c. they acted. The pursuers were still the primary sellers of the goods. The sales were effected through an avowed agent, who still retained his character of broker, with a very small per centage on each parcel. He might have the power of drawing the price when paid; but if no price was paid, the pursuers had a special and preferable claim (for aught established in this case) over the unpaid price in the hands of the defenders. These views are in a great measure founded on the latest and best authorities on the law of principal and agent; *Blackburn v. Scholes*, 2 Camp. 343; Paley, 279-281, *et seq.* I am therefore of opinion that the reasons of advocation should be repelled.

LORD IVORY adhered to his former opinion as Lord Ordinary.

LORD FULLERTON was absent.

The COURT, therefore, by a majority, "alter the Lord Ordinary's interlocutor submitted to review, and remit to the Sheriff *simpliciter*: Find the reclaimers entitled to expenses."

*Campbell and Smith*, W.S., Reclaimers' Agents.

*Lockhart, Morton, Whitehead and Greig*, W.S., Respondents' Agents.

## FIRST DIVISION.

No. 247.

PETITION, SOLOMON ARNOLD.

*Process—Sequestration Statute—Judicature Act—Decree by Default—Reclaiming Note—Competency.*—*Held* incompetent to reclaim against decree by default in a sequestration case beyond ten days.

Mar. 10. 1852. This was a reclaiming note praying to be reponed against a decree by default. To the competency of this note it was objected by Pet. Solomon Arnold.

*T. Mackenzie*, that by the Court of Session Act § 11, the reclaiming note requires to be put in within ten days from the date of the interlocutor reclaimed against. The ten days had here elapsed; *Falla v. Graham*, 14th Jan. 1837, Scottish Jurist.

*Pattison*, contra. The decision referred to was in a proper Court of Session case. This interlocutor is in a process of sequestration, which is regulated by the Sequestration statute. In the new Court of Session Act no reference is made to that statute, while various other statutes regulating the forms of process in the Court of Session are enumerated.

**Lord Ivory.** This does not seem to be a Bill Chamber case, Mar. 10. 1852. and it is not a Court of Session case. It is a case under the <sup>Pet. Solomon</sup> Sequestration Statute, and it appears to me that the view of it <sup>Arnold</sup> which is taken by Mr Pattison is correct, because the late Judicature Act sets forth a variety of statutes regulating the procedure in this Court, and it goes on, "and whereas it is expedient that the provisions and enactments of the said recited Acts should be in some respects altered and amended, &c." Now, the Sequestration Statute is not one of the statutes quoted, and therefore it appears to me that this is a proceeding regulated by another statute not recited here.

The COURT took time, and this day gave judgment. Having consulted with the Judges of the Second Division, they sustained the objection, and refused to write upon the note.

*James Bell, S.S.C., Agent for Reclaimer.*

*Thomas Dunn, S.S.C., Agent for Respondent.*

### FIRST DIVISION.

SHEDDEN v. PATRICK.

No. 248.

*Process—Reduction, &c.—Preliminary Defence—Relevancy of allegations of Fraud—Vicennial Prescription of Retour.*—A Scotchman resided and engaged in business in America for upwards of 30 years, during which time he succeeded to an heritable estate in Scotland. He never returned to Scotland, but died in America. Shortly before his death he married a woman, by whom he had previously two children, a son and daughter, having declared it to be his intention thereby to render them legitimate. His succession, however, was not wound up and settled on that footing, but a collateral relation served heir, and entered into the possession of the heritable estate. *Held* (1.) In a reduction, &c., at the instance of the son against the author of the latter, on the ground of fraud and collusion, &c., that the facts libelled were not sufficient to sustain the relevancy of the summons; and (2.) That the vicennial prescription applied and barred the objection to the retour; but *observed*, that the plea of prescription would not have barred an inquiry into the fraud, if relevantly laid.

This was a conjoined process of reduction and declarator, and of Mar. 10. 1852. a supplementary action of declarator, reduction, and count and reckoning, at the instance of William Patrick Ralston Sheddenn, son of <sup>Sheddenn v.</sup> Patrick, the late William Sheddenn, merchant in New York, against William Patrick, W.S., Robert Sheddenn Patrick, heir-at-law, or otherwise representing his deceased father, Dr Robert Patrick of Trearne, in the county of Ayr, and William Cochrane Patrick, advocate, Esq.,

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of Ladyland, his tutor-at-law, bearing to proceed on various acts of fraud, conspiracy, and collusion, concealment of fact, and wilful mistakes in law, with the view of injuriously affecting the pursuer's legal position, in respect of the domicile of his father, which was alleged to be American, and not Scotch, and his own legitimacy and rights of legal title and birth, as his father's eldest son, heir-at-law, and successor, and all for the purpose *inter alia*, of preventing the pursuer in that character from claiming the lands of Roughwood and others in the county of Ayr, which formerly belonged to the pursuer's father, William Shedden, and now in possession of the defender, William Patrick, W.S. The summons called for production of, and concluded to have set aside the retour of service obtained by the defender's author, and the titles thereon; also certain decrees and judgments pronounced by the Court of Session and House of Lords, under gross error in fact and in law, with other collusive and fraudulent proceedings, adopted in order to defeat the pursuer's just and legal rights.

The production was not satisfied, but preliminary defences were given in for both defenders, to the effect that the pursuer has no title to pursue the action, in respect he does not possess the character set forth in the summons; that the actions were barred by the vicennial prescriptions of retours, that the judgments sought to be set aside formed a *res judicata*, and could not now be challenged; that there was here acquiescence and *mora* on the part of the pursuer; and that, generally, the summons was irrelevant to infer its conclusions.

On these preliminary defences a record was made up, and the Lord Ordinary (Wood) reported the cause to the First Division of the Court, in terms of the 14th sec. of the Act 13 and 14 Vict., c. 36, and granted warrant to enrol in the Inner House rolls.

The case being called for debate, *Macfarlane*, *Neaves*, and *Moncreiff*, appeared and argued for the pursuer.

*Mure*, *Ross*, the *Solicitor-General*, the *Dean of Faculty*, and *Lord Advocate*, were for the defenders.

The nature of the facts, and the arguments of counsel, will be sufficiently seen from the judgment.

The LORD PRESIDENT. I have now to announce to the counsel and the parties, that, after the fullest deliberation on the case, and the very elaborate argument submitted to us, the Court has formed an unanimous opinion, which will now be delivered by Lord Fullerton.

LORD FULLERTON. These actions are brought to set aside, Mar. 10. 1852.  
first, the retour of the service, dated 25th October 1799, of the  
late Dr Robert Patrick, in the lands of Roughwood, as the lawful  
heir of Mr Shedden, the father of the pursuer, with the titles which  
have followed upon it; and, secondly, the judgments pronounced  
by this Court in 1803, and the House of Lords in 1808, suc-  
cessively repelling the reasons of reduction urged against the  
retour on behalf of the present pursuer, by the factor *loco tutoris*  
appointed to him by the Court. The preliminary defence on  
which we have heard the argument, involved three points. First,  
the alienage of the pursuer; secondly, the vicennial prescription  
of retours; and, thirdly, the palpable irrelevancy of these sum-  
mons, even assisted as they are by the condescendence. On  
the first point, that of the alienage, I should have great diffi-  
culty in sustaining it as a conclusive defence at this stage of the  
procedure; as a substantive ground of defence, we should not  
I think, *in hoc statu*, do more than reserve the consideration of  
that plea till the production was satisfied, and the merits of the case  
before us.

But really this is of little importance; for the next ground of  
defence truly confines the pursuer's action to the allegations of  
fraud and conspiracy, and clearly excludes the consideration of any  
error, either of fact or law, in the proceedings now brought under  
challenge. This defence is the vicennial prescription; and upon  
this I am not prepared to say that it would exclude a relevant and  
specific charge of fraud, though it might and must exclude all other  
reasons of reduction. The object of the statute seems to me to  
secure the service from all challenge on the ground of error, from  
whatever source that error, *qua error*, arose. But I should most  
certainly hesitate to find that it was intended to apply, and did  
apply to the case of that error being induced by the positive fra-  
udulent act of the party benefited by the service, or of any one em-  
ployed by him. But then the admission of the defence under these  
qualifications, just raises the question involved in the third ground  
of defence, which we all must consider as the substantial one, viz.,  
whether there is in these summonses, explained as they are by the  
descendence, such a specific and relevant allegation of fraud  
as can be received by the Court. And that leads us to consider  
in what sense the expression *relevant* is here used. There is no  
doubt that the general allegations of fraud are not spared either in  
these summonses or the descendence. And, accordingly, in the  
argument for the pursuer, it was said that in discussing the ques-

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tion of relevancy, we must hold those allegations *pro veritate*, and at once, as a matter of course, order the defenders to satisfy the production, because the defenders cannot dispute that, if fraud is proved, the action is well founded. But this is going rather too summarily to work in a matter of this kind. It is not enough for a party, founding a reduction on the head of fraud, to state that fraud has been committed. Fraud is a general term, to be inferred from specific acts. The party then must state in what the fraud consists, and what the acts are from which the existence of fraud is to be inferred. And if the facts which he does state are clearly insufficient to support such an inference, or what is worse, are absolutely inconsistent with such an inference, the objection of irrelevancy must be sustained. Not that the general allegation of fraud is in itself irrelevant, but that the acts, as averred, are irrelevant to support the general allegation. It is then to the alleged acts, from which fraud is said by the pursuer to be necessarily inferred, that we must look in discussing the point of irrelevancy. And I must say, that in all my experience, I never saw an action put on grounds so vague, so shadowy, and so inconsistent. For it is to the contents of the summonses alone that we must look in this discussion. And for this reason I think a good part of the argument on both sides was out of the limits of the only point of the case now before us, which must depend, not on extraneous evidence, but on the facts or documents as set out in the summons itself.

Now the first thing which must strike every one, is, that the letters as they are set out in the summonses are absolutely negative of any fraudulent intent whatever. They are the letters of persons who had interests adverse to that of the pursuer, and of course were lawfully entitled to defend their own interests, but who were at the same time desirous that those of the pursuer should be fairly protected, and who recommended the steps necessary for that purpose. Dr Robert Patrick was the recognised heir-at-law of Mr Shedden in America, who was understood to be unmarried. On his death-bed, that gentleman, by his letter dated 12th November 1798, founded on in the summons, informed his nephew, the defender William Patrick, that he had married Miss Anne Wilson, by whom he had two children, a boy and a girl;—an event of which Mr Patrick had been previously apprised by a letter from his brother John Patrick, in New York, dated a few days before. This might be most natural and proper on the part of Mr Shedden, but it is certainly not going too far to say, that a death-bed marriage, entered into for the sole purpose

of conferring on the wife and children a *status* and pecuniary rights, Mar. 10. 1852  
which the party withheld from them till he was about to leave this <sup>Shedden v.</sup>  
world, approaches very nearly to, and is likely to be viewed as a Patrick.  
somewhat harsh interference with the rights of those whom,  
till that moment, he had left in the expectation of his succession.

It is not to be wondered at then, that the Patricks, and among others the defender William Patrick, lost no time in ascertaining how the law of the case stood. And the result was the clear opinion of American counsel, also referred to in the supplementary summons, dated 20th May 1799, that the marriage was good, but had not the effect, by the law of America, of rendering the children legitimate. In these circumstances it was perfectly natural that William Patrick should have no scruple in taking the steps for carrying through his brother's service, which accordingly took place on the 25th October 1799. But the statement, repeated both in the summons and in the argument, that this was done while all the time William Patrick was acting as the guardian of the pursuer, is a striking instance of the incongruity of the general allegations of the summons with the documents founded on it. For at page 8 of the original summons there is to be found at length a letter from William Patrick to the American executors, before the pursuer arrived in Scotland, in which he says he cannot accept of the appointment of guardian, being obliged to attend to the interest of his brother, who claimed to be heir to the deceased William Shedden. Mr William Patrick, though he had obtained the service of his brother in the lands of Roughwood, was of course professionally aware that this procedure, taken *pericula petentis*, left the matter of right still open; and he very naturally points out to the American executors how that question is to be tried. This letter is expressly founded on in the supplementary summons, and is to be found, page 262 of print. It is a very important feature of the case for the defender Mr William Patrick, fully and satisfactorily explaining the motives by which he was actuated. And the whole of the other letters founded on in the summonses as passing between William Patrick and his brothers are of the same complexion and character. Taking them according to their literal and unequivocal meaning, it is impossible to conceive any series of writings more utterly and absolutely inconsistent with the charge of fraud which they are brought forward to support. No doubt that is not always conclusive. The assumption of the fairest and most honest motives is often the cloak for designs of a very different character; and, accordingly, the

Mar. 10. 1852. summonses aver that they were all parts of a scheme for defrauding the pursuer of his just rights. The statement already quoted, in support of which these letters are referred to, is that "these parties *conspired* together for the fraudulent purpose of neutralizing the object which their uncle had in view, of legitimating the children." But when a party founds on letters in evidence of fraud and conspiracy, which, according to their clear and literal meaning, express no such intent, but the reverse, it lies on him, in order to support the relevancy of his statements, to set out the facts from which the conspiracy is to be inferred, and a colour is thus to be given to the letters essentially different from that which they present to the uninformed eye of those who peruse them. Now on all this, these summonses, assisted as they are by the condescendence, seem an absolute blank. There is not one fact set forth which bears the slightest resemblance to an act of conspiracy between William Patrick and his brother to defeat the rights of the pursuer. The pursuer says, indeed, that these parties did conspire; but in what the conspiracy consisted, how it was conducted and carried through, is a matter on which, though essential to every relevant charge of fraudulent conspiracy, we have no information whatever.

This defect seems quite fatal to the allegation of conspiracy. But it is said that all these letters were written, and all the steps recommended, on the footing of the late Mr Shedden having been a domiciled American, while the defender, Mr Patrick, and his brothers *knew* that his domicile at the time of his marriage and death was Scotland. Their knowledge of that as a fact is the sting of the whole charge of fraud. Now in considering the admitted facts of the case, according to the ordinary apprehension of mankind, the question naturally suggests itself how William Patrick or his brothers, charged with fraudulent concealment or conspiracy, *knew* that William Shedden, who had lived and died in America, and had not seen his native land for about thirty years, continued to be a domiciled Scotchman till the day of his death. And the affirmative of that question is evidently essential to the pursuer's case, when put on fraudulent concealment.

Accordingly the attempt to answer it is made, and it is founded on certain letters, which, however, merely shew what was natural enough, that William Shedden, like many of his countrymen, looked with hope and satisfaction to the possibility of his return at one time or another to his native land. And after all we heard in argument, I must say that I am not satisfied that,

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even according to what the pursuer considers the improved and Mar. 10. 1852. matured law of domicile, any case has yet occurred in which such mere expressions of hope and intention to return to his own native country, have been held to take off the effect of the *de facto* corporeal residence of the party in a foreign land. No doubt, if the pursuer could have founded on letters or extraneous evidence shewing that the parties possessed this knowledge, he might have had something like a case. But when he infers the fraud merely from the letters just alluded to, and nothing else, he is evidently inferring fraud from nothing but a misapprehension in law on a point of great nicety and difficulty, on which, I venture to say, nine-tenths of the lawyers of that day, and the whole of the uninitiated, would have, in the most excellent faith, come to the same conclusion. Mr William Patrick and his brothers might be right or wrong in that view; but the proposition that, even if ultimately found wrong in the law, their conduct must necessarily be held to be tainted with fraud, is one to which no court, following the dictates either of law or common sense, could give the slightest countenance. Holding then, as I must do, from the analysis of the import of these summonses, that the whole charge of fraud rests on this assumption, I can come to no other conclusion than that the statements are utterly irrelevant to support the conclusions of the actions. And this would be the necessary result even if the subject of reduction were confined to the service of Robert Patrick. That, as I have already stated, is protected by the vicennial prescription from all ground of challenge except fraud. If fraud is not relevantly averred, the summonses cannot be sustained.

But the case assumes a still more hopeless aspect for the pursuer, when we consider what followed on the service—I mean the judgments of this Court, and the House of Lords confirming it. This action is brought against the parties who, it is said, took the benefit of these judgments sought to be reduced. The ground of it, and the sole ground of it, is the concert or conspiracy between those parties and Mr Hugh Crawfurd, the factor *loco tutoris* to the pursuer, appointed to protect the pursuer's interest. Yet neither that person, nor any one representing him, is called as a defender; and the single fact, from which the pursuer chooses to infer fraud or collusion, is, that the factor *loco tutoris* and his advisers did not advance a plea or proposition in law, which he, assisted by the new lights lately obtained, thinks would have led to a different judgment. For, as has been already remarked, the

Mar. 10. 1852. sole foundation of the charge of fraud or collusion is, that the factor *loco tutoris* and his advisers did not bring forward the plea, that though the residence *de facto* of the late Mr Sheddern was America, still his domicile was Scotland. But how can such a charge be listened to after the case was put under the guidance of eminent counsel? They were the parties to determine, on their own professional responsibility, how the case was to be conducted. Their silence on the legal proposition on which the whole of the present actions rest, is to be ascribed to one of two causes. They either held that the domicile of William Sheddern could not in law be separated from his residence, so as to affect the consequences of the marriage; or, if they took a different view, the presumption is, that they made the necessary inquiries into all the circumstances of fact by which that different view could be supported, and found those circumstances insufficient. But whether the case was well argued or not, or judiciously conducted or not, can any one listen to the proposition, that the factor, the formal *dominus litis*, must be held liable to the imputation of fraud or collusion, because the counsel, the best which the bar could afford, did not take that particular view of the law of domicile which the pursuer now assumes to be the true one? But, the case of the pursuer will be found not to rest on fraud at all. The fraud lies, and so it is put by the pursuer himself, in the failure to bring forward a certain legal proposition, which is said to have been omitted in the pleadings in the former reduction, and which, according to the pursuer's view, would now warrant a different conclusion. But even holding that view to be the sound one, what does it come to but this, that the pursuer under the cover of a charge of fraud, in itself untenable according to his own summonses, is attempting to obtain a review of the judgment of this Court and the House of Lords, on a matter of law which had not been brought under the notice of either tribunal; a review which, by the force of the vicennial prescription, is entirely incompetent and inadmissible? For if the allegation of fraud is indispensable to get the better of that prescription as applicable to a bare retour, *a fortiori*, is it indispensable, when that retour has been confirmed by judgments of this Court and the House of Lords?

On these grounds the objections to the relevancy of these summonses ought to be sustained and the defenders assailed.

The COURT pronounced the following interlocutor:—"Edinburgh, 10th March 1852.—The Lords, on the report of Lord

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Wood, having considered the record and productions, and having Mar. 10. 1852.  
 heard the Counsel for the parties, sustain the defences pleaded by <sup>Shedden v.</sup>  
 the defenders against the relevancy of the grounds of action set Patrick.  
 forth in the conjoined summons and supplementary summons of  
 declarator, reduction, and count and reckoning: Dismiss the said  
 actions, and assoilzie the defenders from the whole conclusions  
 thereof: Find the defenders entitled to their expenses: Appoint  
 accounts of expenses to be lodged: And remit to the Auditor to  
 tax the same and to report."

*Gibson-Craigs, Dalziel & Brodie*, W.S., Agents for the Pursuer.

*Christopher Douglas*, W.S., Agent for the Defender, William Patrick.

*James M'Ewen*, W.S., Agent for R. S. Patrick.

## SECOND DIVISION.

THE STIRLING and DUNFERMLINE RAILWAY COMPANY v. THE No. 249.  
 EDINBURGH and GLASGOW RAILWAY COMPANY.

*Railway—Leave under Statute—Agreement.*—Where a statute provided for the lease of a railway to another railway company, which leased line was to be accepted in portions as it was made—*Held*, in a declarator of right under the lease, and to have the obligations in the same implemented, that it was no defence to the action that a private agreement had been made between the parties, which set forth different terms of lease; and that the pursuers were not bound to wait till the whole line originally contracted for was completed.

In this action the pursuers sought to have it found and declared Mar. 10. 1852.  
 " that the Railway and Branch Railways, authorised to be con-  
 structed by 'the Stirling and Dunfermline Railway Act, 1846,'  
 'The Stirling and Dunfermline Railway (Amendment and Devia-  
 tions) Act, 1848,' and 'The Stirling and Dunfermline Railway Co.  
 (Deviation, Extension of Time, and Amendment) Act, 1849,' are,  
 under the provisions of these several acts, leased to the defenders  
 for a period of thirty years from that completion, or from the com-  
 pletion of any part thereof. And further, that it ought and should  
 be found and declared, by decree foresaid, that the portion of the  
 said Railway now completed, situated between the joint station  
 of the Edinburgh, Perth, and Dundee Railway, and the Stirling  
 and Dunfermline Railway, in or near to the town of Dunfermline,  
 and the station of the Stirling and Dunfermline Railway in the  
 town of Alloa, extending to thirteen miles six furlongs and ninety  
 yards or thereby, is, by virtue of the said Acts of Parliament,

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Mar. 10. 1852. vested in them from and since the 4th day of December 1850, and  
~~~~~ during the said period of thirty-five years, subject to the condi-  
Stirling and Dunfermline Rail. tions contained in the said Acts, and that the said defenders are,
Co. v. Edin. and Glas. Rail. during the said period, bound to take and hold the same in lease,
Co. and to maintain the works so completed in good and sufficient
order, and to pay to the pursuers an annual fixed rent or consider-
ation for the use thereof, at the rate of four per cent. on the whole
amount expended by the pursuers in obtaining the said several
Acts, and in completing the said portion of railway, as the said
amount shall be ascertained and fixed by John Miller, civil engi-
neer in Edinburgh; whom failing, by the engineer of the Edin-
burgh and Glasgow Railway Company for the time being; and
also to pay to the pursuers a further fluctuating and contingent
rent or consideration, equal to one-half of the whole receipts
which shall appear from the books of the said defenders to have
been drawn by them during the preceding year, in respect of the
traffic of the said portion of railway, after deducting the said fixed
rent of four per cent., and a sum equal to 35 per cent. on such
gross receipts, in respect of the expense of maintaining and work-
ing the same;" reserving to the pursuers all farther claim for the
contingent or fluctuating rent before mentioned, and likewise all
claim for damages competent at the pursuers' instance against the
said defenders, for the loss sustained and to be sustained by them,
by and through the failure of the defenders to implement their
obligations above written.

The defenders pleaded an agreement which they had made
with the pursuers, and which proceeded, as a fundamental condition,
upon the footing that it should be null, in the defenders' option,
if a connection between the Edinburgh and Glasgow and
Stirling and Dunfermline lines should not be obtained; and that
connection not having been legalised, the defenders cannot be
compelled to take the line in lease. They also pleaded, that as
only a portion of the line had been completed, and that a mere
fragment, incapable of being worked by itself to advantage, the
lease could not be held binding on them; and the obligation to
take a part of the line being conditional upon the execution of the
lease, the whole line of 1846, which included an independent ter-
minus on ground now otherwise occupied, and which condition,
therefore, the pursuers cannot now fulfil, this obligation cannot
be enforced against the defenders.

The Lord Ordinary (Cowan) pronounced an interlocutor, by
which he "Finds that, according to the sound construction of the

statutes libelled on, the leasing provisions, and clauses, therein, ^{Mar. 10. 1852.}
 have come into operation as regards that portion of the pursuer's
 line of railway which has been completed, as the same is described
 in the summons; and that the said clauses and provisions fall to
 be implemented by the defenders, as lessees of the railway under
 the said statutes: Therefore, finds, decerns, and declares, in
 terms of the declaratory conclusions of the libel, and appoints the
 cause to be enrolled, with a view to the farther procedure therein
 under the other conclusions of the libel."

The defenders reclaimed.

Patton and Neaves for the reclaimers.

Bruce, Marshall, and the Solicitor-General (Inglis), for the re-
 spondents.

The COURT were of opinion that the pleas maintained by the Edinburgh and Glasgow Company afforded no answer to the action, but they thought that the interlocutor of the Lord Ordinary should be made more special, and pronounced an interlocutor by which they "Repel all the defences stated on record against the conclusions of the present action: Find that it is proved by the certificate of Mr Miller, the engineer named in the statute libelled on, dated 4th December 1850, and not disputed, that the whole portion of the Stirling and Dunfermline Railway from the station at Dunfermline to the station in or near to the town of Alloa, being, in whole, above thirteen miles and six furlongs, has been completed and executed to the satisfaction of the said John Miller, and must now be taken, under the statute libelled on, in lease by the Edinburgh and Glasgow Railway Company, defenders in the action; and the powers conferred by the statutes on the Stirling and Dunfermline Company, in regard to the management and working of the said portion of the line, now vest in the said Edinburgh and Glasgow Company, and may be exercised by them: Find that the contract of lease constituted by the statute 1846, of the line of the Stirling and Dunfermline Railway, took effect and came into operation so soon as the above certificate was granted by the said John Miller, and that the portion so completed must be taken by the Edinburgh and Glasgow Company under the provisions, obligations, and conditions of the said lease, as specified in the said statutes, as fair implement *pro tanto* of the said contract of lease: Find it not averred that there has been any undue delay on the Stirling and Dunfermline Company in proceeding to complete the remainder of the line to the town of Stirling, and

Mar. 10. 1853. that they are bound to proceed in the formation and execution of
the same with all convenient speed : Find that the Stirling and
Stirling and Dunfermline Railway Company have acquired all the ground which
Dunfermline.Rail. it was necessary for them to obtain in order to carry the railway
Co. v. Edin. to the western extremity of the line at or near Stirling, described
and Glas. Rail. Co.
in the Act of 1846 : Find that the Edinburgh and Glasgow Com-
pany have assigned no valid reason for not fulfilling their part of
the contract of lease constituted by the statute 1846, and con-
tinued by the other statutes libelled on, or for not now entering
into possession of the portion of the said railway now completed
under the said statutory contract of lease : Therefore, find, decern,
and declare, that the portion of the said railway now completed,
situated between the joint station of the Edinburgh, Perth, and
Dundee Railway, and the Stirling and Dunfermline Railway, in
or near to the town of Dunfermline, and the station of the Stirling
and Dunfermline Railway, in the town of Alloa, extending to
thirteen miles, six furlongs, and ninety yards, or thereby, is, by
virtue of the said Acts of Parliament, vested in the defenders
from and since the 4th day of December 1850, and during the
period of thirty-five years thereafter, subject to the conditions
contained in the said acts ; and that the said defenders are, during
the said period, bound to take and hold the same in lease, and to
maintain the works so completed in good and sufficient order, and
to pay to the pursuers an annual fixed rent or consideration for
the use thereof, at the rate of four *per centum* on the whole amount
expended by the pursuers, in obtaining the said several acts, and
in completing the said portion of railway, as the said amount shall
be ascertained and fixed by John Miller, civil engineer in Edin-
burgh, whom failing, by the engineer of the Edinburgh and Glas-
gow Railway Company for the time being ; and also, to pay to the
pursuers a further fluctuating and contingent rent or considera-
tion, equal to one-half of the whole receipts, which shall appear from
the books of the said defenders to have been drawn by them
during the preceding year in respect of the traffic of the said por-
tion of railway, after deducting the said fixed rent of four per cent.,
and a sum equal to thirty-five per cent. on such gross receipts, in
respect of the expense of maintaining and working the same.
And, further, find, decern, and declare that the said defenders
were bound as on the said fourth day of December 1850, to enter
into possession of the said portion of the said Stirling and Dun-
fermline Railway, and thereafter, during the said period of thirty-
five years, to exercise all the powers and authorities conferred by

the said Acts on the pursuers with respect to the maintenance, Mar. 10. 1852.
 protection, and use of the said portion of the Stirling and Dun-
 fermline Railway, subject to the same provisions, rules, and regu-
 lations as are by the said Acts imposed on the pursuers; and
 remit to the Lord Ordinary to proceed with the disposal of the Co.
 cause, due regard being had to the fact, that the whole defences
 stated against the conclusions of the action are hereby repelled :
 Find the pursuers entitled to expenses since the date of the Lord
 Ordinary's interlocutor," &c.

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Dundas and Jamieson, W.S., Agents for Pursuers.

David Smith, W.S., Agent for Defenders.

SECOND DIVISION.

MENZIES v. MENZIES.

No. 250.

Entail—Locality to Widow—Shootings, &c.—An heir of entail, under a power to that effect in a deed of entail, granted, by a disposition of locality, a provision to his widow, to the extent of one-fourth of the rental of the entailed land, without making mention of the unlet shooting, &c., pertaining to the locality lands : *Held* in an action at the instance of the heir of entail in possession against the widow of the last heir, that, in estimating the fourth of the rental, the value of the shootings on the locality lands, although unlet in the lifetime of the last heir, ought to be taken in computation with the other shootings on the estate.

This was a declarator to ascertain the relative rights of the Mar. 10. 1852.
 pursuer, Sir Robert Menzies, as heir of entail of the lands and baronies of Menzies and others, and of the defender, as widow of the late Sir Neil Menzies, baronet, the father of the pursuer, under a disposition of locality in favour of the defender, by her said husband.

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Menzies.

The record for the pursuer set forth, that by the deed of entail of the estate of Menzies, including the estate of Rannoch, a permissive power is conferred upon the heirs of entail to grant provisions in favour of their widows by way of locality, in the following terms:—
 “ And likeways that it shall be leisome and lawful to the said heirs male of my body, and the other heirs of tailzie above mentioned, to provide and infest their wives by way of locality allenarly, in competent liferent provisions, the same not exceeding a fourth part of the said lands and estate, in so far as the same shall be free and unaffected for the time with prior liferents and annual rents of real debts, and after deduction of the annual rents of personal debts, that do or may affect the same ; excepting always from the

Mar. 10. 1852. *Menzies v. Menzies.* said power of providing wives in locality, the foresaid mansion-house and manor place of Castle Menzies, with the office, houses, yards, orchards, and enclosures adjacent thereto, which it shall be noways lawful to give up in liferent, albeit the said enclosures may be brought *in computo*, in order to ascertain the said fourth part of my lands and estate above mentioned." That this power was exercised by Sir Neil Menzies in executing a disposition of locality in the defender's favour, by which he settled on her by way of provision a variety of farms as specified in the deed, the rental of which amounts *in cumulo* to L.1824, somewhat beyond the fourth part of the gross rental at the period of Sir Neil's death. That the deed of locality comprehends not only farms to the extent specified, but also the mansion house and family residence of Ranwick Lodge, that a very large tract of grouse and muir grounds, to the extent of 30,000 acres, as well as several lakes, together with the privilege of shooting, hunting, and fishing, which would yield a considerable rent, besides the rent paid by tenants for the purpose of pasture and agriculture, none of which had been taken into account in estimating the fourth of the rental for the locality; and that the shooting, hunting, and fishing aforesaid were claimed by the defender, to the entire exclusion of the pursuer, the heir of entail in possession. The summons proceeded to libel that a declarator had been brought in 1845 concluding for the pursuer's rights in respect of the above grounds; but the matter of which was afterwards referred to arbiters by a regular deed of submission entered into by the pursuer and defender, which, with a variety of other procedure, did not appear to have been brought to any conclusion, the defender being unwilling to proceed with the submission.

The pursuer therefore pleaded that the submission must be held to be subsisting and effectual, and that the defender was bound to proceed with the same. That the defender was not entitled to the privileges of shooting, hunting and fishing over the locality lands, and that the pursuer has the only title to exercise those rights. But that, if so entitled, the defender was bound to impute the fair annual value of the shooting, hunting and fishing in payment of her provision, and as the same exceeds any lawful proportion of the whole similar rights connected with the estate, she was bound to reconvey to the pursuer a corresponding part of her locality lands and farms. It was further pleaded for the pursuer, that the defender was bound to pay or make due allowance for the rent of Ranwick lodge and residence.

The defender denied that the provision made to her exceeded Mar. 10. 1852.
 one-fourth of the gross rental of the estate, or that the provision
 made to her in any respect exceeded what she was entitled to ^{Menzies v.} ~~Menzies~~.

under the permissive power of the deed of entail, and pleaded that the shootings and fishings referred to were an accessory of her life-right, and that she was in no way bound to account to the pursuer for the value of the same; and that even upon a re-adjustment of the locality, and a revaluation of the whole estate, the defender could not be called upon to include the shootings and fishings in question in the rental, or pay for the same, seeing that at the date of her disposition these subjects were not let, and were in a measure unproductive. As to the submission, the defender pleaded that the same having lapsed before any decree interim or final was pronounced, it was totally incompetent by means of a declaratory action, independent of consent of parties, to revive the same.

The Lord Ordinary (Wood) on the 26th June 1849, pronounced an interlocutor, by which he found that the submission no longer subsisted, but had expired, which interlocutor was acquiesced in; thereafter, on the 13th December 1850, his Lordship sustained the defences generally, "except in so far as the shootings on the locality lands may have been let at the date of the disposition of locality, and reserves to the pursuer to shew how far the extent of the locality would be affected by taking the rent of the shootings so let into view, having regard at the same time to the rent of any shootings on other portions of the entailed estates that may have been then also let, in order that the pursuer may be relieved in the manner that shall appear fit under the circumstances, of any excess in the locality which, upon that footing, may appear to exist;" and, further, before answer as to the claim of rent made by the pursuer in respect of the defender's residence of Ranwick lodge, appointed the cause to be enrolled."

The pursuer reclaimed.

Ross, Neaves and the *Lord Advocate* for claimer.
Wood and Inglis for respondent.

The COURT "before disposing farther of the prayer of the reclaiming note, Find that, by the disposition of locality, dated the 6th day of February 1844, granted by the late Sir Neil Menzies in favour of the defender, the whole right of shooting, hunting and fishing belonging to the said Sir Neil Menzies, as heir of entail in possession, except as regards the right of salmon fishing over the

Mar. 10. 1852. lands conveyed as locality lands to the defender in life-rent, during all the days of her life, after the decease of the said Sir Neil Menzies, was carried exclusively to the defender by the said disposition of locality. But in regard to the question whether the value of the said shootings, although not let by the said Sir Neil Menzies, ought to be taken into computation with the value of the other shootings on the estate, in ascertaining whether the provision made by the said disposition in locality does or does not exceed the extent allowed by the entails to be settled on the wife of the heir in possession, in case of his predecease : Appoints parties to give in cases on that point." These cases were accordingly given in.

The authorities referred to in the case for the pursuer, were *M'Pherson v. M'Pherson*, 24th May 1839, 1 D. 795, House of Lords, 13th August 1846, 5 Bell, 280; *Sinclair v. Lord Duffus*, 24th Nov. 1842, 5 D. 174. The defender referred to *Malcolm v. Malcolm*, 21st Nov. 1823; *Agnew v. Agnew*, 10th Dec. 1810, reported in note to *Gordon*, 24th Jan. 1811.

By a subsequent interlocutor the Court directed these cases to be laid before the whole judges for their opinion. Opinions, accordingly, were returned by the Lord President, Lord Cunningham, and Lord Wood, who concurred in considering that the value of the unlet shootings ought not to be taken into computation with the value of the other shootings on the estate. Lords Rutherford, Fullerton, Ivory, Colonsay, Robertson, and Cowan answered the question submitted to them in the affirmative, and were therefore of opinion that the value of the unlet shootings ought to be taken into computation.

This day the case was advised, and the Court pronounced the following interlocutor :—" The Lords having resumed consideration of the case, in respect of the opinion of the majority of the whole judges, Find that the value of the shootings over the lands conveyed as locality lands, although not let by the deceased Sir Neil Menzies, ought to be taken into computation with the value of the other shootings on the estate, in ascertaining whether the provision made by the said disposition in locality does in real value exceed one-fourth part of the lands and estate belonging to the grantor of the disposition of locality, and in respect of the averments of the pursuer as to the value of the shootings over the locality lands, as increasing the value of these lands to such an extent as to exceed to a material extent the one-fourth part of the lands and estate ; remit to Thomas Syme, writer to the signet, to

value the shootings on the said locality lands, and on the whole Mar. 10. 1852.
 lands and estate held by the said Sir Neil Menzies under the ^{(Menzies v.}
 deeds of entail referred to in the disposition of locality, with ^{Menzies v.}
 power to him to take such evidence as he may think necessary for
 his own guidance, or for the information of the Court, and to re-
 port the value of the same, and at the same time to report
 whether to any, and to what extent the lands conveyed by the
 said disposition of locality, along with the value of the shootings
 on the same, exceed one-fourth part of the said entailed lands and
 estate in point of value, the value of the shootings over the rest
 of the lands being taken into account, as well as the value of the
 shootings on the locality lands."

Hope, Oliphant & Mackay, W.S., Pursuer's Agents.

James Robertson, W.S., Defender's Agent.

FIRST DIVISION.

Mar. 11. 1852.

This day John Marshall, Esq., having been elected Dean of Faculty, in room of the Lord Advocate (Anderson) resigned, the learned gentleman was duly presented to the Court, and took his place at the bar as Dean accordingly.

FIRST DIVISION.

THE PRINCIPAL AND PROFESSORS of King's College, Aberdeen, v. No. 251:
 LADY JAMES HAY AND HUSBAND.

Feu-duty—Personal Bond—Transference of Property—Liability—Held
 that a personal obligation to pay feu-duty constituted by personal bond
 does not impose an obligation in perpetuity, but is extinguished by the
 transference of the property over which it is secured.

This was an action of declarator and payment, and the question Mar. 11. 1852.
 raised related to the security for his feu-duty, which the superior ^{The Principal}
 may stipulate for and enforce against the vassal. Along with this and Professors
 ease, there was conjoined a similar case of *Brown's Trustees v. Webster*, reported ^{of King's Col.}
infra, p. 634:—This action was raised at the ^{Aberdeen, v.} Lady Hay, &c.
 instance of the constituent members of the University of Old
 Aberdeen, who, as trustees of certain mortifications belonging
 to the College, were originally heritable proprietors of the lands
 of Bankhead, lying in the vicinity of Old Aberdeen, with the sal-
 mon fishings on the river Don attached to these lands. The action

Mar. 11. 1852. is directed against Lady James Hay of Seaton, only child and execatrix of the deceased James Forbes, Esq., of Seaton, and her husband, for his interest.

The Principal and Professors of King's College, Aberdeen, v. The lands of Bankhead, besides their agricultural value, Lady Hay, &c. afforded the most eligible point from which to draw off the water

of the Don for the use and extension of certain mills and manufactoryes situated in the immediate vicinity. And the pursuers and their predecessors in office in 1818 having resolved to dispose of the subjects by public sale to the highest bidder by way of *feu*, the lands and fishings, after being duly advertised, were exposed to sale by public roup at the upset price of L.100 sterling in money, and the price of fifty bolls of the best farm or market bear, conform to the fairs prices for Aberdeenshire. The articles of roup stipulated by article third, that "the person who should be preferred to the purchase of the said lands, salmon fishing, and others, should be obliged, within fourteen days after the roup, to grant a personal bond, with sufficient security to the satisfaction of the said principal and professors, for the regular and punctual payment of the foresaid yearly money and victual feu-duty at the terms before mentioned for the space of ten years from the term of Whitsunday then last, &c., and which personal bond should also contain an obligation on the purchaser, and his heirs and successors, for the regular and punctual payment of the said yearly feu-duty, in all time coming, from and after the expiry of the said ten years," &c. And by article 4th, it was provided that "upon the purchaser's granting a personal bond as aforesaid, the principal and professors of said College, or a majority of them, should execute and deliver to the purchaser a charter to the foresaid lands, salmon fishings, and others, in favour of him, his heirs and assignees, &c., in all time thereafter.

At the sale Mr Davidson was, after a competition, preferred to the purchase at a feu-duty of L.502 annually over and above the victual feu-duty before mentioned, and thereafter declared that he had made the purchase on behalf of Mr Forbes of Seaton, proprietor of one of the neighbouring manufactoryes.

In implement of the obligation in the articles of roup under which he had purchased, Mr Forbes, on 12th August 1818, granted a personal bond along with a cautioner, by which he binds and obliges himself, "his heirs, executors, and successors," regularly to pay the yearly feu-duty in all time thereafter; and "for and with the said James Forbes as principal," the cautioner bound and obliged himself, his heirs, executors and successors for

payment of the yearly feu-duty during the period of ten years, Mar. 11. 1852. with penalties and interest in case of failure. And the principal and professors on their part granted a feu-disposition of the grounds and fishings in question, containing, 1st, the ordinary imposition of the feu-duty as a real burden; 2d, A personal obligation on Mr Forbes, his heirs, executors, and successors; 3d, A declaration that the real and personal rights should both stand effectual, the one without prejudice to the other. They also granted a charter in favour of Mr Forbes, his heirs and assignees, stipulating *inter alia* that every heir or singular successor should be obliged to take out a charter on entry, and to grant a personal obligation if required, for payment of the feu-duty.

On this charter Mr Forbes was infest, and on his death, Lady James Hay made up titles to the lands and fishings, and was duly infest on a precept of *clare constat*, containing the same provisions and declarations which are contained in the original charter to Mr Forbes.

The feu-duty was regularly paid up to Martinmas 1847. At that term it was refused, on the ground that the lands and fishings of Bankhead had been sold and assigned to a person of the name of James Gould, described as "a feuar at Stoneywood," who, it was said, was ready to enter with the pursuers as their vassal in the lands, and who, it was maintained, was from that time forth the only party liable in payment of the feu-duties, whether money or victual, exigible for the lands in question.

The pursuers, considering that Gould was without the means of paying the feu-duty in question, declined to grant him an entry, the effect of which would, or might have been, if given unconditionally, to liberate Lady James Hay from her obligations as feuar. A charge was therefore given at Gould's instance to enter him as vassal in the lands. A suspension of this charge was brought by the principal and professors, and thereafter the present action of declarator and payment, concluding against the defenders,—1st, for payment of the feu-duty and liquidate penalty: and, 2d, to have it declared that the defenders "and all others, the heirs, executors and successors of the said deceased James Forbes of Seaton, now are and shall continue in all time coming, in terms of the above recited bond, personally liable to the pursuers, their successors in office, and donees or assignees, for payment of the said money, feu-duty and conversion of victual feu-duty, at the terms specified, in all time coming, in terms of the above recited bond. . . . And that notwithstanding of the said sale or pre-

The Principal
and Professors
of King's Col.
Aberdeen, v.
Lady Hay, &c.

Mar. 11. 1852. tended sale to the said James Gould, or of any sale or alienation made or to be made by the said defenders or their foresaids, of the Principal said lands of Bankhead, and salmon fishings thereto attached, and of King's Col. notwithstanding of any entry which the pursuers may see fit here-Aberdeen, r. Lady Hay, &c. after, or may be bound and obliged to grant to the said James Gould, or other party as vassal in the said lands and others."

A record was made up, and cases were lodged by both parties, arguing the cause.

The Lord Ordinary (Wood) having found for the pursuers, the defenders reclaimed.

The case was appointed to be heard before the whole Court.

Ross and Dean of Faculty (Marshall) for the reclaimers. Land is the primary debtor. Baron Hume, p. 77. The superior's security is in the land itself, and he is not entitled to enquire whether the vassal is able to pay the feu-duty. A conveyance of the land divests of all obligations, and therefore a personal obligation for feu-duties cannot be available after divestiture of the subjects to a singular successor. *Pedie v. Gibson*, 27th Feb. 1846, 8. D. and B. 560; and *Small v. Miller*, 11. D. and B. 495. The question is, has the vassal power to convey the lands. That power is indisputable. He may sell at any time, and under 20 Geo. II., the superior may be compelled to enter any other person who buys. The articles of roup are properly a contract of sale; and the other deeds merely give effect to the stipulations therein contained. These subjects were offered to sale by public roup. The sellers did not know who were to be the purchasers. They had no *delectus personae* in the matter at all. This explains why they stipulated for a cautioner; for as to him they had a *delectus personae*, and he was absolutely bound for the payment of the feu-duty for ten years. There is nothing in this stipulation in the articles of roup, to shew that it was intended to be different from the obligation in all similar transactions, that the purchaser of the feu should be liable only while he was the vassal, like all other purchasers of feus. The fact of this obligation being on a separate writ, does not attach a different construction to it. There is nothing therefore in the circumstances of this case, to distinguish it from other cases. There is a right to assign; and the assignation divests the assigner of the liability for payment of the feu.

The *Solicitor-General (Inglis)* with whom *Moir*, for the pursuers. The question is, whether there is constituted by the deed in question such an obligation as is enforceable against Seaton and his sub-

stitutes, notwithstanding his alienation of the feu. It is another Mar. 11. 1852 question whether the college is bound to accept Gould as their vassal. *Coutts v. Tailors of Aberdeen*, Robertson's Ap. cases, p. and Professors 325, 340. We are dealing with a contract of sale. This personal obligation is for the price. It makes no difference whether this Lady Hay, &c. price is payable annually, instead of all at once. Would it be held that in the one instance the obligation was binding on the granter and his heirs, and in the other that it was not. Again, this obligation applies equally to the first ten years, and to all time. The obligation is one and indivisible, beginning from the term of entry to the feu. If it be during the first ten years, an obligation binding Forbes and his *successors*, (not in the subjects, but *heirs and successors generally*), it cannot, after the first ten years, be binding, not on his representatives, but the successors in the feu; for there is but one clause applicable to both. Again, Forbes binds himself and his foresaids, and his heirs, executors, and successors, to relieve his cautioner. Does this mean he binds his successors in the feu to relieve his cautioner? That is absurd. It is therefore a personal obligation that transmits to, and is enforceable against, the granter's representatives. The granting the personal bond was the preliminary condition of obtaining the feu-charter. This is not a *bona fide* alienation, but a mere device to defeat the feu. *Magistrates of Inverness v. Bell's Trustees*, Nov. 28. 1827, 3 F. C. 133; 6 S. 160. A party may have the legal power of transferring a right to another, and yet after the transference, he may continue bound as before. *Skene v. Greenhill*, May 20. 1825, 4 S. 26, E. B. 2, 7, 6, § 34. *Bankton*, B. II. 79, § 14.

To-day the case was advised.

Of the consulted Judges, the LORD JUSTICE-CLERK, LORDS MEDWYN, Wood, and COLONSAY, were of opinion that the bond was a separate independent personal bond, and that there was no warrant for making the terms of the bond matter of construction, or for limiting the obligation therein contained. The granting of it was the condition of sale. It is not merely a part of the title. Nor is it merely because it is a separate bond, and not embodied in the feu-charter, that it is held to have a different effect from that which was contained in the two former cases of *Pedie v. Scot's Trustees*, and *Small v. Miller*; but that whilst the personal obligation against the feuar and his heirs, as intromitters with the rents, existed while they were so, both under the feu-charter and the feu-contract, the superior was not satisfied with this, but

Mar. 11. 1852. stipulated for this farther security in a separate and independent
 The Principal ^{and} deed, to be first granted and expressed in different words, and
 and Professors with a perfectly different meaning and intention. This deed was
 of King's Col. to be complete in itself for carrying out its purpose, that no mis-
 Aberdeen, v.
 Lady Hay, &c. take might occur, by supposing that it was only a repetition of,
 and an obligation to, the same effect, as in these deeds which con-
 stituted the right in those other cases so often referred to.

LORDS ROBERTSON, MURRAY, COWAN, RUTHERFURD, and COCKBURN, were of opinion that the obligation in this bond was of a limited nature, and that there is no solid ground for making a distinction in this question between the cases now before the Court, and those of *Soot's Trustees*, and *Small v. Miller*, and therefore that the interlocutor of the Lord Ordinary ought to be recalled. There is no obligation in the bond to pay to the trustees and their assignees. They could have no right, therefore, to grant an assignation of that personal bond apart from the feu. But suppose they had sold the superiority and right to the feu-duties, would the personal obligation be effectual in favour of the new superior? It seems clear that it would be so as against Mr Forbes and his representatives, as long as they continued the vassal and no longer; and if it was renewed, as the charter stipulates, then against the new vassal, as long as he continued feuar, and no longer, or against any successor in the feu undertaking the obligation, or by taking out the charter, and thus becoming bound in his character of feuar. But this could only be so, in respect that the obligation to pay the feu-duty was the concomitant of the possession of the feu. The obligations, although expressed in separate writings, were co-relative. The land was liable for the feu-duty, and the superior, both by law and the terms of the feu-charter, had his remedies of irritancy in the event of two years' feu-duty running into arrear, and poinding the ground. He also held the personal obligation of the vassal, upon which he could do personal diligence on the registration of the bond.

The circumstance of a personal bond for the feu-duties being stipulated for as a separate deed, appears sufficiently accounted for, without holding it by *implication* to afford evidence of intention that it was stipulated for and granted as the constitution of a *perpetual* personal obligation. The stipulation was important for the superiors, (1.) to secure the constitution of the cautionary obligation, which the purchaser was taken bound to give for the feu-duties of the first *ten* years; for although the cautioners might have been made parties to a feu-contract, as in Small's case, they

could not be parties to the feu-charter ; (2.) to give to them immediate means of recovering the feu-duties, not merely against the original vassal, but against his heirs and successors in the feu, by whom similar bonds were to be granted certainly for that purpose ; and, (3.) to furnish the superiors with a deed constituting the personal obligation to pay the feu-duties by the possessor of the subjects of the feu for the time, whether the original feuar or his heir taking the subjects, or his successor in the vassalage by singular title, on which immediate diligence might be used. To give the effect contended for by the superiors to the personal bond, merely because of its being a separate deed, would be contrary to the understanding and footing on which the parties must be held to have contracted ; and, without any sufficient indication of intention to constitute such an unusual obligation, to hold by implication that the vassal undertook what, to all real effects must, after alienation of the feu, amount to a perpetual bond of *cautionry*, by which he and his general representatives and estate are to be for ever bound, no matter through how many hands the right to the real estate has meanwhile passed.

THE LORD PRESIDENT. I concur with the opinions of the minority. I am very clearly convinced of the legality of stipulating for such a personal bond as was required by the articles of roup by the exposers, and was duly executed by the purchaser of the property in question. And as during the whole space of ten years the principal as well as the security remained under the absolute obligation to pay the stipulated sum in the bond, whatever steps might be taken as to alienation or change in the vassal, so from the expiry of the above period, the obligation of the principal continued in full force upon him, his heirs and successors, to pay as stipulated, in all time coming, and which accordingly continued to be the case till the recent resistance of the present action. As the whole structure and phraseology of the instrument in question is in strict conformity with a regular personal bond, I cannot discover legal grounds for denying its effect.

LORD CUNINGHAME. I agree with the majority ; at the same time, I think it essential to have it remarked before the case returns to the Lord Ordinary, that I assume the transference of the feu to have been made *in bona fide*, without the least view to aid the seller unduly and collusively of an onerous obligation, or to prejudice the rights and security of the superiors.

LORD IVORY also agreed with the majority.

Mar. 11. 1852. LORD FULLERTON was absent, but the Lord President announced that Lord Fullerton had authorised him to announce that The Principal and Professors he agreed with the majority of King's Col.

Aberdeen, v. The following interlocutor was pronounced :—“ In conformity with the opinions of the majority of the Judges of the Court, alter the interlocutor of the Lord Ordinary reclaimed against, assoilzie the defenders from the declaratory conclusions of the summons, and decern ; Remit to the Lord Ordinary to proceed farther as shall be just, and reserve all questions as to expenses of process.”

Gordon, Stuart & Cheyne, W.S., Pursuers' Agents.

James Ross, S.S.C., Defenders' Agent.

FIRST DIVISION.

No. 252.

BROWN'S TRUSTEES v. WEBSTER.

Feu-Duty—Personal Bond—Transference of Property—Liability.—Held that a personal obligation to pay feu-duty, constituted by personal bond, does not impose an obligation in perpetuity, but is extinguished by the transference of the property over which it is secured.

Mar. 11. 1852. This case was conjoined with the previous case at the instance of the King's College of Aberdeen against Lady James Hay and her husband (*ante*, p. 627). The question raised was, whether a personal obligation to pay a ground annual is extinguished by the transference of the property over which it was secured.

The Parliamentary trustees, for opening and making two new streets in the city of Aberdeen, resolved to expose to sale the building areas along one of these new streets, Union Street, now forming the principal entry to the city from the south. By the articles of roup it was stipulated, *inter alia*, that the purchasers should, within eight days after the roup, find caution for payment of the first five years' feu-duty, and “ that the purchasers, and all succeeding heirs and singular successors in the premises, shall be obliged, within six months after acquiring right, to grant a personal obligation for payment of said feu-duties or annuities.

The property of the new street trustees having thereafter vested in trustees for the creditors of the community and treasury of the burgh, these last mentioned trustees in 1819, exposed the various areas for sale, under the articles of roup referred to. Two of these areas were purchased at the roup for behoof of Mr Alexander Brown, stationer in Aberdeen, for payment, the one of £271, and the other of £104, 8s., of yearly ground rents, forming

together a rent of £375, 8s. yearly. In 1822, Mr Brown re-^{Mar. 11. 1852.}ceived from the trustees for the city creditors, acting by their quorum, a burgage disposition to the two areas so purchased, un-^{Brown's Trustees v. Web-}der a single description comprehending both, upon which he was ^{ster.}thereafter infest. On the other hand Mr Brown granted to the trustees a personal obligation for payment of the ground rents and performance of the articles and conditions of his purchase. By this relative personal obligation, he "binds himself, his heirs, executors and successors, whomsoever, to pay theforesaid sum of L.375, 8s. sterling, in name of ground rent or feu-duty."

Mr Brown some time after the purchase erected a single large building on the two areas, the principal part of which he laid out as an extensive saloon for a reading-room, called the Athenæum news-room, of which he was proprietor. The news-room did not prove a profitable investment: and in September 1845, Brown executed a conveyance of the property in favour of "James Blake, keeper of the Athenæum news-room in Aberdeen," for the nominal price of L.5. Blake now carries on the news-room on his own account. By this disposition, Blake is taken bound to grant a personal obligation in favour of the treasurer of the burgh for the time, and by back letter he holds himself ready to grant such obligation when required, and in certain events to reconvey the subjects to Brown.

Soon thereafter Brown was served with a notarial protest at the instance of the treasurer of the burgh, intimating that notwithstanding the disposition to Blake, the treasurer would hold Brown, his heirs, executors and successors, liable in all time coming for payment of the feu-duty, and that the recovering of the feu-duty from Blake, or his heirs or successors, at any time thereafter, should not prejudice the right of recourse competent against Alexander Brown and his foresaids.

Brown is now dead, and the pursuers, as his trustees and executors of Brown, having received various intimations from the Chamberlain of the arrears of feu-duty alleged to be due by them, and requesting payment, raised this action against the treasurer of the burgh, to have it declared, that as the representatives of Brown, they are freed and relieved from the payment of feu-duty since 1845, and in all time coming, and that the personal obligation granted by Brown should be cancelled.

The defenders pleaded *inter alia*, "that according to the true intent and meaning of the contract of parties, the liability of the purchaser of the areas in question for the ground-rents continues

Mar. 11. 1852. in virtue of the separate personal obligation granted by him, notwithstanding the transference of the subject to a third party."

Brown's Trustees v. Webster. The Lord Ordinary (Rutherford,) "In respect of the reclaiming note now depending before the Lords of the First Division of the Court, in the case at the instance of the Principal and Professors of King's College of Aberdeen against Lady James Hay and her husband, involving the question here raised; Reports the cause to their Lordships."

The two actions were conjoined; and after being heard before the whole Court, a majority of their Lordships were of opinion that this annual bond did not constitute an obligation in perpetuity to pay feu-duty, but that by the transference of the feu the personal obligation is extinguished. A distinction was drawn by some of their Lordships of the minority between this case and that of *Lady James Hay*. In this case the parties against whom the stipulation is directed, and by whom the bonds are to be granted, are described as "the purchasers, and all succeeding heirs and singular successors in the premises." Had the question been as to the terms of the obligation, which it was incumbent on him to grant, there would have been great difficulty in holding that it was incumbent on him to grant a personal obligation, binding himself and his "heirs, executors, and successors whomsoever," to pay the feu-duty; but such an obligation having been granted, it must be given effect to. With reference to what he had stated in his note as Lord Ordinary, before whom this case depended, Lord Rutherford, in his opinion, delivered as one of the consulted judges, remarks: "I observe that in referring to the case of *Lady James Hay*, I assumed that the personal obligation was not inserted in the feu-charter, but that the charter had contained, like the investiture in *Brown's Trustees*, nothing but the ordinary *reddendo*. It does not appear to me, however, that the cases can be differenced on this ground; because I consider the personal bond in both instances to contain nothing but an expression of the obligation arising from the feudal relation in a form more convenient and advantageous for the superior or creditor in the ground annual."

The following interlocutor was pronounced: "In conformity with the opinions of a majority of the Judges of the whole Court, repel the first plea in law stated for the defender, and decern; remit to the Lord Ordinary to proceed farther as shall be just, and reserve all questions as to expenses of process."

James Ross, S.S.C., Pursuer's Agent.

Barron & Hagart, W.S., Defender's Agents.

FIRST DIVISION.

GILMOUR v. GILMOUR'S TRUSTEES.

No. 253.

Process—Diligence—Jury Trial—Right to Countermand.

This case was moved in by the defenders for a diligence, and Mar. 11. 1852.
 for an order on the pursuer to lodge immediately certain documents recovered by him under a diligence formerly granted.

Gilmour v.
Gilmour's
Trustees.

F. Young for the pursuer. We gave notice to have this case tried at Circuit; thereafter the Court, on 19th February, on the motion of the defenders appointed the case to be tried by a special jury. It is possible that certain witnesses from Canada may not arrive in this country in time for the trial, and we may be compelled to countermand. As the order for trial may interfere with this, our right of countermand should be reserved.

The COURT granted the diligence, and appointed the pursuer's diligence to be reported fourteen days previous to the trial, "without prejudice to the pursuer's right of countermand, as by law would have been competent under the notice of trial given by him."

Patrick Graham, W.S., Pursuer's Agent.

Alexander Hamilton, W.S., Defenders' Agent.

FIRST DIVISION.

THE GENERAL PRISON BOARD OF SCOTLAND v. THE BURGH No. 254.
 OF INVERKEITHING.

Expenses—Extra-judicial Communings.—A finding for expenses does not cover extra-judicial expenses whether incurred prior or subsequent to the proceedings in Court.

This was a question of expenses. A petition was presented in Mar. 11. 1852. 1848 by the General Board of Directors of Prisons in Scotland, to authorise the collection of assessments in the burgh of Inverkeithing, under the Acts 2 and 3 Vict., c. 42, and 7 and 8 Vict., c. 34. The narrative of the petition recites *inter alia* § 46 of the former Act, which directs the chief magistrates of burghs "to lay on and collect, or direct the laying on and collecting of the sum apportioned on each respective burgh, with such further sum as may be necessary to cover expenses and risk of assessment, collection, and remittance, and any arrears of preceding years," &c.; and the prayer of the petition was, "to find the petitioners entitled to the expenses of this application and other procedure to follow hereon," &c.

The General
Prison Board
v. The Burgh
of Inverkeithing.

Mar. 11. 1852. execution, and payment of costs and expenses already incurred
according to their sound discretion, having a just regard to the
interest of the parties as they may be affected by the affirmance
or reversal of the judgment or decree appealed from."

Pet. Young. The petition, therefore, prays the Court to allow decree in favour of the judicial factor already appointed to go out and be extracted, and execution to proceed thereon, notwithstanding the appeal, and to prorogate the time for the said judicial factor finding caution for one calendar month from the date of their Lordships' judgment; and all this upon such caution (if any) as the Court might think requisite in the circumstances, to provide for the event of the interlocutor appealed from being reversed in the House of Lords.

The petition having been moved in Court this day, the *Solicitor-General* for the respondents asked to be allowed to give in answers by the box-day.

Millar, for the petitioners, argued, that in the meantime and till answers were lodged, some arrangement behoved to be made for the protection of the estate. There is at present no person whatever in charge of this estate. The petitioner does not pretend that he can take charge of it, nor can the respondents pretend that, after the decision of the Court appointing a judicial factor, which has been made the subject of appeal, they can interfere; and the affairs of this copartnery and the interests of the copartners are thus under the charge of no one. All that the petition asks is, that some one shall, in the meantime, be appointed to protect the estate.

Solicitor-General for the respondents, the case is on the single bills, and the respondents' motion is to be allowed to give in answers. Were this application granted *de plano*, the result would be that the appeal would be mutually defeated, because the whole office of the judicial factor would be brought to a close before the appeal was decided; the application formerly presented, was one of a very unusual nature—perhaps unprecedented, its competency being doubtful, and at all events it was open to very serious objections. Such being the case, it was only to be expected that it could be made the subject of an appeal, and till the proceedings of the Court of last resort was blamed, nothing could be done by which the interests of parties should be permanently affected.

The COURT pronounced the following interlocutor:—"The Lords having heard counsel and considered the petition for interim

execution, pending appeal; nominate and appoint Mr Kenneth Mar. 11. 1852. Mackenzie, accountant, judicial factor, *ad interim*, on the estates of ^{the} company of Dormet Collins, Alexander Young and Peter Feely, and for winding up the affairs of that company, with power to realise and recover the whole effects of the company, to pay all debts due by the company, to balance the company's books, with reference to the accounts and claims of the partners *inter se*, and decern: The said factor finding caution within eight days, and allow answers to be given in to the said petition by the second box day in the ensuing vacation."

James Gordon, jun., W.S., Agent for Petitioner.

Baxter and Macdougall, W.S., Agents for Respondents.

SECOND DIVISION.

MACALISTER, *Factor Loco Tutoris.*

No. 256.

Pupil's Protection Act—Factor loco tutoris—Malversation in Office.

This was a proceeding under the Pupils' Protection Act, 12. Mar. 11. 1852. and 13 Victoria, c. 51.

The accountant having reported that the factor was due to the estate about £150, he was ordered to attend at the bar, in the event of his failing previously to consign the same. He attended, and two days were allowed him, and he was ordered again to appear at the bar.

Macalister,
Factor.

On his again attending the Court,

Pattison stated that the factor had still been unable to make consignation, and craved further delay to enable him to do so.

THE LORD JUSTICE-CLERK.—We shall certainly take no steps to prevent consignation being made, but we must take those steps provided by the statute that this shall be done.

The COURT gave decree of consignation for the balance reported by the accountant, to be consigned within a month, and authorised extract to go out therefore in name of the accountant, and, *quoad ultra*, remitted the case to the accountant.

W. Lorimer, S.S.C., Agent for the Factor.

The Court of Session rose for the Spring Vacation.

HIGH COURT OF JUSTICIARY.

Before the LORD JUSTICE-CLERK, LORDS COCKBURN, WOOD,
COLONSAY and COWAN.

No. 257. Suspension, MIDDLEMISS v. LORD and LADY WILLOUGHBY
D'ERESBY and MANDATORY.

Poaching—Offender under age—Name and identity of Offender.

Mar. 16. 1852. On the complaint of Lord and Lady Willoughby D'Eresby and
 Middlemiss v. Lewis Kennedy, Esquire, their factor and mandatory, James
 Lord D'Eresby Middlemiss, junior, and Thomas Middlemiss, sons of James
 &c. Middlemiss, senior, labourer in Muthill, were convicted before the
 Justice of Peace Court, for the county of Perth, of poaching by
 means of setting snares for game in contravention of the Act 2d
 and 3d William IV., c. 68, § 1, and sentenced respectively to pay
 a penalty of 20s., with L.1 : 6 : 10 of expenses, failing which, to
 be imprisoned for 30 days within the tolbooth of Perth.

This sentence it was now sought, on behalf of the convicted
 parties and their father as their administrator-in-law, to have sus-
 pended on the ground of their infancy, James Middlemiss junior,
 being only two years old, and Thomas having reached but six
 years. They were therefore legally incapable of committing the
 offence set forth in the conviction.

It was answered for the respondents, that Thomas Middlemiss
 was of sufficient years to understand and commit the offence of
 poaching, and that as he had actually done so, the conviction was
 good. But that the party who answered to the name of James
 Middlemiss junior, was not the infant of two years, but an elder
 brother, who improperly answered to the name of James Middle-
 miss junior, and that as he did not appear before the Justices, the
 case, as allowed by the statute, was proceeded with and proved
 against him in his absence, and that as the conviction passed
 in the name which he himself had given when apprehended, it
 could not be suspended.

It was stated that the respondents had no intention to follow out
 the sentence, the object of the prosecution having been merely to
 check a species of poaching which had been carried on in the
 neighbourhood to a great extent. In answer to this, two letters
 were produced from the respondent's country agent, addressed to
 the infant boys Middlemiss, formally intimating the alternative
 sentence of penalty and expenses or imprisonment.

Logan for the suspenders.

Mar. 16. 1852.

M. Bell and Neaves for the respondents.

Middlemiss v.
Lord D'Eresby
&c.

The COURT were of opinion that the party named and designed in the complaint and conviction was "James Middlemiss junior," the infant of two years of age, and the prosecutors' agent being aware of this at the beginning, and having admitted that he was not the individual who committed the trespass, he was entitled to have the sentence set aside, and in regard to him and the other suspenders pronounced the following interlocutor:—

"Edinburgh, 16th March 1852.—The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having heard counsel for the parties, pass the bill, suspend the sentence complained of *simpli-citer*, against the complainer James Middlemiss junior, and his father as his administrator-in-law, and in respect it is stated for the respondents, that they do not mean to put the sentence into execution against the other suspender, Thomas Middlemiss, find it unnecessary to proceed further in his case, and decern; Find the respondents liable in expenses, of which allow an account to be given in, and remit the same when lodged to the clerk of Court to tax and report."

James Bayne, S.S.C., Agent for Suspenders.

Dundas and Wilson, W.S., Agents for Respondents.

No. 258.

HOUSE OF LORDS.

THE LORD ADVOCATE, and the COMMISSIONERS OF WOODS AND FORESTS v. REDDIE, HAMILTON, AND OTHERS.

Property—Alveus of a Navigable River—Compromise—Rights of Crown—3 and 4 Vict., c. 118.—The trustees for improving the navigation of a river had by their operations narrowed the channel and reclaimed land from the alveus; finding it a better plan some years afterwards to widen the channel, they wished to resume possession of the reclaimed land, but the landowners of the adjoining banks, having been in possession of such reclaimed land for a considerable time—claimed to be fully compensated for the same. A compromise was however made between the trustees and some of these landowners, by which the trustees agreed to pay and the latter to accept half the value of such reclaimed land in full of all compensation for the same. This was sanctioned by the 3d and 4th Vict., c. 118, which however expressly reserves the right of the Crown. The Crown having claimed the compensation money found due to the landowners who were parties to the compromise, on the ground of the land being the property of the Crown, by reason of its having been formerly part of the *alveus* of a navigable river:—*Held, Affirming the decision of the Court of Session, that the sum being one obtained by a compromise to which the Crown was no party, it could not now be claimed by the Crown.*

Mar. 12. 1852. This was an appeal against a judgment of the First Division of the Court of Session in an application by petition under 3 and 4 Vict., c. 118, sec. 124, to the Court of Session, brought to establish the right of the Crown to a sum of money awarded in a submission between the respondents, Mr Hamilton, and the trustees of the River Clyde, as the price of a certain portion of ground comprehended within the *alveus* or channel of the river Clyde, and acquired by the trustees for the purposes of the navigation under the 3 and 4 Vict., c. 118. The circumstances of the case were these:—

Lord Advocate &c.

By various statutes, and particularly by 3 and 4 Vict., the trustees of the river Clyde are authorised to improve that river and the harbour of Glasgow, and to acquire the ground necessary for their operations. The plan on which the trustees at first proceeded for improving the navigation of the Clyde was that of narrowing the channel, and with this view dykes and jetties were built, the effect of which was to cause an accumulation of mud, sand, and other materials, by which in course of time the solid ground on the banks of the river was considerably added to, and the channel proportionally reduced in breadth. Of late years the

trustees have changed their system of operations, having become Mar. 12. 1852. satisfied that the proper course for improving the navigation was ^{to widen} not to narrow but to widen the channel. The trustees have accordingly taken possession of considerable quantities of ground which formerly lay within the alveus or water-way of the river, and was added to the adjoining banks as before explained. ^{Lord Advocate v. Reddie, &c.}

Before the 3d and 4th Victoria was passed, a question was raised by Mr Charles Todd, who was proprietor of subjects situated on the south bank of the Clyde, for the purpose of having it found that the Clyde trustees were not entitled to take possession of the portion of ground opposite his property, which had been reclaimed from the river in the manner already explained, without making full compensation to him for the value of such ground. This point was tried in an action of declarator, at the instance of Mr Todd against the Clyde trustees, and after full discussion the Court of Session decided in favour of the trustees, and that Mr Todd had no right of property in the recently gained ground, (2 D. 357.) Mr Todd appealed to the House of Lords, but their Lordships affirmed the judgment of the Court of Session, (2 Rob. 333.) After that question had been decided in the Court of Session, and while it was under appeal in the House of Lords, the Clyde trustees applied to Parliament for additional powers, and obtained the 3d and 4th Vict. c. 118, which was passed before any judgment was obtained under the appeal. A large body of the landowners of property on the banks of the river left their claims to be settled by common law. On the other hand, there was another class of these proprietors, amongst whom was the respondent Mr Hamilton, who went into an arrangement with the river trustees whilst the appeal was in dependence, and on the faith of such bargain refrained from opposition to the bill. The general nature of this arrangement was, that the parties mutually agreed to waive on either side the decision of the question of right, either as depending upon the matter of fact as to what fell or did not fall within the limits of the ancient water way of the river, or on the matter of law regarding the right of property in land so situated. But adopting as the basis of the agreement a plan prepared by an engineer of the name of Kegle in the year 1800, it was arranged, that in regard to all land which appeared from that plan to have been formerly part of the bed of the river, a separate valuation was to be put upon the same, and that the proprietors should receive, and the trustees should pay, as in full, of all compensation in respect of such ground, one-half the

Mar. 12. 1852. amount of such valuations. This arrangement having been made, the 3d and 4th Vict. c. 118 was passed; the 11th section of which ^{Lord Advocate v. Reddie, &c.} authorised the trustees to take all such ground as might be requisite for the operations sanctioned by the statute on compensation to their owners. The 20th section of this act contained a special provision in reference to certain proprietors therein mentioned, among whom is Mr Hamilton. The 124th section expressly reserves the right of the Crown in respect of the water way, *alveus*, or channel of the Clyde, "Provided, nevertheless, that this reservation should not limit or lessen the powers or authorities given to the trustees acting under this or any of the before recited Acts as regards the performance or execution of the works necessary for the improvement and enlargement of the harbour of Glasgow, or as regards any of the said recited Acts, to be done or performed by the said trustees, with the view and for the purpose of improving the navigation of the said river Clyde."

By the 9th Vict., c. 23, the period allowed to the trustees for compulsorily taking lands, was extended, and the Lands Clauses Consolidation (Scotland) Act was incorporated with the 3 and 4 Vict., c. 118. On 8th September 1846 the trustees gave notice to the respondent, Mr Hamilton, that they required to take for the purposes of the aforesaid statutes, a certain portion of his lands of Mavisbank, a proportion of which (viz. 1240 square yards) fell within the line denoted on Mr Kyle's plan, as the old water-way, or alveus of the river. These proceedings resulted in a submission to Lord Robertson to determine the amount of compensation due to the respondent, Mr Hamilton. A reference was accordingly entered into, and his Lordship, after having issued notes, pronounced a decree-arbitral, by which he found *inter alia*, that one-half of the entire value of that portion of the ground occupied by alveus was L.775, and he decerned and ordained the trustees to pay that sum along with other sums, to Mr Hamilton; and on the other hand he decerned and ordained Mr Hamilton to grant to the trustees an effectual conveyance of the subjects "containing clause of absolute warrandise of the whole subjects conveyed, excepting the said alveus, which is only to be warranted from fact and deed." A claim having been made to this sum of L.755 on the part of the Crown, before the same had been paid over to Mr Hamilton, the trustees consigned the sum in bank to meet any competition which might arise in regard to it. The Lord Advocate, and the Commissioners of Woods and Forests, on behalf of the Crown, being the appellants in this case, presented their peti-

tion to the Court of Session under the authority of the 124 sec. Mar. 13. 1852. of 3 and 4 Vict., c. 118, praying to have this consigned money paid over to them. Appearance was entered in the process, both ^{Lord Advocate} ~~s. Reddie, &c.~~ for Mr Hamilton and the Clyde trustees, and a record having been made up and closed, and the parties heard, the First Division of the Court of Session by a majority sustained the claim of the respondent, Mr Hamilton, for payment of the L.755 with interest, by the following interlocutor, pronounced on 29th January 1849 : —“The Lords having considered the petition of Her Majesty’s Advocate for Her Majesty’s interest, with the whole record, and heard counsel for the parties, refuse the desire of the said petition, and decern in favour of the respondent, William Hamilton, for payment of the said sum of L.755, with the interest thereon, but find no expenses due.”

This was the interlocutor appealed from.

J. Anderson, Q.C., and *James*, argued for the appellant, and referred to the following authorities—*Craig*, 1, 16, 11; *Stair*, 2, 1, 5; *Eruk*, 2, 1, 5–6–17; *Bell’s Princ.* 639; *Grant v. Duke of Gordon*, M. 1280; *Officers of State v. Smith*, 8 Bell and Murray, 711; and *House of Lords*, 6 Bell, 487; *Com. Dig. Navigation*, B. 152, 5th Ed.; *Hale de jure marea*, pp. 12, 81, 85; *Todd v. Clyde Trustees*, 2 D. 357, and *House of Lords*, 2 Rob. 333; 8 and 9 Vict., c. 99; *Hollis v. Goldfinch*, 1 B. and C. 205; *the King v. the Mersey and Irwell Navigation Company*, 9 B. and C. 95.

The Solicitor-General of England, and *B. Andrews, Q.C.*, for the respondent, cited *Rex v. Lord Garborough*, 3 B. and C., 105, and *2 Bligh, N.S.*, 147.

J. Anderson, Q.C., replied.

THE LORD CHANCELLOR. The case before your Lordships is so excessively clear, that I cannot advise your Lordships to delay your judgment, especially in the peculiar circumstances under which this respondent, Mr Hamilton, has been brought to your Lordships’ bar. The case is extremely simple, and lies within a very small compass, although the arguments have occupied a considerable time.

The trustees, under the Acts of Parliament which have been referred to, stand for certain purposes in the place of the Crown, viz., they are public trustees for the improvement of a public navigation. They are not a joint company formed for its own benefit, but trustees appointed under an Act of Parliament for the per-

Mar. 12. 1852. formance of a public duty, which duty, but for their appointment, ^{the} ~~Lord Advocate &c.~~ would otherwise, to a certain extent, have devolved upon the ^{r. Beddie, &c.} Crown, viz., the maintaining this navigation in a proper condition.

Now, the question has been very much mooted with respect to the right of the Crown to the *alveus* or bed of this navigable river. In the present case, however, that was a question which could admit of no dispute. Up to the present time, no one has attempted to deny that the soil or bed of a navigable river, so far as the tide flows and ebbs, is the property of the Crown, but in this case the argument assumes a very different shape, for by the 124th section of this Act, the right of *alveus* is distinctly saved to the Crown. The ground, or rather the value or price of the ground, which was the subject of dispute, formerly composed a portion of the bed of the river. The trustees, in pursuance of their powers had, with a view to the improvement of the navigation of the Clyde, narrowed the channel by raising certain banks and jetties, and the consequence was, that the places between them and the adjoining ground had become filled up with sand and other things, until at length something very like solid ground was formed connecting the water of the river with the adjoining land. I apprehend that there is no dispute in point of law that that land so formed would still be the property of the Crown. I am speaking of that which formed the bed of the river, and had at no time ceased to be so. When the trustees required for further improvements, with a view to the enlargement of the bed of the river to its original extent, that very ground which they had previously abstracted from the bed of the river, where can be the doubt that the right would exist? The Crown could not have interposed to prevent that property from being restored to the old channel. There would be nothing done disturbing the rights of the Crown. It is, however, very true that the sand and rubbish which had collected and so resolved themselves into a solid bank would be removed, because as a bank they had become an obstruction; but the *solum* of the channel would belong to the Crown in its own right, precisely as it did before. I should have conceived, therefore, that the Crown would never have sought for, would never have been entitled to, compensation from the trustees for taking from the bank that which they had previously added, and restoring it to the original channel of the river. This was not a revesting in the Crown, for the right of the Crown had never been interfered with or disturbed, but it left the Crown just in the same enjoyment of the rights of the soil as it had previously possessed. Now,

this fact would account for the shape of the Act of Parliament, for Mar. 12. 1852. the Act never once referred to the rights of the Crown, nor did it make any provision for these rights, while it expressly empower^{ed} Lord Advocate v. Reddie, &c. the trustees to take the banks. Indeed, the very purpose of the act was to enable those persons to take the banks, and it never supposed that there was any right in the Crown which could be exercised adversely to the trustees. Therefore it had been that no clause in the act had any provision in it for that purpose. Putting aside the 124th clause, then, the act was precisely that which one should have expected to find. In the present case there appeared to be two classes of proprietors—being those to whose land the banks had been added, who had used them, I presume, without interruption. Well, upon that ground those parties had set up a title to the soil itself. They were divided into two classes—those who had been represented many years since by Mr Todd, who in his proceedings had stated that he should stand upon his rights, and would submit to no compromise, and who, at that time, was coming to this House upon his question of right. Mr Todd set up his right as against the Crown, as well as against every one else. Before the question in respect of this claim of Mr Todd's was determined, this Act of Parliament passed. That was one class of proprietors. The other class were those—Mr Hamilton being one—who had adopted a different course from that taken by Mr Todd. They, upon the question of right being raised, expressed themselves willing to withdraw from any contest upon the subject upon the trustees giving them one-half the value of their interest in the ground. Now, the property was either in the trustees, who would have a right to revert to it, and to re-acquire that which they had permitted to be added to the adjoining land, or it was in the Crown as yet constituting a portion of the *alveus*, or it was in the proprietors of the adjoining land. What, then, would be the consequence? If the trustees had the right, they would of course rely upon their right so far as they considered they could. But, as respects the other parties, I will suppose the Crown and the landlords, there were two conflicting claimants, each claiming the whole right of property. What shape did the Act of Parliament take? It contained two provisions as diametrically opposed to each other as any two provisions possibly could be. It contained a provision applicable to those proprietors who had agreed to what I term a compromise, while the other provision applied to those owners who had taken their stand upon their rights, and had refused to compromise. Now,

Mar. 12. 1852. as regarded those who had compromised, the language was not only explicit, but if your Lordships look at the meaning of the ^{Lord Advocate} & Reddie, &c. Act of Parliament, you would at once perceive what its true construction was.

The mode of dealing here was clearly a compromise, for it was only by concession that the parties could arrive at the result they attained. As to the other class of owners, there was no compromise, for the act stated that their rights should in no manner be affected by its operation. But in their case there was to be a jury. The question is so plain, that I cannot tell your Lordships that it is open to the smallest doubt. It is one of the plainest cases I ever saw. Under this compromise Mr Hamilton was to be paid his proportion of the value, altogether without reference to the rights of the Crown, totally irrespective of the rights of the trustees, as the purchase of his interest, and by way of buying him off, so as to put an end to his claim as well as to the claims of others standing in the same position. Now, the Crown is anxious to have the benefit of this compromise. Was there ever such a contention before? If Mr Hamilton had a right, he was clearly entitled to do that which he had done—he had accepted one half the value of his interest. But the Crown asks your Lordships to give it that money which ought to be paid to Mr Hamilton. Why did not the Crown pursue the trustees, and so try its right in a question of so much importance to the whole *solum* of this river? If the Crown had done that, the question would have been decided as a solemn point of law. That should have been the course for the Crown. The only other question is as to the reservation of the rights of the Crown in section 124. That is an absolute reservation in respect of the soil. The soil is still in the Crown, and the power is still in the trustees to improve the navigation. Indeed, all parties are left in their original position. The 124th clause is as laboriously contrived to puzzle its readers as any clause by possibility can be. The clause, it is true, saves the right to the Crown, but it does not confer any new right. It was a great mistake in law to insist that the reservation of the rights of the Crown conferred a further right upon the Crown. The rights of the Crown remained just as they were. No new right had been created for the Crown by the clause in question. Neither did it give to the Crown the right which it now contended for. I very much regret that the forms of the House do not permit your Lordships to give the costs to the respondents, of having been brought to this House, as well as to the

Court below, upon a point so plain and so simple. I shall, however, move that your Lordships affirm the interlocutor of the Court below, and dismiss the appeal.

*Lord Advocate
v. Reddie, &c.*

LORD BROUGHAM concurred.

Appeal dismissed.

Horne and Rose, W.S., Edinburgh; and Thomas Wyllie Webster, Solicitor, London, } Agents for the Appellants.

Gibson-Craigs, Dalziel & Brodie, W.S., Edinburgh; and Pemberton, Crawley and Gardiner, Solicitors, London, } Agents for the Respondents.

HOUSE OF LORDS.

The PAROCHIAL BOARD of the PARISH of SOUTH LEITH, *Appellants*, No. 259.
and ALLAN and the PAROCHIAL BOARD of the CITY of EDINBURGH, *Respondents*.

Poor's Rates—Double or single Rating—Stats. 7 Geo. III., c. 27, and 8 and 9 Vict., c. 83.—Lands which originally belonged to the parish of South Leith, were by 7 Geo. III., c. 27, disjoined from that parish, and annexed to the City Parish of Edinburgh, but with a proviso which made them subject to the parochial burdens of South Leith as before the act. The General Poor Law Act, 8 and 9 Vict., c. 83, declares, generally, that there shall not be an assessment for the poor in more than one parish, and repeals all laws inconsistent with that act: *Held*, affirming the interlocutor of the Court of Session, that the proprietor of such lands was not liable to be assessed for the poor in the parish of South Leith as well as in that of Edinburgh, but in that of the latter only.

Note.—That the summons in the action raised by the parish of South Leith for the payment of assessments for such parish, ought to have shewn the right of that parish thereto, under 7 Geo. III., c. 27, and not under the General Act, 8 and 9 Vict., c. 83.

The questions in this case were, *first*, whether certain subjects in Leopold Place, Windsor Street, and Elm Row, of which Mr Allan, the respondent, was the proprietor, and which were situated in the Hillside grounds, were liable to a double assessment for the relief of the poor; and, *secondly*, whether, if subject only to a single assessment, the right to levy the assessment belonged to the City Parish of Edinburgh, or to the parish of South Leith. The Hillside grounds were formerly in the parish of South Leith, and were feu'd out by Heriot's Hospital to Mr James Grant in 1756. By the feu-charter it was stipulated "that in case the royalty of Edinburgh should at any time hereafter be extended,

The Parochial Board of the Parish of South Leith v. Allan, &c.

Mar. 25. 1852. the said James Grant and his foresaids, or the proprietors of the
 The Parochial Board of the Parish of South Leith, &c. Allan, &c. said ground for the time, shall not only be subjected to build such houses as they shall build thereon agreeable to the plan to be concerted by the Town Council of Edinburgh and other managers for the time; but likewise the houses to be built thereon, shall be subject and liable to pay the same public burdens as the other inhabitants of the city are subject and liable to pay."

In 1767 the lands in question were disjoined from the parish of South Leith, and annexed to the royalty of the city of Edinburgh, by the 7 Geo. III., c. 27, which set forth in its preamble that the proprietors had either consented, or were bound by their titles to consent that their lands should be included within the royalty of the city of Edinburgh. The following are the sections of that act which are material to this case:—The 10th section, “That the said magistrates and town-council of the city of Edinburgh shall have full power to appoint stentmasters to levy from the proprietors and possessors of all such houses as are built, or shall hereafter be built, upon the foresaid grounds hereby annexed to and comprehended within the said royalty, an equal portion of the cess, annuity, poors'-money, and watch-money, payable by the city of Edinburgh, in the same way and manner as the same are now levied within the present royalty.”

15th section, “That the aforesaid grounds hereby annexed to, and comprehended within, the royalty of the city of Edinburgh, shall be, and they are hereby for ever after disjoined from the parish of St. Cuthbert's or West Kirk, and South Leith, and are hereby annexed to the parish of St. Giles, within the city of Edinburgh.”

The 16th section, “Provided always that the lands hereby disjoined from the Parishes of St. Cuthberts and South Leith, and the heritors thereof, shall remain liable and be subject to the ministers' stipends and other parochial burdens; and that the tythes payable out of the lands hereby annexed shall be, and the same are hereby saved and reserved to the true owners thereof, in the same manner as if this act had never passed.”

The 46th section of the poor law amendment Act, 8 and 9 Vict. c. 83, declares that the “owners and occupiers of lands and heritages shall not be liable to be assessed in respect of such lands and heritages for the relief of the poor in more than one parish or combination,” and the 91st section of that act enacts “that all laws, statutes and usages shall be, and the same are hereby repealed, in so far as they are at variance or inconsistent with the

provisions of this act ; provided always that the same shall continue in force in all other respects." Mar. 25. 1852.

Mr Allan having been assessed for poor's rates in both South Leith and the city parish, raised a summons of declarator against the parochial boards of both parishes, for the purpose of having *v.* Allan, &c. The Parochial Board of the Parish of South Leith it declared that he was liable to assessment in one only. To this summons separate defences were respectively lodged on behalf of both parishes, each maintaining that the property was liable to be assessed in both parishes, and each claiming to be entitled to the single rate, supposing only one assessment competent. The parochial board of South Leith raised also an ordinary action against Mr Allan for payment of the assessments for the relief of the poor of South Leith parish, imposed on the above mentioned property. In this latter action the summons began with the following recital, "that the said parish of South Leith is a landward parish, and the poor thereof are, according to law, supported by assessment, the one half of which is imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish. That Thomas Allan, Esquire, banker in Edinburgh, is owner of the lands and heritages particularly after specified, situated in Leopold Place, Windsor Street, and Elm Row, *in or near Edinburgh*, and as such is liable in payment of the sums which have been imposed or assessed, by or in the said parish of South Leith, upon, or on account of such lands and heritages, in respect of ownership, under the provisions of the act 8th and 9th of our reign, chapter 83, intituled," "An Act for the amendment and better administration of the laws relating to the relief of the poor in Scotland."

And after referring to the decision of the House of Lords in Allan *v.* M'Craw, October 6. 1841, the summons prayed that the defender Mr Allan might be decerned to make payment of L.36 : 11 : 3½, the aggregate of two sums, each being the proportion or half leviable from the defender, as owner of the lands and heritagesforesaid, of the assessment, for the relief of the poor of the said parish, and the other purposes mentioned in the said act of the 8 and 9 Victoria, c. 83, for the year there specified. To this summons, defences were lodged for Mr Allan, in which he simply referred to the action of declarator at his instance, and repeated the pleas therein maintained by him against double liability. The two actions were afterwards conjoined, and on the 13th

Mar. 25. 1852. July 1849, the Lords of the Second Division pronounced an interlocutor, which, in the terms of the declaratory action at Mr Allan's Board of the Parish of South Leith *v. Allan, &c.* instance, found and declared that the pursuer of that action, and the owners and occupiers of the lands and other heritages therein mentioned, were only liable to be assessed in respect thereof, for the relief of the poor in one parish or combination, and that as the lands in question were disjoined from the parish of South Leith, and annexed to the parish of St Giles, within the city of Edinburgh, the pursuer and owners and occupiers of the said lands and heritages were liable to be assessed in respect thereof, within the city of Edinburgh only, and not in the parish of South Leith.

Against this interlocutor the present appeal was brought by the parochial board of South Leith.

Rolt, Q.C., and Anderson, Q.C., for the appellants. According to the construction put on 7 Geo. III. c. 27, sec. 16, by the case of *Allan v. M'Craw*, 1 D. B. M. 513, and 2 Rob. 507, the liability of Hillside to a double assessment for the poor-rates was settled. The question, therefore, is, has the new Poor-law Act, 8 and 9 Vict. c. 83, made any alteration in this respect? The respondent (Mr Allan) relies for this purpose on the 46th and 91st sections of that statute. But the object of that act was not to exempt lands or parishes, but as the preamble states, for the better administration of the poor laws in Scotland. It was not the intention of the legislature to interfere with private rights then existing, and the 46th section has reference only to parishes generally, and to the 34th and 35th sections, with which it is connected, and under which, in some cases, there might be a double assessment. With respect to the construction of acts, *The Queen v. The Inhabitants of Aylesbury*, 4 Railway Cases, 314, and 14 Sess. Cas. 248, and *Salter v. Johnson*, 1 Hare 196, are authorities. Next assuming that the property is liable only to a single assessment, it is submitted that South Leith is entitled to that assessment. There is a difference between the 10th, 15th, and 16th sections of 7 Geo. III. c. 29, which is to prevail. The object of the legislature was to benefit Edinburgh; to do this it was necessary that certain property should be taken from South Leith and annexed to Edinburgh; but there was this condition attached, that the property so taken should remain liable to the burdens of South Leith. This has not been altered by the 8 and 9 Vict. c. 83.

The Solicitor-General of England and Brown for the respondent

Allan.* Mr Allan is not liable to be rated twice for the same lands. Mar. 25. 1852.
 Nothing can be plainer than the words of 8 and 9 Vict. c. 83, sec. 46, that there is not to be a double rating. It is sought to cut down the operation of this section, on the ground that it would otherwise interfere with private rights, contrary to the intention of the legislature. This is denied on the part of the present respondent. The property could only have been ever liable to a double assessment by virtue of 7 Geo. III. c. 27, sec. 16, and that clearly has been repealed by the later act 8 and 9 Vict. c. 83, sec. 46, which section is a substantive provision, and is altogether disconnected with the 34th and 35th sections to neither of which it has any reference. With regard to construing the act according to the intention of the legislature, the correct rule is that laid down by Coleridge, J., in *Rey v. The Poor-law Commissioners*, 6th Ad. and El. 7, where he says, "It is in my opinion so important for the Court in construing modern statutes to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity upon doubtful evidence of intention, that nothing shall induce me to withdraw a case from the operation of a section which is within its words but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute, and also that to adhere to the literal interpretation is to decide inconsistently with other and over-ruling provisions of the same statute."

Bethell, Q.C., and *Donaldson* for the respondents (the Parochial Board of the city of Edinburgh). Supposing the property to be liable only to a single assessment, the assessment must be for the poor-rates within the city parish of Edinburgh, for the 34th sec. of 8 and 9 Vict. c. 83, which prescribes the mode of assessment, expressly directs it to be imposed on the owners and tenants of lands and heritages *within the parish*, and there is no power to impose it on any but those which are in this parish. The lands in question being taken out of the parish of South Leith by the 15th section of 7 Geo. III. c. 27, and annexed to the city parish of Edinburgh, are within the latter parish only, and, consequently, liable only to the assessment for that parish.

Rolt, Q.C., replied.

LORD CHANCELLOR. My Lords,—My noble and learned friend

* The Lord Chancellor decided that the House would only hear two counsel on the same point, and, therefore, as counsel appeared for the Parochial Board of Edinburgh, the counsel for Mr Allan confined their arguments to non-liability to double rating.

Mar. 25. 1852. and myself, not entertaining any doubt upon this question, we do
not propose that there should be any adjournment of the con-
sideration of the judgment which ought to be pronounced. My
Lords, the property belonged to Heriot's Hospital, and of that
property grants were made by the Hospital of small quantities
of land, only—in fact, a few were for villa residences in the
immediate neighbourhood of Edinburgh, towards the parish of
South Leith; and the Hospital, anticipating that buildings would
be carried out beyond the natural limits of the burgh of Edin-
burgh, in the grants which they made stipulated that the persons
to whom the lands were granted should consent to this, that if
the royalty of Edinburgh were extended to the property in ques-
tion, not only should the buildings be made conformable to the
regulations of the municipality of Edinburgh, but that they should
be liable to the parochial burdens of the royalty of Edinburgh.
Now, there was no contract in one sense; but there certainly was
a contract in another sense. It certainly was a contract that a
man who took that property should never object to a Parlia-
mentary enactment which would make him liable, not only to
build the houses which he erected on the land which he had taken,
according to the directions of the city of Edinburgh, but that he
would pay the burdens equally imposed on other property in the
city of Edinburgh. He never could have retired from that. That
contract was so far binding in that limited sense; but it required
the sanction of Parliament, and I can see nothing whatever on the
face of that contract which at all touches the parish of South
Leith. The property was in that parish,—the liability could only
be discharged by law, that is, by an Act of Parliament. The
parties, therefore, left that as they found it. They had no reason
to suppose that the liability would be removed, and there was no
stipulation in regard to it. The stipulation, therefore, is one for
the benefit of the city of Edinburgh; and it is no contract what-
ever, even between these parties, as affecting the parish of South
Leith, or giving any benefit to South Leith. It neither damaged
South Leith, nor did it benefit South Leith; but it left that parish
to stand precisely on its own rights, as it did before these grants
were made. When Parliament came to deal with the question, and
to extend the royalty, which was the object of the act, to these parti-
cular lands, it made them liable to the responsibilities of property
within the royalty of Edinburgh so extended; but it said nothing
about South Leith, and it proceeded, as it must have proceeded,
upon the contract of the parties not to object to that extension.

Parliament, then, acting on the contract, made these provisions, Mar. 25. 1852. first of all extending the royalty, and extending the liability, and then severing "for ever" from the parish of South Leith, and an- nexing to the royalty of Edinburgh the particular lands in ques- tion. Then comes that clause upon which this House, upon a former occasion had to pronounce its opinion, that, notwithstanding that severance, the persons who were the owners and occupiers of the land, should be liable, amongst other things, to the parochial burdens of the parish of South Leith. This property, in consequence, did, for a considerable period, become subject to double-rates,—a grievance, no doubt, and one which I must think was not within the purview of the parties. Probably, as it has been suggested, the burden at that time was very small.

The Parochial Board of the Parish of South Leith, &c. Allan, &c.

Then came the General Poor-Law Act for Scotland, and a good deal has been said, very much to the purpose, upon the policy of that Act. Your Lordships, in deciding this point of law, can only look at the policy as bearing upon the particular provisions; but it is impossible to read this Act of Parliament without seeing, from the whole frame of it, that it was as much the policy of the Act to make a given and limited provision for the poor as it was to impose that liability upon the parishes. The machinery directed in each parish is a parochial board chosen by the parishioners, and having the limited powers which are here given. Now, I look in vain in this Act of Parliament, for any power, in any parochial board, to assess any land which is not within their own parish.

Now, my Lords, before I proceed to consider that which has been particularly argued upon in the construction of this Act of Parliament, I want to ask what is the summons here? The summons of the appellant puts him out of Court. It is utterly impossible to read the summons without seeing instantly that the whole of the appellant's case is without foundation. The summons is this—[*His Lordship here read the summons.*]—The case falls to the ground upon the summons; the parties state themselves out of Court. The right to assess is within the parish,—they say the land in question is out of the parish, and then they say, therefore it is assessable. But upon what Act of Parliament do they found themselves in this summons? Why, they found themselves upon the general Act of Parliament. Where is the provision which authorise them? If they have such a provision it is under the early Act of Parliament, and the summons ought to have been of a totally different nature. They ought to have come before the Court below, and said, We are not entitled to assess under this ge-

Mar. 25. 1852. general Act of Parliament, but we are entitled to assess under our early Act of Parliament. That was their case, if they had any; but The Parochial Board of the Parish of South Leith v. Allan, &c. in the way that they have framed their case, they found themselves upon an Act of Parliament which does not touch their case; they profess themselves to be within it, and there is not a single provision which touches their case. Now, there is a provision in this general Act of Parliament, which tells strongly against any possible claim; and it is important, on a question of this sort, in advising your Lordships to affirm the interlocutor of the Court below, that it should be shewn clearly that there is no right to impose this rate. In the 16th section of the general Poor-law Act, there is a power to combine together any parishes which it may be thought proper to bring into a common Union, and there is to be a common assessment for any two or more parishes. How are they to be rated? In respect of each individual ownership within the parish. If there was any exception, would it not have applied, and was it not likely, under the circumstances, to have applied to Edinburgh and South Leith? There was nothing to prevent South Leith and Edinburgh from being put together, and forming one parish, and being only liable as one parish, and no man within the parish being liable beyond the extent of his property, and only put, as he ought to have been put, on a state of equality, as to burden, as he had the benefit, with his fellow-parishioners.

Now, my Lords, that would satisfy my mind that there was no intention here to keep up any burden such as is insisted on at your Lordships' bar; but it may be worth while to consider how far the argument at your Lordships' bar can be maintained, even in the way in which it has been presented to your Lordships.

The argument is this—first, that there was a contract which, I have shewn your Lordships, is no contract which would operate in this view; but assuming that there be that contract, it is then said that the 46th section was necessary in consequence of the general provisions of sections 34 and 35, shewing the manner in which the assessment is to be made. It is quite clear that, according to the true construction of those earlier sections, they would have authorised what was unjust—that is, double assessment. Therefore it is provided by the 46th section, that it shall not take place. Why is not that very clause in this very Act of Parliament, which is to apply to all Scotland, to apply to every man in Scotland, and every man's property in Scotland? If you allow the words to have their proper operation, without giving a forced construction to every single word—if you only

allow the clause to be read, as every man who reads it must Mar. 25. 1852. understand it, it does precisely what ought in justice to be done —it gives equal burden, and equal benefits to every one of her Majesty's subjects in Scotland. If there were any doubt upon this, then look at the 91st section. The 91st section is perfectly clear. Is, or is not, the provision in the early Act of Parliament inconsistent with the provision in this Act of Parliament? My Lords, it comes simply to this, that if the Legislature, in passing a general act, had committed so great an injustice as to have this property liable to double burdens, it was absolutely necessary, in order to effect that unjust object, that provisions should have been expressly inserted to give effect to that intention. If you even shew that the intention was not to abrogate that former act, you have no means of carrying it into effect; you have no exception; and it would require an express exception, and a creation or a continuation of special machinery, to enable that particular intention to be carried into effect.

Viewing the merits of this case on the part of the appellants, I think the case is free from all doubt; and I shall therefore move that the interlocutor of the Court below be affirmed with costs.

LORD BROUHAM. My Lords, I also agree that the Court below has come to the right conclusion in dealing with the construction of these Acts of Parliament. I consider the grounds upon which the Court below have decided the case to be perfectly sufficient to support the interlocutor. The 46th section of the later act is absolute, that there shall not be double assessment, and it is without any exception. I think, with my noble and learned friend, that there is very great difficulty in seeing how, under the 35th section, the parish of South Leith could assess. I do not think it is necessary, however, to go into that topic at all. I consider that, taking the 46th section with the 91st section, and comparing the provisions which are set up as favourable to double assessment, by the contention on the part of the appellant, there is no room whatever for doubt. Then, that the assessment must be for Edinburgh, and not for South Leith, I think is too clear to require any further discussion.

Interlocutor appealed against affirmed with costs.

William Anderson, S.S.C., Agent for the Appellants.

Thomas Sprot, W.S., Agent for Respondent, Allan.

James Morgan, S.S.C., Agent for Respondents, Parochial Board of City of Edinburgh.

HOUSE OF LORDS.

No. 260. The TRUSTEES of the HARBOUR of DUNDEE v. DOUGALL.

Prescription—Non-Usage—Port and Harbour—Levying Tolls.—The trustees of the harbour of D. had a right of free port, within the limits of which, and its precincts, they were empowered by Act of Parliament to levy certain dues. The port and harbour of F. were within these limits; but the respondents, on whose property F. was, alleged that the trustees had not been in use, for the prescriptive period of forty years, or for time immemorial, to levy dues at F.,—and he further claimed a right of free port at F. Issues were directed on both points, and the trustees judicially admitted the affirmation of the first issue, as to the right to levy dues at F.; whereupon, in a conjoined process of suspension and declarator judgment was given for the respondent:—*Held*, affirming that decision, that the right of the respondent, in respect of the port and harbour of F., excluded the claim of the trustees; but that the respondents' claim to a right of free port at F. could not be entertained in this process, and a variation made in the terms of the interdict accordingly.

Mar. 22. 1852. The following are the facts which gave rise to these actions:—

The Trustees of Harbour of Dundee v. Dougall. The respondent, Mr Dougall, is proprietor of the estate of Scots-craig, on the south side of the river Tay, below Dundee. On that property there is the village of Ferry-Port-on-Craig, which is situated on the margin of the river, and at that part where it is narrowest, and from it to the opposite point on the north shore, which is Broughty Castle, there has been from time immemorial a ferry which belongs to Mr Dougall, and belonged for a very long period to his predecessors, the proprietors of the Ferrytown, as it was called. To this village, with its bays or havens, which these ferry-boats frequent, and to the right of the ferry itself, it was admitted by the appellants that Mr Dougall had right. The village of Ferry-Port-on-Craig lies on a portion of the river shore between the point on which the ancient monastery of Balmerino formerly stood on the west, and the Drumla Sands, which are at the mouth of the Tay, on the east. These two points form the limits of the harbour of Dundee on the south side of the Tay.

The appellants, who are Trustees of the Harbour of Dundee, maintained that the space included within these two points formed a portion of the harbour of Dundee, and that, as Ferry-Port-on-Craig was within such limits, the trustees had a right to levy dues there, under the authority of the 6 and 7 Vict. c. 83 (local), which empowers the trustees to levy the dues specified in that Act, “within the port and harbour of Dundee, or the precincts there-

of." The respondent, Mr Dougall, disputed the right of the trustees to levy any such dues from vessels loading or unloading at Ferry-Port-on-Craig, and claimed, moreover, to himself, a right of free port or harbour there. In order to have a judicial determination of their rights, the trustees raised an action of declarator, in which they sought to have it declared, *inter alia*, that the quay or ferry harbour of Ferry-Port-on-Craig is within the precincts of the Dundee harbour, and that the Dundee harbour-rates are leviable from vessels repairing to the quay or ferry harbour of Ferry-Port-on-Craig, or to the portion of the water of Tay opposite or adjacent to that village, with a view to unload there, and that Mr Dougall "has no good right of free port or harbour there, or to molest or interfere with the pursuers, or their officers or others by them authorised, from collecting the dues and rates leviable by the pursuers at and near to the said village, or along the coast or beach, or in the river opposite to the same, so far as the same extends from the place where the monastery of Balmerino formerly stood, to the Drumla Sands."

On the other hand a suspension and interdict was brought by Mr Dougall, in which he prayed that the trustees might be interdicted "from levying rates and dues upon vessels resorting to or delivering their cargoes at the quay and harbour of Ferry-port-on-Craig, or precincts thereof, and from molesting and interfering with the masters or owners of such vessels in any manner of way, as also from molesting or interfering with the complainant Mr Dougall," and his tenants, servants, or others authorised by them in the use and management of the said harbour, and in levying and collecting the dues and rates payable to the said complainant, as grantee and proprietor of the harbour of Ferry-port-on-Craig aforesaid. The suspension was conjoined with the declarator, and having been debated before the Lord Ordinary, his Lordship pronounced an interlocutor on 26th May 1847, against which both parties reclaimed to the First Division of the Court of Session, and that Court remitted the conjoined process to the Lord Ordinary to prepare issues. (See 11 D. 6.) The case having been accordingly resumed before his Lordship, the following issues, in which the respondent was held to stand as pursuer, and the appellants as defenders, were approved of for the trial of the cause before a jury, viz. :—

"1. Whether for forty years prior to August 2. 1844, or for time immemorial, the harbours of Ferry-port-on-Craig have been used for receiving ships and vessels, and for the loading and unloading

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Mar. 22. 1852. of cargoes shipped and unshipped thereat, without the defenders
 or their predecessors levying any dues on the ships or cargoes ?
 The Trustees of Harbour of Dundee v. Dougall. " 2. Whether for forty years prior to August 2. 1844, or for time
 immemorial, the pursuer and his predecessors or authors by themselves or others deriving right from them, have in virtue of a certain grant there referred to levied harbour dues on vessels using the harbours of Ferry-port-on-Craig, or on the cargoes loaded or unloaded thereat ?"

The appellants afterwards lodged in process a minute, in which they argued that it should be held that a verdict had been returned in favour of the respondent upon the first of these issues, and consented that the case should be dealt with on the same footing in all respects as if such verdict had been found by a jury. The respondent thereupon moved the First Division of the Court of Session in respect of the said minute, to enter up the verdict in his favour on the said first issue, and to apply the verdict, and pronounced an interlocutor, which, after referring to the above mentioned minute lodged by the trustees, found that the said trustees had no right or interest in the said harbours of Ferry-port-on-Craig, and no right to interfere with the alleged rights of Mr Dougall, and therefore assailed Mr Dougall from the whole conclusions of the action against him, and in the suspension and interdict, suspended and interdicted in terms of the prayer of the note of suspension and interdict, and declared the interdict perpetual. From these interlocutors pronounced by the Lord Ordinary and the First Division of the Court of Session, the present appeal was taken by the trustees.

The *Solicitor-General* of England, *Bethell, Q.C., Anderson, Q.C.*, for the appellants, relied on the 6 and 7 Vict. c. 83, which empowered the trustees to levy from the master, &c. of every vessel which should come into or go out of the port or harbour of Dundee, or the precincts thereof," the tonnage, rates, and duties specified in the Act and on old charters, which they contended described the precincts, and that within such the village of Ferry-port-on-Craig was situated, and also that the omission to exercise the right of levying dues there for forty years did not lose that right. They cited the *Magistrates of Edinburgh v. Scott*, 14 Shaw 922 ; *Magistrates of Campbelton v. Galbreath*, 7 Dunlop 482, *Hale de portibus maris*, c. 2, p. 46, *Bell*, § 233, 1 *Craig*, c. 15, § 15 ; and *Girwood v. Campbell*, 7. S. 840. It was also contended that even if the House should be against the appellants on the material question, still the interlo-

cutor of the Court of Session must be varied, as it went too far, Mar. 22. 1852.
 and was a perpetual injunction, not only against receiving dues,
 at the harbour of Ferry-port-on-Craig, but the "precincts there-
 of;" and moreover improperly assoilzies Mr Dougall from the
 whole conclusions of the action, instead of being confined to that
 portion which affected his rights at Ferry-port-on-Craig.

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Rolt, Q.C., Moncreiff, and Donaldson for the respondent, con-
 tended that the trustees had no right to levy such dues either
 by immemorial usage or by the authority of Parliament, and
 that as by the verdict which the trustees had consented to be
 entered against them in the first issue it had been found that
 for forty years the harbour of Ferry-port-on-Craig had been
 used for loading and unloading vessels without the trustees levying
 dues thereon, the trustees were precluded from exercising any
 alleged right to such dues, and an immunity in favour of the har-
 bour had been created. They cited Bell's *Prin.* sec. 739, 3 *Ersk.*
 c. 7 to 8, *Inhabitants of Kelso v. Duke of Roxburgh*, Dict. 10,737;
Miller v. Storie, Dict. 10,738; *Tarsappie*, Dict. 10,770; *Gir-*
wood v. Campbell, 7. S. 840; *Magistrates of Wigton v. M'Cly-*
mont, 12 Shaw 289; *Rolland v. Lord Craigevar*, Dict. 10,724;
Graham v. Douglas, Dic. 10,745; *Freemen Fleshers of Canongate*
v. Magistrates of Canongate, 4 S. 751; *Tod v. Magistrates of St*
Andrews, Dic. 1997, and *Cowan v. Magistrates of Edinburgh*, 6
 Shaw and D. 586.

LORD CHANCELLOR. My Lords, in this case the appeal is from
 a decision against the Trustees of the Harbour of Dundee, and in
 favour of the owner of Ferry-Port-on-Craig, as far as regards the
 right claimed by the trustees to levy tolls on ships loading and
 unloading in the latter harbour. The question is not, whether
 the defender has, or has not the right himself to levy tolls upon
 ships loading or unloading in that place or harbour—the question
 is, whether the trustees, the pursuers, have that right or not?

Now, my Lords, this question has been argued upon very ex-
 tensive grounds; but it lies, after all, in a narrow compass. The
 trustees, who claim under the Corporation of Dundee, base their
 title upon the ancient charters which give them the harbour of
 Dundee, which is unquestionably a free port, and on their right
 of loading and unloading at that harbour; and those charters
 give them other rights of taking tolls, which are mixed up with
 rights of taking tolls at fairs, and they give them rights over the
 waters for a distance, it is stated, of upwards of twelve miles up the
 Tay on the north side and on the south side. It is admitted by

Mar. 22. 1852. the defender, that Port-on-Craig is within those limits on the south side of the river. The question, then, as a mere contest of title of Harbour of as to an absolute right of property, as between the pursuers and Dundee v. Dougall.

The Trustees of Ferry-Port-on-Craig, yet there is not sufficient evidence before your Lordships' House, nor has there been sufficient evidence at any period of this litigation, that the port in question was what is termed properly a free port. Now, nobody has disputed that that is, so far as regards the harbour of Dundee; and, ultimately, the question came before the Courts below, upon the double claim, by way of defence on the part of the defender.—[*His Lordship here recapitulated the proceedings before the Lord Ordinary and the First Division of the Court of Session, and then read the words of the first issue.*]—That was the first issue. Had there been, from time immemorial, that practice of loading and unloading ships, and no claim adduced by the trustees or their predecessors? The second issue was upon the question which had been reserved to the defender to litigate, as to the right to Ferry-Port-on-Craig as a free port. The Trustees of the Harbour were, of course, advised to admit as a fact found by a Jury, the first issue, and then the case stood thus—that their claim in the action of declarator was to be tried upon their own admission, that during time immemorial ships had loaded and unloaded at the harbour of Port-on-Craig, and that they had never levied any dues upon them. It became, in the view of the Inner-House, (and I think this is the proper view of the case,) unnecessary to consider the question raised in the second issue, as the first issue was positively admitted, and found, by the admission, in favour of the defender; and upon that a declarator was pronounced by the Inner House, upon the terms of which a good deal of observation has been made. The substance and intention of that declarator was not to establish any right of free port in the defender in Ferry-Port-on-Craig, but to absolve him wholly from the claim on the part of the trustees, to levy tolls in his harbour upon ships loading and unloading there.

Now, there has been a great deal of discussion, in the first place, whether this is a positive, or whether it is a negative prescription. I believe that the law of Scotland has been very much embarrassed by the introduction of those terms. They are not to be found in the Act of Parliament; and they do not properly belong to, or

describe, the subject. You may mention many cases in which Mar. 22. 1852. you might properly, in point of language, say, that there was a negative prescription even where a positive prescription exists—^{The Trustees of Harbour of Dundee v. Dougall.} they must be so entirely blended with each other that they only tend to confound; and I believe it has very often happened that there has been more contention about the meaning of those words, than there would have been upon the substance of the cases in which those words have been a matter of discussion.

Now, my Lords, the Act of Parliament itself is one of the simplest Acts of Parliament that ever was passed. It declares the rights. It must be remembered that it is an Act which applies solely and only to an heritable subject. One of the first objects is to secure quiet possession, not to allow claims to be set up at great distances of time, when evidences may be lost, and rights may be held which have been fairly acquired by others, and thus to disturb a title which has been long enjoyed, and in most cases with sufficient foundation. But there were other cases which required a remedy, and those cases are provided for in the same simple manner by a separate clause, that in actions upon heritable rights and so on, 40 years without enjoyment shall operate as a bar. That is an exclusion in fact; it is an exclusion of the right to recover, without establishing a right in the party who has the benefit of the exclusion. If the question here had been the title to the harbour of Dundee, then a great deal of the argument which your Lordships have heard would have been relevant. But nobody disputes the title to the harbour—it stands upon grounds which cannot be shaken, and the defender is only defending himself against the claim set up by the Harbour Trustees. Now, I must say, that looking through the authorities, I find every confirmation of that which I have believed to be the true distinction between positive and negative prescription. The words are clear enough. I look at the substance, and I am perfectly satisfied, upon the authorities, that this is what is called by the Scotch law a negative prescription, and that therefore 40 years would be a bar except some other right is set up. These Acts imposing tolls of this nature, must always be read in favour of course of the subject, and unless rights are expressly taken away, the Courts of law will never interfere with them. Here the intention of the legislature was, that the Act shall operate upon the harbour of Dundee, and not effect a right upon the opposite coast.

My Lords, I submit to your Lordships in point of law, that

Mar. 22. 1852. if there was at the time of this Act of Parliament, a clear exemption on the part of Mr Dougall, from the payment of tolls, to The Trustees of Harbour of be raised by the trustees in a particular port or harbour, that right Dundee v. Dougall. is not taken away by the Act of Parliament, and so far from some of the exceptions having the operation which has been assigned to them, it does not appear to me, that one of the exceptions, particularly that of making the ferry, would rather tend the other way. That Act of Parliament must receive the natural and common construction, and cannot be forced beyond its proper and intended limits to take away an absolute right which existed in this party at the time the Act of Parliament passed.

Then, my Lords, that question will really dispose of this case, because if there is no reason why the defender should now be subject to the rights of the trustees, of course it must be dismissed. The only remaining question will be as regards the points which have just been raised at your Lordships' bar, with respect to the terms of the interdict, and the terms of the declarator. Now, my Lords, that interdict was of course granted before the rights were settled by the admission of the pursuers of the first issue, I am not therefore at all surprised that that interdict goes further than is necessary.

The interdict was pronounced, as all such interdicts are, before the final decision. Therefore when that interdict was pronounced, the Court had not before it all these facts upon which it ultimately founded its final decision. I am not therefore my Lords at all surprised to find that that interdict does go further than appears to me to be called for. Their Lordships are deciding this only that the Trustees of Dundee Harbour have no right to levy tolls in the harbour of Port-on-Craig upon ships loading and unloading there. That is all that I understand to be really decided, and that is all that I am prepared to advise your Lordships to affirm, and I therefore propose to your Lordships that you shall save the rights of the trustees to this extent, that the interdict should not be deemed to go beyond the finding of the first issue as admitted by the trustees. The trustees, in their admission, confined their admission to the harbour of Port-on-Craig. Now this interdict must go no further than that. It must be co-extensive, and it must be confined to the issue. Then as regards the subsequent portion, I very much think that that does not establish any right, and is not intended to do so, but it is ambiguous, and as the defender has no right to take advantage of any ambiguous matter found in the interdict, I think that there should be some

words introduced in order to show that this House is not now deciding any positive right in the defender to a free port, or himself to levy tolls and dues in the harbour of Port-on-Craig. I think it will be best done by a saving clause, not altering the interdict, but expressly saying that that is to be without prejudice to the rights of the trustees in the respect which I have mentioned.

The Trustees
of Harbour of
Dundee v.
Dougall.

Then we come to the question of the interlocutor itself. When the Court had that before them they had before them every thing which has transpired in the cause, and therefore this stands upon a different ground. Now I am not satisfied that there is any objection to that declarator, because although the summons founds itself on assertion of right upon the part of the pursuers, those are merely inducements—they are only to found that which is set forth, namely, the right to levy tolls and dues in this harbour of Port-on-Craig. As to the interdict, when this House takes care, as it will take care, to qualify that interdict, and not to let it have any operation beyond what must have been intended, and which your Lordships are bound to carry into execution, then I submit to your Lordships that there will be no reason whatever to alter the final interlocutor. I feel that there is no necessity for going through all the authorities, as I entirely agree, after full consideration, with the Court below, and I shall move your Lordships to affirm, with the saving which I have specified, the declarator of the Court below, and to dismiss the appeal with costs. I say with costs, because although it is proper that that variation should be made, yet as it might have been made upon an application to the Court below at the time acquiesced in by the parties, without coming to your Lordships' bar, your Lordships never will admit a thing of that sort as a valid reason for not giving costs in this House. Therefore, my Lords, upon these grounds I move your Lordships that these interlocutors be affirmed with costs.

LORD BROUGHAM concurred.

Mr Bethell. My Lords, I understand that your Lordships desire that we should furnish to your Lordships, or to your officer, a form of saving clause, a form of proviso to be appended to the interlocutor by force of your Lordships' judgment, qualifying the interlocutor thus far—

LORD CHANCELLOR. The interdict.

Mr Bethell. Yes, my Lord, the interdict here is the interlocutor in fact, qualifying the order thus far, that it is not to extend beyond that harbour of Port-on-Craig, which is mentioned in the first issue, and by the condition thereof found to have been used

Mar. 22. 1852. by the respondent. My Lords, if you will permit my learned friend and myself, we will endeavour to agree upon a form of saving, if we do not agree we will each hand up our respective forms! The Trustees of Harbour of Dundee v. Dougall.

Interlocutors appealed from affirmed, with variation and with costs.

Dalmahoy and Wood, W.S., Edinburgh; and
Dodds and Greig, Solicitors, London, Agents for the Appellants.

William Miller, S.S.C., Edinburgh; and

Adam Burn, Solicitor, London, Agents for the Respondent.

HOUSE OF LORDS.

No. 261. M'WILLIAM (Pauper), *Appellant*; ADAMS, *Respondent*.
LINDSAY (Pauper), *Appellant*; M'TEAR, *Respondent*.

Parochial Relief—Able-bodied Poor—8 and 9 Vict., c. 83.—*Held* by the House of Lords, affirming the judgment of the Court of Session (whole Court), that an able-bodied pauper, although unable to find employment, was not entitled to parochial relief for himself: *Held also* that an able-bodied pauper was not entitled to such relief for his destitute children.

These were appeals from interlocutors of the First Division of the Court of Session, pronounced after taking the opinions of all the other Judges, (Lords Jeffrey and Robertson dissenting), and by which it was found that the appellant, M'William, being an able-bodied pauper, was not entitled to parochial relief; and further, that the appellant Lindsay, also being an able-bodied pauper, was not only not so entitled himself, but could not claim parochial relief for his destitute children.

The facts and the procedure in the Court below are sufficiently stated in the following judgment.

Mar. 26. 1852. In *M'William v. Adams, J. S. Wortley*, Q.C., and *R. Palmer*, Q.C., were for the appellant.—*Bethel*, Q.C., and *Anderson*, Q.C., for the respondent.
M'William, &c. v. Adams, &c.

In *Lindsay v. M'Tear*, *Gregg* and *R. Palmer* for the appellant.—*Rolt*, Q.C. and *G. Ross* for the respondent.

The appeals were argued before the House of Lords last Session, when their Lordships took time to consider their judgment, which was this day delivered.

LORD BROUGHAM. My Lords, in the year 1848 the appellant

(M'William), a boiler maker, preferred his petition to the Sheriff Mar. 26. 1852. substitute of Glasgow, stating that he was utterly destitute ; that he was willing to work but unable to find employment ; that his application for assistance from the parish had entirely been rejected, and the petition therefore prayed an order requiring the inspector of the poor, the present respondent, to administer relief. The respondent, by his answer, stated that the petitioner was an able-bodied man, and consequently was not entitled to relief. The Sheriff-substitute assizelized the respondent ; but the Sheriff-principal, upon appeal, disagreed with his Substitute, and decided in favour of the appellant ; that is to say, decided that the appellant, though an able-bodied man, was entitled to relief. Thereupon the case was carried by advocation to the Court of Session, and the Lord Ordinary made great avizandum, which your Lordships are aware has the effect of taking the matter before the Court (First Division) without his being called on to decide at all, and that Court, after a hearing which occupied several days, in December 1848, requested their Lordships of the Second Division and the permanent Lords Ordinary, to deliver their opinions on the whole case. Of these consulted Judges it appears that one and one only held the claim for relief to be well founded whilst the other eight considered it not to be sustainable. The decision which is brought under the review of the House may be justly represented as carried in the Court by a majority of eleven to two, and the effect was to determine this most important proposition, that by the law of Scotland an able-bodied person is not, under any circumstances, entitled to relief under the poor law. This has been brought before your Lordships by appeal. It was argued most ably at the Bar on behalf of the appellant, and most ably also and fully on the part of the respondent, and it now remains for your Lordships to dispose of the case.

It is admitted on all hands that this important question turns entirely upon the construction of the statute, there being no common law right whatever alleged. The Act of 1579, chapter 74, is therefore to be considered, and the opinion which we may form touching its import must govern the decision of the case at bar. Does it or not apply to able-bodied poor persons who are not incapacitated from working but are unable to find work, and are also unable to maintain themselves ?

The Act of 1579 was the first compulsory provision made for the support of the poor. Whatever had before been done by the legislature was in restraint of that class, and not for their relief.

Mar. 26. 1852. But important light is thrown upon the act by attending to the provisions of those previous restraining statutes, and especially to the exceptions introduced into them. The purpose of the acts was to restrain mendicity and vagrancy—and it seems to have been throughout assumed that begging was the only mode in which the poor could be relieved. It is therefore of great importance to observe to whom begging was permitted by way of exception to the enactments for putting it down. These acts extend from the early part of the 15th to the middle of the 16th century; but I refer particularly to the statute made in 1503, chapter 70. The earlier act of James the First, 1424, cap. 25, had directed that all persons who had no tokens permitting them to beg, shall be charged to labour on pain of burning in the cheek, and banishment. The act of 1503, cap. 70, "Anent beggars and their qualities," after enforcing the observance of the older act, mitigates its severity by introducing the exception of impotent poor as allowed to beg, in these words: "The Sheriffs and Magistrates shall thyle none to beg except crinked, sick, impotent, and weak folk." In the edition of the statutes by the Record Commission, under the superintendence of Mr Thomson, vol. 2, p. 25, we find that it is not "sick," but "blind." Now these classes of persons disabled by bodily or mental infirmity, are alone suffered to beg—that is, alone held entitled to the only relief which at the time, and until the year 1759, was ever in contemplation of the legislature, how great soever might be the necessities of the parties. It may be observed further, that at the same period, 1503, the English statute 19th Henry VII., cap. 12, for the punishment of vagrants, and entitled *De validis mendicantibus repetrandis*, gives a similar relief to beggars who are unable to work. Like the Scotch act, it mitigates the severity of the older statute of 7th of Richard II., cap. 5, (just as the Scotch act mitigates the severity of the old act of James I.) requiring all beggars unable to work to be passed to their p'aces of birth, or of three years' residence, and not to beg except there, by the 2d section, but lessening the punishment of vagrancy in the case of "Women great with child, men and women in great sickness, persons impotent and of the age of 70," (section 8.) The like resemblance is to be found between the provisions of the 14th of Elizabeth, and the Scotch act of 1519.

The act of 1579 had a twofold object, and its title is deserving of attention. It is for "punishment of strong and idle beggars, and relief of the poor and impotent." Next the general preamble sets forth the expediency of providing for the relief of "the aged

and impotent poor people;" and though the subsequent preamble Mar. 26. 1852. to the second branch of the act says, that "Charity would that ^{the} pure and aged and impotent poor should be provided," it Adams. seems reasonable to construe, that as equivalent to the expression in the general preamble, namely, that "pure" is a qualification given to aged and impotent, and not that these are different classes —the poor, the aged, and the impotent. The enacting part, like the second preamble, gives "aged," "poor," "impotent," separately. But if "poor" is to be taken as a separate class, that is, as designing persons who are not incapacitated by age or infirmity, this consequence follows, which I hold to be destructive of the argument in favour of the appellant's contention the enumeration of aged and impotent becomes wholly superfluous, and even insensible. Some argument has been grounded both in this case and in the former one of *Pollock v. Darling*, on the word impotent. It has been plainly said, both by Mr Hume in his argument as counsel in 1803, and more than implied by one of the learned Judges now, that "impotent" means unable to find work, or unable to gain a livelihood. This appears a wholly untenable position, not merely from aged being coupled with impotent, but because this sense is plainly excluded by the provision for the case of those who can do some work. "If," says the act, "the aged and impotent persons not being so diseased, lamed, or impotent but that they may work in some manner of work," refuse to work, they are to be punished. Here "impotent" cannot possibly mean any thing but incapacity to work, through mental or bodily incapacity. Indeed, this part of the Act appears to me almost decisive of the whole question; because the able-bodied poor plainly do not come within its scope, and yet the diseased and aged who can work a little are severely punished if they refuse. Yet no punishment is denounced against the able-bodied who refuse, who, of course, would be much more deserving of punishment. Nothing can more clearly prove that this class of persons was not at all in the contemplation of the legislature.

I regard the Acts subsequently made, especially those of 1661, cap. 38, and 1672, cap. 18, not only as consistent with the construction put upon the Act of 1579, but as aiding that construction.

Lastly, the proviso in the late Act 8th and 9th Vict., cap. 83, sec. 68, deserves to be considered, (being in the opinion of some almost decisive of this case, and in the opinion of all it must be

Mar. 26. 1852. admitted to be important,) as indicating the jealousy of the legislature to guard against relief to "the able-bodied persons when out of employment." It is a proviso in the section extending the enactments to occasional relief, and to prevent the mere want of employment from bringing persons within the class of those entitled to such relief; the proviso, in terms, excludes them from whatever in the enactment is given. Of course this leaves their right untouched so far as it is independent of the Act, but the proviso indicates the general intention to guard against extending it.

The authority of all text writers is in favour of the construction adopted by the Court below. Erskine, though he is somewhat inaccurate in his reference to two of the Acts, (1535 and 1663,) lays it clearly down that those entitled to relief are the "indigent persons who are aged or disabled from work;" and Bankton, (1760,) describes those entitled to maintenance as "poor people that are not able to work;" Mr Bell, (2153,) confines the title to those who are unable to earn their subsistence by labour "in consequence of any mental or corporeal weakness, disability or permanent disease;" and he must have had *Pollock v. Darling*, 17th January 1804, 13 F. C. 294, Mor. 1059, present to his mind, for he cites that case in the next article at 2155, where he lays it down that temporary distress from dearth, stagnation of trade, &c., does not entitle able-bodied persons to the benefit of this relief.

My view of *Pollock v. Darling* is, that we cannot uphold it together with the present decision; that the two are irreconcileable and cannot stand together. But the authority of that case is, in my judgment, exceedingly impaired, not only by the strong opinion of the two greatest lawyers then on the bench, Lord President Campbell, and Lord Justice-Clerk Eskgrove, as well as by the strong opinion of Lord Pitmilly and other writers on the subject, but above all by the kind of reasoning on which those proceeded who pronounced the decision. It is not denied that this decision has been far from commanding the assent of the profession ever since; and it is not denied that it has remained in practice a dead letter. It probably was considered only to apply in exactly similar circumstances on occasions of great dearth, which happily have not occurred since 1800; certain it is, that the case has never been acted upon.

My Lords, in the second case (*Lindsay v. M'Tear*) which stands before your Lordships in order that I may not have

occasion to trouble you further, I will say that I consider it as Mar. 26. 1852. disposed of, if your Lordships should dispose of the first by affirming the judgment appealed from, and that then that case would have no grounds whatever to stand on. The ground of the application of a confessedly able-bodied pauper, who does not pretend that he is unable to support himself, but who merely applies for relief to himself on the ground, and in respect of his having children unprovided for, is disposed of by your Lordships being of opinion, if you shall so think, that the Court below came to a right decision against the right of an able-bodied pauper, to obtain parish relief. It is enough to say on this subject that the statute of 1661, chapter 38, to which I have already referred in the counsel of the argument upon the general question, appoints the Justices to make trial, and examine of poor, aged, sick, lame and impotent, and such as are not able to maintain themselves, (that I have already commented on,) nor are able to work for their living ; and also (another head of inquiry,) of all orphans or other poor children who are left destitute of all help. That is the legislative intendment of poor children. It cannot approach to correctness of expression to say that the children of a person who is an able-bodied pauper, and who does not contend that he is himself unable in one way or another to support himself, come within the description of children left destitute of all relief. I entirely agree with the learned argument of the Court below, that it is impossible to separate the case of the father from the children ; and that if any provision is to be made in such cases, it must be made by new Acts of the legislature.

My Lords, I shall therefore move your Lordships, that the judgment of the Court below in this case be affirmed.

LORD TRURO.—My Lords, I entirely concur with the general view which the noble and learned Lord has just taken of the question in their case. As I understand the question mainly turns upon what the noble Lord has adverted to, the Act of 1579.

The question is simply, one of construction. The judges below, who appear to me to have displayed that learning, and that pains and attention in this case which might be expected from the high character which belongs to them, have enumerated in their judgment, the various classes of persons who might come forward, literary gentlemen, and gentlemen of very different classes in vast numbers, who might very often fail in getting the only work for which persons would suppose they were fit, and it would be, I apprehend, perfectly impossible for a parish to protect itself against

Mar. 26. 1852. claims of that class. But the judicial duty that is cast upon this House is, to look at the language of the statute, and see whether that language is open to any fair and reasonable doubt. I own I should have thought it is not. I am however inclined to hold that opinion tenderly, out of respect to the very learned persons who have entertained a different impression on that subject though they form such a very small minority.

My Lords, it has been most correctly remarked, that as far as one can discover, no doubt appears to have arisen on the law contained in the several Acts of Parliament, up to the case of *Pollock v. Darling*. Now it will be remembered, in considering the weight due to that authority, that this is a question of the construction of an Act of Parliament. And the decision there took place but a very few years ago, of an old Act of Parliament; the Court divided in opinion, although a majority undoubtedly adopt the construction which the Appellant contends for; and also it is a case which arose under very peculiar and special circumstances. It was not the case of an individual applying to receive parish relief; it was a case where the whole parish apparently with one exception, were of opinion that such circumstances had arisen as rendered it expedient that there should be a rate for the relief of persons whose circumstances and situation were too notorious to admit of any deception or fraud. What fell from the learned judges in that case, powerful, able and eloquent, I own it appears to me very much calculated to mislead the mind from the construction, though it might lead the mind to yield to a great public necessity, without much regard to the precise language of, the statute. Not being a cotemporaneous exposition — not being a unanimous exposition — being a decision taking place under very extraordinary and special circumstances, and more effect given to those extraordinary and special circumstances than even one would expect, in the course of the reasoning of the learned judges, the case undoubtedly does not stand so high in authority in these respects as most of the Scotch authorities would stand before the House. After all, it is the duty of this House to construe for itself. This is not a course of decision; this is not a decision which has been acted upon, and which has entered into the interests of individuals, so that they could be in any respect prejudiced or damaged by this House holding a doctrine and adopting a construction at variance with the decision; nothing of the kind. The House has all the materials before it, which the judges had in arriving at that construction; they have all the

materials without any of the topics which would prejudice the Mar. 26. 1852.
mind which then prevailed.

M^r William v.
Adams.

Now to turn to the 8th and 9th Victoria—that statute established a new authority for making a rate—it contains various provisions in regard to the mode of making the rate, the establishing a Parochial Board and a Supervising Board, and other officers to administer that rate, and having provided for the making of the rate, and the administering of the rate, it then proceeds to declare how the rate shall be applied. The present appellant applied under the authority of that statute, for he appealed against the inspector, stating the clause in that statute as the ground to give jurisdiction to the Sheriff, and to render the inspector amenable in respect of being an officer created by that statute. That statute therefore directs its application, and after directing its application it proceeds to say, “Provided always that this statute shall not confer any right or claim upon an able-bodied person to be put upon that list.” But that is not all. It is agreed that that clause only gave the party a right; it took no right away, and therefore left it to be ascertained whether he had such a right in other ways than by the Act. Well, but when the rate he seeks to be paid out of, is a rate created by that Act, to be administered by that Act, the direction and application of it being expressly directed, it goes a very long way to declare that that Act shall not confer any right upon any such person. When you come to the last clause it repeals all the acts, laws, and usages, inconsistent with that Act, and not only that, but at variance with, and inconsistent with, the law. Is there no variance between a state of the law which gives an able-bodied man a right to come on the rate, and one which does not give him that right? By this Act of Parliament he clearly had no right, yet the rate to be created by this Act of Parliament must be administered according to the regulations of the Act of Parliament, and no law is to continue after that Act which is at variance with it.

LORD BROUHAM. By the 91st section.

LORD TRURO. The 91st section. I own it appears to me that the Act is of very considerable importance, and I think that the house might very reasonably have acted on that Act of Parliament; but, at the same time, the question is one of very considerable and general importance. It is much more desirable that it should be decided by this House on the general merits which

Mar. 26. 1852. the appellant seeks to present, and on the grounds on which he
M'William v.
Adams. puts his case, namely, that he had a right antecedent to that Act,
and that the particular form of language of that Act has not taken

it away. The House is able to come to a satisfactory conclusion
on that part of it, and therefore it may be unnecessary for the
House to deal with the statute of the 8th and 9th Victoria; though
I own with reference to other Acts of Parliament framed in some-
what similar language. I consider that if there had been grounds
for the conclusion to which my mind has come, and which my
noble and learned friend has submitted to the House for adoption,
I should have deemed the statute of very considerable import-
ance.

Upon the whole, my Lords, I am of opinion that the judgment
of the Court below ought to be affirmed, and this appeal dismissed.

My Lords, with respect to the second case to which my noble and
learned friend has referred, of Lindsay v. M'Tear, that is also an
extremely important case. The individual says I can support my-
self; I do that with difficulty; I cannot support my children; I
therefore pray that I may be admitted to have relief for my chil-
dren out of the rate. I think that by law this cannot be allowed,
for the party himself not being entitled to relief out of the rate, I
think that the children share the position of the parent in that re-
spect, and that therefore this appeal, like the former, ought to be
dismissed.

LORD BROUGHAM.—My Lords, my noble and learned friend
I must admit, has raised a doubt in my mind as to two matters,
but, as the doubt, if well founded, would greatly strengthen
the argument which I supported before your Lordships in
favour of the affirmance and against the appeal, it is unneces-
sary for me to go further than to say, that with respect to the
inconsistency, the repugnancy, of this decision with that of *Pollock*
v. Darling, I am inclined to doubt rather more than I did when I
addressed your Lordships; and with respect to the effect of the
late act, the 8th and 9th of the Queen, I am rather inclined to
think that I should have argued that a little higher in support of
the judgment of the court below, and the proposition which I took
the liberty of stating. Therefore upon those doubts it is not neces-
sary to dwell, because if they are perfectly well founded, they only
go to affirm rather than to weaken the argument on which I ven-
tured to submit the proposition to your Lordships.

Interlocutors affirmed.

Mar. 26. 1852.

*Charles Spencer, S.S.C., Edinburgh, and
Dunlop and Hope, 19. Fludyer Street,* } Agents for the Appellants
Westminster, } in both cases.

*M'William v.
Adams.*

*James Burness, S.S.C., Edinburgh,
Law, Holmes, Anton and Turnbull,* } Agents for the Respondents
18. Fludyer Street, Westminster. } in both cases.

HOUSE OF LORDS.

HUTCHINSON v. FERRIER OR GORDON AND ANOTHER.

No. 262.

Bill of Exceptions—Letters Missive—Stamp—Evidence.—(1.) On the trial of an issue as to whether a certain tenancy existed, the Judge ruled that certain missives or letters could not be admitted as proving leases, as they were not stamped as such, and that they being in existence, the tenancy could not be proved without them:—*Held* by the House of Lords, that if the missives or letters were offered in evidence for any other purpose than as proving leases, such purpose should have been stated to the Judge:—*Held* also, that if there was any other evidence which could have been produced, it was the duty of counsel to have led such evidence, and if rejected to have excepted to such rejection, instead of resting upon the opinion of the Judge.

(2.) A bill of exceptions to the above ruling of the Judge was signed by him, which, after his signature, contained the following statement,—“The following are the missives or letters referred to in the bill of exceptions,” then followed copies of various letters, but which were not otherwise referred to by the bill of exceptions; *Held* by the House of Lords that their Lordships could not enquire to what letters the bill of exceptions referred, as the letters were not authenticated by the signature of the Judge, and formed no part of the record. An agreement to devise, according to the law of Scotland, requires a lease stamp to be operative. *Per Lord Truro.*

This was an action of damages raised against the late Charles Mar. 29. 1852.
Ferrier, accountant in Edinburgh, now represented by the respon-
dents, for the purpose *inter alia* of recovering damages from him Hutchinson v.
on account of his having wrongfully taken possession of and ex- Ferrier, &c.
cluded Mr Hutchinson, the appellant, from a certain gateway and
small piece of ground alleged by the appellant to form part of a
larger portion of ground in which the appellant had a right of

Mar. 29. 1852. tenancy under the magistrates and town council of Edinburgh.

Hutchinson v. Ferrier, &c. It appeared that Mr Ferrier had let to the appellant a piece of ground at Leith, lying between the road leading from the south end of Morton Street to the Easter Road and Leith Links, and that the appellant continued to occupy and possess the same under Mr Ferrier as a wool-yard till Whitsunday 1837. It was alleged by the appellant, that during the whole of the above period while he was such tenant of the wool-yard, he was also tenant under the town of Edinburgh of a strip of ground lying along Morton Street, to the west of such wool-yard. In February 1832 the appellant, while so occupying both of the above subjects, made an opening in the wall which stood between them, and constructed a gateway betwixt the wool-yard and the adjoining ground. Mr Hutchinson, in the year 1837, ceased to be tenant of the wool-yard, but, continuing to be tenant of the strip of ground, insisted on the entrance being closed up, so that he might have the full use of the whole strip of ground, which he alleged to be let to him by the town of Edinburgh. From 1837 to 1845 Mr Ferrier, however, by his tenants in the wool-yard, used the access by the gateway, and it was for so using this, and excluding Mr Hutchinson from the possession of the ground which formed the entrance that the present action was brought. The case having been remitted to the issue clerks, an issue was taken to the effect, Whether, during the period in question Mr Hutchinson was tenant under the magistrates of the city of Edinburgh of the strip of ground lying along Morton Street to the west of the wool-yard; and whether during such period Mr Ferrier wrongfully took possession of the entrance in the wall of the said strip, and of the portion of the said strip as an entrance from the wool-yard.

At the trial before the Lord President (Lord Justice-General) on the 26th Dec. 1850, the present appellant (the pursuer below) tendered a bill of exceptions to the ruling of his Lordship, which bill of exceptions after stating the issue, and that the same came on for trial before the Lord President, proceeded as follows, "and the counsel for the pursuer, to maintain and prove their case under the said issue, did adduce in evidence the following witnesses:—1st,

"*John Sinclair*, he is assistant town-clerk of Edinburgh, knows there was a discussion about a piece of ground near Leith, of which Mr John Hutchinson was tenant under the magistrates. His father had a lease, and he was entered tenant from year to year by the town, and was acknowledged as such, (and is not aware of a written leasc for many years.) The chamberlain acts

as factor in disposing of the city's property, and cannot let it for Mar. 29. 1852.
more than a year at a time. When he finds it necessary, he takes ^{the direction of the council as to letting any of the city's property;} Hutchinson v. Ferrier, &c.
and witness is aware the chamberlain got, from time to time, permission from the council to let the piece of property to Mr Hutchinson. Witness generally knows the property — a strip along one side of Morton Street, from Duke Street down towards the Links, and the strip came up to Duke Street: 2d, *Mr D. J. Robertson*, he is city chamberlain, and has been so since 1838. He succeeded Mr Turnbull, who is dead. Knows the property occupied by Mr Hutchinson, who had occupied it before witness's time; and his father had held it from year to year before, and the pursuer has occupied it from year to year. There never was any lease to him. He was annually asked if he was to continue, and he answered; and ordinary missives passed every year relative to that ground in the form of letters. The counsel for the defenders here objected, that in respect of the existence of these missives or letters, which are in process, the pursuer cannot prove his tenancy otherwise than by their production. The following statement was merely to explain the facts for informing the Court in reference to this objection, but not as evidence to the jury. Looks at letters. They began in 1836, and go down till 1846. The first year from 1836 was a rent of £16, and it has been the same ever since. Shewn two receipts for 1837 by Mr Turnbull; these are for £8 each half-year; and it has continued £16 ever since, he is quite sure. The Lord Justice-General, after argument of counsel, sustained the objection, that the letters or missives which passed between the city chamberlain and the pursuer, offered in evidence, are not stamped, and therefore could not be admitted as proving leases between Mr Hutchinson and the city of Edinburgh, of the subjects in question, and that these being in existence, the tenancy cannot be proved without them. The counsel for pursuer excepted to the above ruling, that the letters which passed between the city chamberlain and the pursuer during the period in question constituted written leases, and which, not being stamped, could not be given in evidence, nor the contents thereof, nor the pursuer's tenancy proved without them. And it being stated by the counsel for the pursuer, that in consequence of the deliverance of the Lord Justice-General, he would not lead evidence, nor ask for a verdict, the jury did then, under the direction of the Lord Justice-General, deliver their verdict finding for the defenders. Whereupon the counsel for the pursuer requested the

Mar. 29. 1852. said Lord Justice-General to sign the said bill of exceptions, according to the form of the statute, in such case made and provided; *Hutchinson v. Ferrier, &c.* and the said Lord Justice-General did sign the said bill of exceptions, accordingly, on the 22d day of January, one thousand eight hundred and fifty-one years."

"The following are the missives or letters referred to in the bill of exceptions:"—(Then followed copies of various letters between the city chamberlain and Mr Hutchinson, which, however, in consequence of the judgment, it is unnecessary to set out.)

The bill of exceptions was on the 5th March 1851, disallowed by the First Division of the Court of Session, and against that judgment the present appeal was now taken.

Roundell Palmer, Q.C., and Forsyth, for the appellants, contended that the documents were not leases, but only agreements for a lease, or offers followed by a parole acceptance, and therefore did not require to be stamped as leases, that the issue involved only a question of tenancy or no tenancy, and that therefore the origin and terms of it, were immaterial to enquire about, and that at all events the Appellants should not have been precluded from proving the tenancy by other evidence, having no reference to the letters in question, such as by the respondent's own admissions. Counsel cited, 3 Geo. IV. c. 91. *Doe dem. Bailey v. Foster*, 3 C. B. 215; *Doe v. Clark*, 2 Peake, 239; *Haynard v. Haswell*, 6 Ad. and E. 265; *Doe dem. Marlow v. Wiggins*, 4 Q. B. 367; *Doe dem. Morgan v. Amos*, 2 M. and R. 180; *Hunter on Landlord and Tenant*, vol. i. p. 389; *Rex v. Inhabitants of Holy Trinity, Kingston-upon-Hull*, 7 B. and C. 611; *Drant v. Brown*, 3 B. and C. 665; *Doe dem. Wood v. Morris*, 12 East 237; *Slatterie v. Pooley*, 6 M. and W. 664; *Murray v. Gregory*, 5 Exch. 468; *Whitfield v. Brand*, 16 M. and W. 282.

Byles, Sergeant, and J. Anderson, Q.C. for the respondents, contended that the missives were not merely agreements, but were leases, and as such required stamps, and that the existence of leases having been proved, such leases were the best evidence of the tenancy, and no other evidence of it could be admissible. *Skene v. Spankie*, 20th May 1790, noticed in 1 Bell on Leases, 313, note, c. Bancton, B. 2, title 9, sec. 5. *Phillips v. Hartley*, 3 C. and P. 121. *Doe dem Phillip v. Benjamin*, 9 Ad. and El. 644; *Matheson v. Ross*, 6 Bell, Ap. Ca. 374; *Evans v. Prothero*, 20 Law J. Chanc. 448, N. S. and *Countess of Moray, v. Bain*, Dict. 15,179.

Forsyth replied.

Their Lordships took time, and this day delivered judgment. Mar. 29. 1852.

THE LORD CHANCELLOR.—My Lords, in this case it was Hutchinson v. Ferrier, &c. thought necessary by your Lordships to consider the different points which were argued at your Lordships' bar. Since the argument the attention of my noble and learned friend and myself has been drawn by my noble and learned friend opposite (Lord Truro) to the frame and contents of the bill of exceptions, and upon that I apprehend now our decision will turn. I always regret when we have to decide a case upon a question not argued at the bar; but still, as the point appears to be free from doubt, it is upon that point that the decision will rest. At the same time I have satisfied myself that the merits of the case will agree with the question of form, and that both upon the form and upon the merits the order complained of must be affirmed with costs.

At the trial two witnesses were examined for the pursuer, who had the affirmative, both of whom swore that there had been no lease for years granted expressly, but one of whom stated that the property had been held from year to year, and that there never was any lease of it. Then comes this very singular statement, which is very well calculated to embarrass anybody who has to decide this case. "The following statement was merely to explain the facts for informing the Court in reference to this objection but not as evidence to the jury." In point of fact, therefore, nothing went to the jury, and the question itself was never submitted to the jury. Then comes this statement, "Looks at letters." Who looks at letters? They began in 1836 and go down till 1846. The first year from 1836 was a rent of £16, and it has been the same ever since. Shewn two receipts for 1837 by Mr Turnbull, these are for £8 each half-year, and it has continued £16 ever since, he is quite sure." Your Lordships will observe, that although it might be a fair inference here that it is the witness who looks at the letters, it is not stated, nor is it stated what the letters were. So far as we have gone there is nothing whatever to identify any particular letter. Then, "the Lord Justice-General after argument of counsel sustained the objection that the letters or missives which passed between the city chamberlain and the pursuer, offered in evidence"; now it does not appear that they were offered in evidence to begin with, for it is stated that they were only to instruct the Court and not to be offered in evidence; "are not stamped, and therefore could not be admitted as proving leases between Mr Hutchinson and the city of Edinburgh of the subjects in question, and that these being

Mar. 29. 1852. in existence the tenancy cannot be proved without them." Your Lordships will observe, that here is no assertion that they are leases, or that they were tendered as leases, but the ruling is that the letters offered in evidence were not stamped and therefore could not be admitted as proving leases.

Hutchinson v. Ferrier, &c.

Now it will be seen in a moment that the exception is to a different point. The exception is not to the ruling, the exception is this. "The counsel for the pursuer excepted to the above ruling that the letters which passed between the city chamberlain, and the pursuer, during the period in question constituted written leases." There was no such ruling. He stated that to be the ruling, but the ruling which is the subject of the bill of exceptions is of a totally different nature. It is, that not being stamped the letters could not be admitted as proving leases, but there was no ruling by the Lord Justice-General that they did constitute written leases. Then it goes on, "and which not being stamped could not be given in evidence nor the contents thereof, nor the pursuer's tenancy proved without them." The consequence of which is, that the ruling is one way, and the bill of exceptions is another, and therefore does not meet the case. What are the letters? The letters are in an appendix, but as my noble and learned friend has drawn our attention to the fact, although they are in the appendix they do not form part of the bill of exceptions. It has been ruled in this house repeatedly from *Galway v. Baker*, 5 *Clark and Finnelly*, 157, down to the *Bishop of Derry's Case*, in 12th Clark and Finnelly that your Lordships are not at liberty to look out of the record, and that in cases of difficulty infinitely greater than that now before your Lordships. These letters therefore not forming part of the record they cannot be looked at, and then there is no question to trouble your Lordships with.

My Lords, that would be quite sufficient for the decision of this case. But as regards the merits of the case I think it is equally clear. The question to be proved was the tenancy, but it was not a question to be proved ordinarily between lessor and lessee.

The way in which Mr Hutchinson held this property—if he did not hold it under the city of Edinburgh—was by these missives or letters a yearly letting. They were restrained from letting for more than a year—a yearly letting took place by letters. Do you wish to continue for another year at the same rent? Yes, I do; or, Am I to continue for another year? Yes, you are. Ferrier was all this time enjoying the gateway in question. I submit to your Lordships, therefore, that it appears per-

factly clear, putting a fair construction upon all this correspondence, Mar. 29. 1852.
looking at it not as a court of law, which your Lordships are not entitled to do, but looking at it for the purpose of ascertaining whether the merits are with the party or not against whom your Lordships will probably decide, that this property was never intended to be demised in a way so as to create a tenancy absolutely as between the city of Edinburgh and this gentleman, and that, therefore, upon that ground alone, he never, in the true sense of the question intended to be submitted to a jury, could have recovered any portion of the damages which he sought.

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I move that your Lordships do affirm this order, with costs.

LORD BROUGHAM concurred.

LORD TRURO. The issues seem to give rise to the following questions,—1st, Is the disputed spot part of the ground belonging to the corporation? 2d, Was it included within the letting by the corporation to the appellant from Whitsunday 1837 to Whitsunday 1846? 3dly, Inasmuch as such disputed spot was during the whole period of the letting, (that is, from Whitsunday 1837 to Whitsunday 1846) in the adverse possession of the respondent claiming title, even supposing the spot did belong to the corporation, and was intended to be included in their letting to the appellant, it would be questionable whether such letting, in point of law, constituted the relation of landlord and tenant in regard to such disputed spot?

Now, my Lords, upon reference to the record, it will be observed that the proceedings upon the trial are not set forth satisfactorily or formally. It is essential to the validity of a bill of exceptions, that it should set out and authenticate, by the Judge's signature, the letters or written documents which the Judge rejects, especially on a case in which the propriety of rejection depends upon the contents of each letter or document. Upon this occasion, the Judge's signature does not purport to authenticate any letters or documents; but after the bill of exceptions is set out, there is a statement, unauthenticated by any signature, to the effect, "That the following are the missives or letters referred to in the bill of exceptions;" and then follow several letters of very different import and effect from each other. Unless the Judge's signature can be deemed to authenticate the letters which were included within his ruling, I think the House cannot deal with his exception at all. There is no rule more inviolably observed, than that the merits of exceptions to a Judge's

Mar. 29. 1852. ruling must be decided upon with reference to the matter apparent
upon the record, and that the Appellate Court will never look
^{Hutchinson v.} beyond the record; and the House cannot go out of the bill of
Ferrier, &c. exceptions to inquire to which of the letters in particular it did
apply. My noble and learned friend has referred to the cases
which are distinct authorities upon that part of the case, namely,
Galwey v. Baker, 5 Clark and Finnelly, 157; *Gordon v. Graham*,
8 Clark and Finnelly, 107; and *Lord Trimleston v. Kemmis*, 9
Clark and Finnelly, 749, 771.

But assuming the letters which were rejected to be sufficiently
authenticated by the Judge's signature, still I think the ruling
must be deemed to apply to those letters only which contain ex-
pressions importing a contract to let or to take, and which, by the
Scotch law, would operate as leases. The Judge sustained the
objection to the admissibility of the letters as proving leases, be-
cause they were not stamped as leases; and if they were tendered
as proving leases, I think he was right

Now, my Lords, in the result, I think Robertson's evidence
proved the letting to be by writing. Regard being had to the
question to be tried, I think that the appellant was bound to pro-
duce such writing; that such of the documents as tended to prove,
or were tendered in evidence to prove, a letting, or an agreement
to let, were inadmissible unless stamped; and that such letters as
were not evidence of a letting of ground, which included the dis-
puted spot, were *res inter alios acta*, and not receivable at all
against the respondent, and the rejection therefore not the subject
of exception.

The result, my Lords, of the present appeal, however, will not
depend altogether upon the question, whether the letters were
improperly rejected, inasmuch as, by the 13th and 14th Victoria,
cap. 36, sec. 45, it is enacted, "That it shall not be imperative
on the Court to sustain a bill of exceptions on the ground of the
undue rejection of documentary evidence, when it shall appear
from the documents themselves, that they ought not to have af-
fected the result at which the Jury by their verdict have arrived." It
therefore must be considered what effect ought to have been
given to the letters, as maintaining the issue on the appellant's
part, if they had been received in evidence, and submitted to the
Jury; and for that purpose regard must be had to the precise
question raised by the issue. It seems to me that the letters
either leave the point uncertain, or negative the disputed ground
being included.

Attending to the circumstances of the case, and considering Mar. 29. 1852.
 that the respondent was throughout, after the appellant ceased to Hutchinson v.
 be his tenant, in obstinate adverse possession of the disputed spot, Ferrier, &c.
 I cannot deem it probable that the corporation should intend to
 demise the spot to the appellant, and thereby give year after year
 a claim for damages, by reason of his being kept out of the pos-
 session of such disputed spot. It would seem to be a fair intend-
 ment that the corporation let only what was in its possession, or
 in the possession of the appellant, its tenant, at the time of the
 letting. I think the letters, if received in evidence, would not
 have maintained the affirmative issue of the pursuer, and that the
 jury ought upon such evidence to have found a verdict for the re-
 spondent. It cannot be properly said that the appellant might
 have had other evidence, which, if the letters had been received,
 he might have given, and which when coupled with the letters,
 would have maintained the issue on his part ; because, if any such
 evidence was in existence, the appellant was bound to tender it in
 evidence. Now, my Lords, the appellant not only did not request
 that evidence to be submitted to the jury, which he was bound to
 do, but he in express terms withdrew it from the jury, and declined
 to ask for a verdict ; and further, there is no exception upon the
 ground that that evidence was not submitted to the jury, and
 under the circumstances there could not be any such exception.

My Lords, the remaining exception refers to the opinion ex-
 pressed by the judge, that the missives or letters being in exis-
 tence, the tenancy could not be proved by any other evidence.
 Upon this point I submit to your Lordships that no exception
 lies, and that it was the duty of the appellant's counsel, if he had
 any other evidence which he was prepared to contend ought to
 have been received in maintenance of the issue, to produce it,
 and, if rejected upon its being tendered, to except to the rejec-
 tion, and that it was not competent to the appellant to rest upon
 the opinion so expressed by the judge.

Upon the whole, my Lords, I entirely concur in the view which
 is taken by my noble and learned friend upon the woolsack, and
 also submit to your Lordships that this appeal ought to be dis-
 missed with costs, and that the judgment of the Court below
 ought to be affirmed.

Interlocutor appealed against affirmed with costs.

Patrick Graham, W.S., Edinburgh ; and

H. Lang, Solicitor, London, Agents for Appellants.

Scott, Rymer, and Scott, W.S., Edinburgh ; and

Evans and Clode, Solicitors, London, Agents for Respondents.

HOUSE OF LORDS.

No. 263. The EDINBURGH, PERTH and DUNDEE RAILWAY COMPANY,
Appellants, and JOHN LEVEN, *Respondent*.

(1st and 2d Appeals.)

Lands Clauses Act—8th Vict., c. 19, secs. 36 and 37—Railway—Summoning Jury—Notice.—The 37th section of the Lands Clauses Act (8th Vict., c. 19,) governs the preceding section, 36 of that Act ; and therefore, where the landowner takes the initiative, and under sec. 37, gives the Company notice of the amount he claims, and that, if the Company do not agree to the same, he desires the amount may be determined by a Jury, the Company are bound to give the ten days' notice required by sec. 37, before they present their petition to the Sheriff for summoning a Jury ; and if, in these circumstances, they present their petition without giving such notice, the landowner is entitled to recover by action the full amount so claimed by him. This is not altered by there having been a reference to arbitration, which had however become abortive and been abandoned.

Mar. 30. 1852. The questions which arose in these appeals related to the Lands Clauses Consolidation Act (Scotland) 1845, which is incorporated with the Act under which the Railway Company (who are the present appellants) are incorporated and empowered to take lands for their railway. In September 1845 the Railway Company served a notice on Mr Leven, stating that the Company required for the purposes of their railway certain specified portions of Mr Leven's property, and demanding the particulars of his claim in respect of the property so proposed to be taken. Mr Leven accordingly, on the 27th of that month, claimed from the Company, as the value of the said subjects, L.3000, viz., L.2200 as the price of the ground and buildings proposed to be taken by the Company, and L.800 as compensation for the injury done to the remainder of his property. An offer of a sum between L.400 and L.500 was made by the Company but not accepted, and the parties, not having agreed as to the amount of compensation, in December 1845 entered into an arbitration in which a decree-arbitral was pronounced, but which was afterwards set aside at Mr Leven's instance, and no farther proceedings were taken by either party to determine the amount of compensation by arbitration. In the meantime, however, the Company took possession of the ground, and afterwards, on 15th and 17th June 1846, deposited in bank the said sum of L.3000. Previously to this, namely, on

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the 12th June 1846, Mr Leven gave notice to the Company that Mar. 30. 1852.
he claimed from them the sums of L.2200 and L.800 as the price
and compensation aforesaid, and that failing the Company agree-
ing to pay to him the aforesaid sums, he desired to have the
amount of such price and compensation determined by a Jury, in
terms of the Lands Clauses Consolidation Act, 8th Vict., c. 19.
The Company did not comply with the 37th section of that Act
by giving ten days' notice of their intention to cause a Jury to be
summoned, but on the 3d July they presented a petition to the
Sheriff to summon a Jury for fixing the amount of the claim, which
petition, for want of such ten days' notice, was dismissed as incom-
petent, and not conformable to the statute, and this judgment of
the Sheriff was, upon an advocation, adhered to by the Lord
Ordinary, and afterwards by the First Division of the Court of
Session.

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Mr Leven then raised an action against the Company for the
amount of the price and compensation so claimed by him, on the
ground that the Company had, under the 36th section of the
Lands Clauses Act, become liable to pay the same, as they had
not complied with the conditions of the statute in presenting their
petition to the Sheriff. In this action the Lord Ordinary found
the Company liable to pay the amount claimed, and accordingly
his Lordship decerned in the terms of the libel for the said sum
of L.3000.

The Company having reclaimed, the First Division of the
Court of Session adhered to the interlocutor of the Lord Ordin-
ary.

Against both these interlocutors the present appeals were now
respectively brought.

The Solicitor-General of England and *Moncreiff* for the ap-
pellants. The first question is, whether the ten days' notice re-
quired by the 37th section of the Lands Clauses Act is necessary
in all cases, or only in the cases in which the proceedings have
emanated from the Company. There may be many reasons sug-
gested why the landowner should have this ten days' notice where
the initiative is taken by the Company, as for instance, where he
may desire an arbitration; for by the 23d section he must signify
such before the petition to summon the Jury has been presented.
But where the initiative is taken by the landowner the reason does
not apply, and in such case there is no such necessity for this
notice. It is said that the offer which this notice is to contain

Mar. 30. 1852. should always be made, inasmuch as the 50th section regulates the costs by the sum previously offered; but in practice it is well known that a nominal sum is only ever offered, and in truth it is not necessary for the Company to offer any thing. The 37th section cannot be meant by the Legislature to apply to cases under the 36th section; for how can it be required that a notice should be given of the intention of the Company to summon a Jury in a case in which the landowner, by proceeding under the 36th section, has rendered it obligatory on the Company to do so? The next question is, whether, supposing this 37th section does so apply, and the notice is required to be given, the omission to give it renders the presenting the petition a nullity, so as to entitle the landowner to the whole amount he has claimed? Such omission is only an irregularity, and the Sheriff has a general jurisdiction to do all that justice requires. The 36th section is one highly penal, and as the Company presented the petition to the Sheriff, and so complied with all that the condition mentioned in the 36th section requires, the House ought not to go beyond the language of this section and import into it that of the 37th section. The provision of the statute as to the notice is only directory, and non-compliance with it can only be an irregularity; *Preston's case*, February 22. 1715, Dict. 3769; *Duchess of Argyll's case*, June 16. 1727, Fol. Dict. vol. 2, p. 329, 2 Ersk. 11, § 7; *Maxwell and Co. v. Stevenson and Co.*, 5 Wils. and Shaw, 269; *The Thames Haven Dock and Railway Company v. Rose*, 3 Railway Cases, 177; *Corregal v. London and Blackwall Railway Company*, 3 Railway Cases, 411, 1 Stair, title 17, § 14; *Sutherland v. M'Kellar*, 29th November 1850.

Bethell, Q.C., and *Broun*, for the respondent, cited the cases of *Glamorganshire Canal Navigation Company v. Blakemore*, 1 Clark and F. 262; *Goldie v. Oswald*, 2 Dow, 534, for the opinion of Lord Eldon.

Moncreiff replied.

LORD CHANCELLOR. My Lords, in this case there are two appeals, and for myself, I must say, agreeing with my noble and learned friends, that during the whole of the arguments I have not been able to entertain any doubt as to the true construction of this Act of Parliament. This certainly is one of several cases which your Lordships have heard during the present session, in which an attempt has been made to put what I shall term a violent construction on the plain words of an Act of Parliament. I am very far from saying that you ought not to put a construction on general

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words, so as to limit their operation, if you find materials to do so Mar. 30. 1852.
upon the face of the Act of Parliament itself; but if words are ^{~~~~~}
perfectly plain, and apply to all cases generally, it is in fact legis- and Dundee
lation to cut down their operation, simply because they bear hard Railway Co.
on an individual in a particular case. v. Leven.

Now, my Lords, this Act of Parliament appears to me to be very sensibly framed; it provides for companies which have power to take lands *in invitum*, if they can they are to agree with the parties, and if they cannot agree it may go to arbitration, and clause 35 provides for the case of an arbitration failing. In this case, under section 17 of the act, the company gave notice of their intention to buy, and that notice, followed up by what took place, made as perfect a contract as could exist. It is said that clause 36 is highly penal. It may be very disadvantageous and may operate very harshly on the Company in this case, if they have made a slip, but there is nothing penal in it; it is the simplest of all simple things. If there be no agreement or no arbitrement binding on the parties, the party claiming compensation shall have liberty to require a jury, stating the price he is willing to take, and he does that at the peril of having to pay the costs under a subsequent section. Supposing the 37th clause is to be embodied into the 36th clause, where would be the hardship or difficulty of construction? If a party entitled to compensation gives a notice such as is required by the 36th section, the Company will have to do this; in the first place, they will have to give a notice to the party that they intend to present a petition to the Sheriff for a jury, in effect that they do not agree to the sum proposed. It has been very often dropped at the bar, as if the 37th section simply required a notice, but it requires with a notice an act of the deepest importance to be done, viz. that the Company, as purchasers, shall state the price that they are willing to give. In that case the parties are put in a state of equality; one party is bound to state the sum he asks, and the other the sum he is willing to give.

We are told at the bar, and I know it to be correct, that this provision is evaded, and that companies being alarmed lest the sum they offer should be considered the smallest, put a nominal sum; that is an evasion of the Act of Parliament. I do not say it is one that can be punished, but it is an evasion of the clear intention of the Act of Parliament, which meant that the parties should state distinctly the sum the one is willing to give and the other to take. The case has been argued simply on the 36th section of

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the act, and it is said, if you import the 37th, that, in the first place, the company will not have the twenty-one days. I think that argument was very satisfactorily answered by Lord Fullerton in the Court below, that it is not any given number of days, but it is any day within the twenty-one days, it may be the last day. Now, considering that the Company are bound from the time they give the notice, and that the party seeking to obtain the price for his land is bound from the time he asks for a jury to state the sum he is willing to take, if the Company do not choose to avail themselves of the opportunity afforded to them of going to a jury under section 36, there is a perfect contract. The 37th section, which immediately follows the 36th, is, in the most express terms, applicable to *any* case, and to all cases in express words, following upon the 36th section, which, at the latter portion of it, refers expressly to the summoning of a jury to try the amount of compensation. And I submit to your Lordships, without the slightest hesitation, that this 37th clause clearly applies to the case at the bar, and extends to section 36. If that be the true construction, there is an end of all the difficulty which is suggested at your Lordships' bar; the moment you hold that section 37 is by true construction embodied into and forms part of section 36 there is an end of all difficulty. My Lords, that disposes of the first appeal.

Now, my Lords, the second appeal is in regard to the price. As soon as the difficulty which had been suggested, and which had no foundation in law, with regard to the award, is removed, the cases stand on the same footing, for, as by the true construction there was a contract between the Company and Mr Leven, the person entitled to the estate, for £3000, and as by section 36, where the Company has elected to take the estate at the sum asked, a right of action is given to the party entitled to the sum to recover it from the Company, that action appears to me not to have admitted of any defence, and I suppose, from what I see in the papers, that hardly any defence was attempted to be set up; if any defence was set up it did not succeed. The right of action has accrued, the Company are in possession of the land which they took under their clauses giving them the right to do so, they deposited the money—they are not to be prejudiced undoubtedly by that, but the effect of the affirmance which I propose, with your Lordships' concurrence, to give to the decision of the Court below will be that the land will belong to the Company, and £3000 will be paid by the purchaser.

LORDS BROUGHAM and CAMPBELL entirely concurred.

Interlocutors appealed against affirmed with costs.

G. & T. Webster, Solicitors, Westminster, and } Agents for the Appel-
Sir Charles Gordon & Co, Edinburgh, } lants.

John Richardson, Solicitor, Westminster, and } Agents for the Respon-
J. A. Macrae, W.S., Edinburgh, } dents.

Mar. 30. 1852.

Edin. Perth
and Dundee
Railway Co.
v. Leven.

HOUSE OF LORDS.

SIR WINDHAM C. ANSTRUTHER, *Appellant*; and the EAST OF FIFE RAILWAY COMPANY and OTHERS, *Respondents*.

No. 264.

Railway Company—Dissolution—Interdict and Suspension.—An agreement was made between the promoters of an intended railway company, and a proprietor of lands through which the railway was to pass, to refer to an arbitrator the claims of such proprietor; “both as heir in possession of the estate of, &c.,” “by the formation of the railway, and for his support of the measure.” After such agreement the Act for making the railway was passed, but before any step was taken by the company towards its formation a resolution to return the calls and wind up the company was come to by the shareholders. The proprietor presented a note of suspension and interdict against the company’s carrying out such resolution, and violating the above agreement:—*Held* by the House of Lords that the Court below rightly refused such note.

Certain parties applied to Parliament in the year 1845 for an April 19. 1852 Act to enable them to make a railway from the Edinburgh and Northern Railway at Markinch, to Anstruther Easter, with a branch to the Kirkland Works, to be called the East of Fife Rail-way. Previously to the passing of the Act frequent communings took place between the promoters of the scheme and the present appellant, (who, as heir of entail in possession, was a large proprietor in that part of the county of Fife, through which the line of railway was proposed to run,) which resulted in the following letters, namely a letter dated 24th June 1846, and addressed by Mr Hill, secretary to the provisional committee of the intended company, to the appellant, in the following terms: “In reference to the conversation which the deputation of the East of Fife Railway Company now in London, have had with you on the subject of your claims against that company both as heir in possession of the estate of Anstruther by the formation of that railway, and for your support of and exertions in regard to the measure, I have to offer to you, on behalf of the company, that all such claims shall be referred to Thomas Rennie Scott of Castlemains, near Douglas,

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April 19. 1852, as sole arbiter, and that in terms of the Lands Clauses Consolidation (Scotland) Act." And a letter from the Appellant in answer to the East of Fife Rail. Co. thereto, as follows, "June 25. 1846.—In answer to your letter, I beg to state that I agree to the proposal contained in it, to refer my claims against the East of Fife Railway Company, as heir in possession of the estate of Anstruther, and for my support of, and exertions in regard to the said railway, to Thomas Rennie Scott, Esq. of Castlemains near Douglas, as sole arbiter between the company and myself." The Appellant afterwards supported the scheme, and the Act for making the proposed railway was passed on 16th July 1846. The preamble of the Act recited that the making of the railway would be of great public advantage, and that the persons therein mentioned were willing, at their own expense, to carry the undertaking into execution; and the Act then united such persons into a company for the purpose of making such railway, and gave them power to enter upon and take such of the lands as should be necessary for that purpose, and especially declared what was to be the line adopted by the company, as it was to pass through the Appellant's property. The period limited by the Act within which lands were to be purchased was three years from the passing of the Act, and within which the works were to be completed, was seven years from the passing of the Act.

No step was ever taken by the company towards the formation of the railway, and at a meeting of the shareholders, held on 29th March 1849, it was resolved that the directors should take measures to rescind the call already made, and to return what had been paid by the shareholders, and to dissolve and wind up the company. In consequence of this, the Appellant's agent wrote to Mr Hill to know whether the company intended to make the line or to wind up, stating that the company had concluded an agreement with the Appellant to make the line. Mr Hill in reply declined to give information on the subject to one who was not a shareholder, and denied all knowledge of any such agreement. Under these circumstances, the Appellant presented a note of suspension and interdict, praying that the company might be interdicted from taking any steps for its dissolution, and from returning to the shareholders the money advanced by them in the shape of deposits or calls, and from violating the agreement entered into between the Appellants and the company, so long as the said agreement remained unimplemented by the company.

The note of suspension and interdict came before Lord Robert-

son as Ordinary, on 18th July 1849, when his Lordship refused the note and found the appellant liable in expenses. Against this interlocutor the appellant reclaimed to the First Division of the Court of Session, on advising which their Lordships, by their interlocutor of 17th November 1849, adhered to the Lord Ordinary's interlocutor and refused the note. From these interlocutors the present appeal was brought.

Rolt, Q.C., and *Powell* for the appellants. The appellant was entitled to have the interdict passed until at least the result of an action of declarator which has been brought by him has been determined. He was so entitled, either by virtue of his right of land-owner to the property through which the proposed railway was to pass, or by virtue of the agreement by which any claims that might be due to him by the company in respect of the railway so passing through his land, were to be settled by arbitration. In consequence of such agreement, and of its being proposed that the railway should go through his property, the appellant abstained from opposing in Parliament the company's bill. Now when an agreement is made by a party with a provisional committee, and on the faith of it an opposition in Parliament is abandoned, and the committee succeed in obtaining the company's act, that agreement is afterwards binding on the company. *Edwards v. Grand Junction Railway Company*, 1 Myl. and Cr. 650. Then it is admitted by the respondents that it is their intention to dissolve the company, and as they are returning the moneys paid by the shareholders, it is evident that whatever Parliament may determine when applied to by them on the subject, the company have resolved not to make the railway, but to abandon the undertaking. The company's act was passed for a public benefit, as appears by its preamble, and they were bound to make the railway unless they were relieved afterwards by Parliament from doing so. *Blakemore v. the Glamorganshire Canal Company*, 1 Myl. and Keene, 162. It is submitted that the appellant is at all events entitled to an interdict until his right has been determined, or the company have obtained the authority of Parliament to abandon the projected railway. It is said by the respondents that they contemplate coming to Parliament for power to effect a dissolution of the company, but the mere alleging such an intention is surely not sufficient.

Bethell, Q.C. and *Munden* appeared for the respondents, but were not called on.

April 19. 1852. LORD CHANCELLOR. I do not think it necessary that your Lordships should in this case hear the other side, the company having failed in their undertaking, Sir W. Austruther instituted proceedings in the Court below to obtain an interdict against the company in these terms. (*His Lordship here read the interdict prayed.*) If such an interdict could be obtained, it would, my Lords, be most improper; for it has never been established that a landowner could come and compel a company to execute their railway where no steps have been taken by the company towards its formation; and as regards that part of the note of suspension as prays for an interdict against violating the agreement, it is impossible that any such injunction could be allowed; for the agreement was only for a reference of claims which might arise on the taking of the lands by the company, which occasion has not arisen. What is asked for, would, if granted, include even the preventing the company from applying to Parliament to be dissolved; and besides, the person so asking this interdict is not a shareholder, but is a stranger, and one who might or not be benefited by the company carrying out their line. It is said that your Lordships may qualify the interdict, and cut out three-fourths of what is asked for, but your Lordships I am sure will do no such thing in order that this appeal may be saved. With respect then to the application to restrain this company from paying back to the shareholders the money advanced by them, the appellant is a person who has no right to those funds, and nothing would be more mischievous than if, in a case like this, a landowner could come and interfere with such payment. I therefore move your Lordships that his appeal be dismissed with costs.

Appeal dismissed with costs.

*Surr and Gribble, Solicitors, London, and } Agents for the Appellants.
James F. Wilkie, S.S.C., Edinburgh.*

*James L. Hill, W.S., Edinburgh, and } Agents for the Respondents.
Connell and Hope, London.*

HOUSE OF LORDS.

No. 265. ARNOT AND ANOTHER, *Appellants, v. BROWN AND ANOTHER Respondents; and*
HOGG AND ANOTHER, Appellants, v. BROWN AND ANOTHER, Respondents.

Nuisance—The Judicature Act—Closing the Record—Waiver.—An inte-

rim interdict was obtained against commencing a manufacture which was May 7. 1852. alleged would be a nuisance. An issue was framed to try whether the manufacture, if carried on in a particular way, would be a nuisance ; but ^{Arnot &c. v.} ~~Arnot &c. v.~~ ^{Brown &c.} there being a difficulty in trying such issue, the Court of Session made a remit to a scientific person, who reported that it would not be a nuisance. The complainer consented to the interim interdict being recalled, and afterwards applied to have the cause on the roll for advising. The Court of Session having then finally repelled the reasons of suspension and interdict, this House affirmed the same. *Held* also, that after the consent which had been given, objection could not be made to the record not having been closed, or to the case not having been sent to a jury trial.

Note.—The Judicature Act (6 Geo. IV. c. 120), requiring actions for nuisances to be tried by jury, does not apply to proceedings to prevent a contemplated nuisance from existing.

The appellants in this case presented a bill of suspension and interdict to the Court of Session, stating that they were the proprietors of lands and houses in the Abbey Hill, Edinburgh, in the vicinity of property of Mr Brown, one of the respondents ; that Mr Brown intended to fit up certain buildings and premises on that portion of his property with apparatus or machinery fitted for a manufactory of candles, and that the other respondent, Mr Common, was about, unless prevented by interdict, to use the premises when so fitted up as a candle work, and that such proposed application of the buildings would be productive of an intolerable annoyance to the neighbourhood, under whatever pretences the manufacture might be carried on. The complainers, therefore, prayed a suspension of such proceedings, and that the respondents might be interdicted from introducing into the said buildings machinery fitted for the purpose of candle-making, or commencing the manufacture of candles, within the said premises, or otherwise creating a nuisance within the same. The Lord Ordinary on the Bills (Cuninghame,) granted interim interdict, and afterwards, on answers having been given in, his Lordship continued the interdict until the facts in dispute, which involved the effect of the proposed manufactory, had been ascertained.

The respondents, in the November following, having moved the Lord Ordinary for leave to make an experiment of the proposed manufacture for a limited period, so as to afford evidence of its nature and effect on the trial of any issue that might be sent to a jury, the Lord Ordinary so far relaxed the interdict as to allow the respondents to make such experiment. Against this last inter-

May 7. 1852. locutor, the appellants reclaimed to the Inner House, and their Lordships, on the 16th January 1847, pronounced an interlocutor, by which they recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary "to proceed in the preparation of the record, and to allow the respondents, before answer as to the application to be permitted to try an experiment in the premises in question, to give in a specific statement as to the apparatus and method of working proposed to be used by them, so as to prevent all nuisance to the suspender, reserving all questions of expenses between the parties."

A record was thereafter prepared before the Lord Ordinary, consisting of revised reasons and pleas for the suspenders, and revised answers and pleas for the respondents, but the record was never finally closed, and, on 18th March 1847, the Lord Ordinary pronounced an interlocutor, by which he appointed the respondents to give in a specification of the way in which they proposed to arrange their premises and machinery, in order to remove objections to their manufactory, and appointed the complainer to give in a minute on the case, and the respondents to give in a minute in answer thereto. Under these appointments a specification was lodged by the respondents, who renewed their application to be allowed an experiment; and a minute and answers having been given in by the parties, the Lord Ordinary reported the case to the First Division of the Court of Session, stating that the record was then made up, "though not closed."

The Court afterwards (17th Nov. 1847) pronounced the following interlocutor:—"The Lords, on report of Lord Cuninghame, having considered the papers intended to form the record and the specification, with the minute and answers relative to the proposed experiment, and having heard the counsel for the parties, without prejudice to the interdict granted in the Bill Chamber, and still subsisting, so far relax or recall the same, as to allow the respondents to carry on, by way of experiment, their proposed manufacture, in the manner proposed to be permanently conducted by them, as set forth in the specification, from the morning of Monday the 6th to the evening of Saturday the 25th December next, inclusive, and declare that the interdict shall thereafter take effect till the issue is decided on the merits, reserving, in the meantime, all questions of expenses; and appoint the respondents to give access at all reasonable times, when the experiment is going on, to the suspenders, or to any men of skill to be named by them."

The experiment was accordingly made in the presence of various persons, selected by both parties, and the result was variously represented by each. Immediately after the experiment the appellants presented a note to the First Division of the Court of Session, praying for a remit of the cause to the issue clerks, in order to have issues prepared, whilst the respondents, on the other hand, applied for leave to lodge an additional specification specifying farther improvements which they had to suggest with a view to a farther experiment. The Court gave the respondents leave to lodge such specification, which they accordingly did, and on 12th Feb. 1848, the Court pronounced a further interlocutor, giving the respondents permission, in terms similar to those contained in the former interlocutor, to make a second experiment. Accordingly the manufacture was again carried on by way of experiment in the presence of scientific persons brought there by both parties.

The respondents thereafter lodged a note to the Court, craving a remit to the issue clerks, in order that the necessary issue or issues might be prepared. Upon this note the Court remitted to the issue clerks, who accordingly prepared the following issue. "It being admitted that the suspenders are proprietors of lands and houses in the Abbeyhill, in the neighbourhood of Edinburgh, and that the respondent, John Brown, is proprietor, and the respondent, William Common, tenant, of subjects in the vicinity of the suspenders' said subjects or some of them.

"It being further admitted that the respondents are about to establish on their said subjects a manufactory of candles, and that they have put into process a specification, No. 30, of the mode in which they propose the manufactory to be conducted.

"Whether the establishment of the said proposed manufacture would be to the nuisance of the suspenders or their tenants in said subjects, whereby their said properties, or any of them, would be deteriorated, or the suspenders or their tenants incommoded and annoyed in the use and enjoyment of their said properties ? "

Upon this issue being reported to the Court for approval, much discussion arose as to its form, and as to the proper mode of disposing of the case; and the Court being of opinion that a remit to scientific men to report was the most appropriate mode of solving the question raised by the pleadings, pronounced an interlocutor, by which they appointed a trial to be made under the inspection of the Professor of Chemistry in the University of Edinburgh, who was to report to the Court on the result, and particularly whether in his opinion the said manufactory, if carried on

May 7. 1852. under such specification, would be to the nuisance of the complainers. The Professor of Chemistry in the University of Edinburgh was unable to undertake the above remit, and Dr Thomson, the professor of Chemistry in the University of Glasgow, was appointed to make the inspection ordered by the last interlocutor. Dr Thomson accordingly inspected the whole process, and made a report thereof to the Court, in which, after giving an account of the proceedings, he concluded with the following result:—"I may therefore state with perfect confidence, that the process of candlemaking, as conducted by Mr Common, cannot in the least incommod the neighbourhood; that it does not injure the health, and does not give out any offensive smell."

In consequence of this report, the Court of consent of the appellants recalled the interim interdict granted in the bill chamber, to the effect of allowing the respondents to carry on the proposed manufactory under the specification, and superseded farther advising *in hoc statu*.

In December 1849 the appellants made application to the Court to resume consideration of the cause, and order it to the roll for advising. It was in consequence put out for further discussion in January, when the Court pronounced the following interlocutor:—"22d January 1850.—The Lords having considered the Notes, Nos. 41 and 42, and having heard the counsel for the parties, repel the reasons of suspension and interdict, and decern: Find the suspenders liable in expenses subject to modification; and before answer as to the amount of modification, appoint an account of expenses to be lodged, and remit to the Auditor to tax the same and report." From the above interlocutor the present appeal was brought.

Rolt, Q.C., and *Anderson*, Q.C., for the appellants. The proceedings of the Court below have been irregular, *first*, because there was never any closed record in this case according to the Judicature Act, 6 Geo. IV., c. 120. That act is imperative. *Pattison v. Campbell*, 5 Shaw and D. 208; *Nicholson v. Hay*, 2 Dunlop and B. 995; *Sprout v. Mure*, 5 Shaw and D. 66; *Doig v. Fenton*, 5 Shaw and D. 533; and *Falconer v. Shiells*, 4 Shaw and D. 829. The 13 and 14 Vict., c. 36, does not materially alter this, it only dispenses with counsel's signature. *Secondly*, this was especially a case for a jury trial. It is one of the enumerated cases directed by the Judicature Act, 6 Geo. IV., c. 120, to be tried by jury, sec. 128 specifies as causes appropriate to the Jury Court, "all actions brought for nuisance." [Lord Chancellor.

After the appellants had consented to the interlocutor of 17th May 7. 1852. July 1849, by which in effect they admitted, that carrying on the manufactory under the specification was not a nuisance, what issue was there for a trial by jury? An issue whether, working the manufactory otherwise than under the specification, would be a nuisance; and we say this, if such working should prove to be a nuisance, the respondents should then have been interdicted against working the manufactory otherwise than under the specification—~~Arnot, &c. v. Brown, &c.~~ There is at present nothing binding the respondents to work only according to the specification. The consent was only upon the understanding that *quoad ultra* the cause would be proceeded with by adjusting the issue, closing the record, and sending the issue to trial; but even if this was not the case, the consent can have no effect where the matter is one of the enumerated cases stated in the Judicature Act, for the Court has then no discretion, but is bound to direct a jury trial; *Bald v. Kerr*, 3 Shaw and Maclean 1; and *Wemyss v. Wilson*, 6 Bell, 394. Here, however, the case had been left to the issue clerks to prepare the issue, so that, whether it be an enumerated case or not, there was no discretion left; *Craig v. Duffy*, 6 Bell, 308.

Bethell, Q. C., and *G. H. Pattison*, for the respondents. After the interdict was repelled by consent there remained nothing to adjudicate on but the costs. Whatever objection there was ought to have been made before the pronouncing the interlocutor of July 1849, but no objection was ever made at any time to the jurisdiction of the Court; even after that interlocutor the appellants applied to the Court to order the cause for advising. The cases of *Reid v. M'Cormick*, 8 Shaw and D. 300, and *Bain v. Whitehaven Furness Junction Railway Company*, 7 Bell 79, shew that the objection to the record not being closed may be waived. The issue was not one which a jury could have tried, for it was not simply a question of fact but a matter of speculation, and the course adopted by the Court of remitting it to scientific persons to make an inspection of the proposed working was the proper course to adopt. *Trotter v. Farnie*, 5 Wilson and Shaw, 649.

The LORD CHANCELLOR. In this case, my Lords, the question is, what weight is to be attached to the technical objections which have been taken. There is, my Lords, this distinction between the law of England and of Scotland with reference to nuisances, which has given rise to much of the difficulties in this case. The law of England does not permit a man to maintain an injunc-

May 7. 1852. Arnot, &c. v. Brown, &c. tion for a probable nuisance, but the law of Scotland does. Now, whilst it is problematical whether the matter complained of will turn out to be a nuisance or not it is very difficult to meet the case. A candle manufactory may not necessarily be a nuisance, for science has now done so much as to prevent many things from being nuisances which formerly were such. Until the manufactory has been established it is not therefore so easy to determine whether it will or not be a nuisance. The appellants in this case asked for an absolute interdict against introducing into the buildings "machinery fitted for the purpose of candle-making, or commencing the manufacture of candles within the said premises." Nobody, I presume, my Lords, will contend that this was a nuisance, unless it was intended to use the manufactory so as to be a nuisance; it was therefore necessary for the appellants to allege that such a use was intended to be made of the buildings and machinery as would operate as a nuisance. The pleadings were this, one side asserted that candle-making upon these premises would be a nuisance, and the other side insisted that according to the way it was proposed to carry this on it would not be a nuisance. Now I agree so far with the counsel for the appellants that the experiment which was first tried was intended only to assist the jury, for at that period the intention was that the question should be decided by a jury. A variety of proceedings afterwards took place, and ultimately the case was remitted to the issue clerks to prepare the proper issue, and an issue was framed which could not have tried any matter the trial of which could have determined the present one, viz., whether candle-making upon these premises would be a nuisance, but only whether it would be a nuisance to conduct the manufactory according to this specification. The result, therefore, was, that instead of reforming the issue, or sending the matter to a jury, the matter had been remitted, without opposition on the part of the appellants, for another experiment to take place under the superintendence of a scientific person. This had been treated by the counsel for the appellants as if it had been a question of evidence. It was, however, no such thing, but a question of science and of sense combined. Dr Thomson conducted the experiment in the presence of scientific persons who attended on behalf of the appellants, and the result was a report as conclusive as one can conceive it to be possible. Now, instead of opposing this report, the appellants consented to the recall of the interim interdict. On that consent the whole case, in my opinion, turns. It was, my Lords, most

ably argued on behalf of the appellants, that this consent was only given to modify the interim interdict to a certain extent, and that it was not to be more extensive than such interim interdict. But, my Lords, the only point then to be decided in this case was, I think, whether candle making, as proposed to be carried on by the respondents was or was not a nuisance. The parties, by consent, had adopted all that had taken place up to this time, and had substituted the experiment for the issue. How could there afterwards have been an issue? What was there then to try? The question of nuisance had then been determined, so too had the question, whether the respondents should be prevented from constructing machinery for the purpose of their trade. The only question therefore now is as to the effect of the consent. I apprehend that any one may waive whatever is for his benefit, and therefore I am of opinion that your Lordships will be relieved from the consideration of the technical objections which now for the first time have been raised by the appellants, as in my opinion they are all concluded by the consent. I will, however, offer a passing observation on the subject of these objections. In my opinion this is not the case of a nuisance specially mentioned in the Judicature Act as a cause to be tried by a jury. For the present is not an "action brought for a nuisance," but it is brought to prevent a nuisance being established—to prevent it ever existing. Then as to the other objection, namely, whether it was competent for the Court of Session to stop the case from going to the jury after it had been remitted to the issue clerks, I am strongly of opinion that the Court of Session has the power which formerly belonged to the Jury Court, and that it therefore had jurisdiction, but I still think that the record was not properly closed, and that if the case had to go to trial, that circumstance would have been a good objection; but the appellants chose to adopt a proceeding not founded on a closed record, and therefore they were not I think at liberty to fall back afterwards upon this objection. It is not necessary to dwell longer on these technical objections. Are the merits then with the appellants? I am of opinion that they are not. I have shewn your Lordships to what the interim interdict extended. There was no other obstacle but that to the respondents carrying on their trade—that interdict was removed by consent, and there then remained nothing else to decide on except the costs. Now that could not be decided without bringing the case before the Court. The appellants themselves asked to put the cause on the roll for advising, and then both par-

May 7. 1852. ties having thus brought this case as it then stood before the Court for ultimate decision, the Court made the order of 22d January Arnot, &c. v. Brown, &c. 1850. The appellants now denied the jurisdiction of the Court to make this order, but there could be no doubt as to the question having been brought properly before the Court, and the Court therefore having jurisdiction. Are the appellants to be at liberty then to say, we admit that the proposed manufactory is not now a nuisance, but it may become one? If they could, the same might be said of every manufactory throughout the kingdom. All I can say is, that when this manufactory does become a nuisance, (but I hope not until then,) the appellants will be at liberty to apply for an interdict, but looking at this case in every possible view, I have come to the conclusion that the appellants have not made out their case, and consequently that the interlocutors ought to be affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

Richardson, Loch and MacLaurin, } Agents for the Appellants.
Solicitors, Westminster,
A. Hutchison, Solicitor, Edinburgh,

Deans and Rodgers, Westminster, and } Agents for the Respondents.
John Walls, S.S.C., Edinburgh,

HOUSE OF LORDS.

No. 266. *SUTTON AND ANOTHER, Appellants, v. AINSLIE, Respondent.*

Act of Sederunt of 1841—Practice—Deposition of Foreign Witness—Proof.—Held, affirming the decision of the Court of Session, that the evidence of an English, or other foreign witness, taken under a commission, may be read at the trial, without proof of the witness being then still out of the jurisdiction of the Court:—*Held also*, that on the trial of an issue, whether a bond had been given for a gambling debt, an exception taken to the Judge's charge, on the ground that his Lordship refused to tell the jury that the defender in such issue (who was the charger on the bond) was not bound to prove the consideration given for it, but recommended them to find for the defender, unless it was proved by the pursuer that the bond had been granted for money won at play, was rightly disallowed by the Court of Session.

May 10. 1852. This was an appeal from the interlocutor of the First Division Sutton, &c. v. Ainslie. of the Court of Session, by which the Court disallowed exceptions taken by the appellants in the course of a trial between them and

the respondent, on 19th March 1851, before Lord Murray and a ^{May 10, 1852.} special jury. The following are the facts of the case:—The respondent having been bound in a bond to one Henry Stephen ^{Sutton, &c. v.} Ainslie. Sutton, since deceased, to pay the interest of a sum conditioned to be paid by another bond by one Robert Stewart, and having been charged by Sutton for payment of such interest, presented a note of suspension, in consequence of which an issue was settled to try whether the bond given by Stewart was granted in consideration of money won at play, or money due in respect of losses at play, and whether the bond charged on was granted in farther security of the said gambling debt, or of interest accruing thereon. The respondent, who was the suspender in the Court below, was the pursuer of the issue, while the appellants, who had been sisted in the room of Mr Sutton upon his death, and were called chargers in the Court below, were the defenders.

At the trial of this issue, the counsel for the respondent proposed to give in evidence the report of a commission containing the deposition of James Thomas Blurton of Princes Row, Pimlico, in the county of Middlesex, which had been taken in London on the 15th of July 1846, by commission from the Court of Session, upon interrogatories which had been settled and approved of in the usual way. The counsel for the chargers thereupon “objected, that the report of the said commission could not be read to the jury, unless the suspender proved that the witness, the said Thomas James Blurton, could not attend the trial on account of absence, or that the suspender could not bring the witness to the trial.” The Judge having repelled the objection, the counsel for the chargers excepted, and this forms the first exception in the bill. The second exception relates to a similar ruling by the Judge as to the report of commission containing the examination upon interrogatories settled and approved of in the same way, of George Thomas Fisher, residing at 83. Albert Street, Mornington Crescent, London, taken at London on 17th July 1846. The third exception relates to a similar ruling by the Judge as to the report of commission containing the examination upon interrogatories settled and approved of in the same way, of Edward Claude Marsack, residing in London, taken at London on 15th March 1851.

The fourth exception was to the charge of the judge, “in respect that his Lordship though called upon to do so by the counsel for the said charger, refused to tell the jury that the charger was not bound to prove the consideration given for the

May 10. 1852. bond, and that the presumption was that it was given for value Sutton, &c. v. until the contrary were established by the suspender.

Ainslie. The following note by Lord Murray, which he wrote down at the time in Court, was added to and formed part of the bill of exceptions:—"I did not give the direction to the jury in the precise terms which the counsel for the defender has required or suggested, but I recommended them to find for the defenders, unless it had been proved by the pursuer that the bond had been granted in consideration of money won at play, or due in respect of losses at play."

The bill of exceptions came before the Court of Session, on 13th December 1851, when their Lordships by an interlocutor of that date, disallowed the whole exceptions contained therein.

Rolt, Q.C., and Moncreiff for the appellants. The first three exceptions involve the same question, which is, whether, when it is alleged at the trial that a witness resides beyond the jurisdiction of the Court, it is competent to read the deposition of such witness, which has been taken on commission, without offering any evidence to shew that the witness is unable to attend. It is submitted that to allow such depositions to be read without such evidence being given, is contrary to the Acts of Sederunt. See 55 Geo. III. c. 42, and relative Act of Sederunt, 9th Dec. 1815. Upon that act there have been the following decisions, *Haddnay v. Goddart*, 1 Murray's Jury Reports 150, and *Seton v. Seton's Trustees*, 1 Murray 9, both of which shew that the deposition could not be used unless it was proved that the witness was unable to attend. See also the following authorities, the Judicature Act, 6 Geo. IV. c. 120; and Act of Sederunt of Nov. 1825, sec. 28, 1 W. 4 c. 69; and Act of Sederunt, 17th Feb. 1841, sec. 17. *Mackay v. M'Leod*, 4 Murray 278; *Willox v. Farrell*, 10. D. B. M. 807; *Wight v. Liddell*, 4 Murray 328, and 5 Murray 47; *Scott v. Gay*, 4 Murray 61, and *Armstrong's Assignees v. The Leith Banking Company*, 12 S. and D. 440. Then the judge at the trial wrongly directed the jury by "recommending;" a recommendation is very different from a direction. It is submitted that the judge was bound to tell the jury as a matter of law, and not of fact, that the onus of proving the consideration for the bond did not rest with the present appellants.

The Solicitor-General for Scotland (with whom were the *Solicitor-General for England*, and *Anderson, Q.C.*) for the respondent. The objections are purely technical, and ought not to be sustained. It appears from the depositions and the descriptions there given

of the witnesses, that they were residing out of the jurisdiction of May 10. 1852, the Court—this applies, it is true, to the time only when the ^{Sutton, &c. v.} depositions were taken, but the presumption would be that they ^{Ainalie.} were still abroad, where they were described to be residing. With respect to the acts of Sederunt, it is clear that the act of 1815 does not contemplate the case of foreign resident witnesses. The first provision for such was made by the 28th sec. of Act of 1825, and that makes a distinction, it is submitted, between the case of foreign and of native witnesses. In *Mackay v. M'Leod* there was in evidence that the witness was at the time out of the jurisdiction. *Wight v. Liddell* supports the view taken by the respondent. *Scott v. Gray*, 4 Murray, 61, is very different from the present case. There being no decision shewn to the contrary, the practice of the Court, with reference to cases under the Act of Sederunt must be important; and upon that the opinion of the Judges of the Court in the present case is strong and decisive. The Lord Justice-General said, “the practice of the Court is invariable, that depositions taken in London, or more commonly abroad, are read without any evidence being required as to the witness not being here. The common practice is just to read them at once; and I have no recollection of any such proceeding as putting a man in the box to give such evidence as is asked by the defenders here. It is never done.” This is the practice, not only since 1841, but ever since 1825. As to the last objection—it was unnecessary for the Judge to give the direction to the Jury that he was asked to do. What the Judge laid down was sound law, and no objection can be made to the word “recommend.”

Moncrieff replied.

The LORD CHANCELLOR. My Lords, in this case there are two points; one turning upon the construction of the Act of Sederunt of 1841, and the other relating to the charge to the jury. Now with respect to the first of these points it is to be observed, that the cases which relate to the disability of the witness from illness have no bearing on this point, which is whether residence abroad is for this purpose within the Act of Sederunt. In the case of illness of a witness who lives within the jurisdiction his examination cannot still be read without first proving that such witness is unable to attend to give his evidence. Now the Act of Sederunt of 1841 is not in all respects the same as that of 1825, and I am not satisfied that the change of phraseology that occurs in it was not intentional. [*His Lordship here read the 28th section of the Act of 1825.*] It makes the evidence receivable, on its being established

May 10. 1862. to the satisfaction of the Court, that the witness cannot attend
Button, &c. v. "owing to one or other of the causes aforesaid," without enum-
erating the particular acts of disability, and therefore it might have
been held under that Act to include every case before mentioned,
whether that of a foreigner or not. Now as far as I can under-
stand the cases, (which are however very vague) a foreigner was
not ever held to come within that branch of the Act which requires
proof of the witness's inability to attend, but that his absence
was proved by his want of presence. In *Wight v. Liddell* the
Lord Chief Commissioner is reported to have said "this witness
is a foreigner and the presumption is that he will not come;" and
Mackay v. M'Leod also shews that the absence of a foreign wit-
ness is a sufficient cause of excuse. The Act of 1841 avoids the
generality of expression which is in the Act of 1825, and it enu-
merates the causes of the absence of the witness, which are re-
quired to be established before the evidence is used. Before,
however, I state my view of the construction of this Act, I must
observe that I have no hesitation in saying that the Act is so
vague that it is capable of supporting either of the construc-
tions which have been contended for. The 17th section is this—
[*His Lordship here read the section.*] The second branch of this
section provides for two cases which are to be established by
proof before the evidence is used, namely, the death of the wit-
ness, or that he cannot attend owing to absence, age, or perma-
nent infirmity; now the first branch of this section has reference
to a witness whose residence is not foreign, but who is unable to
attend from illness, or from being obliged to go abroad. Then
when the Act comes to provide for the proof before the admissi-
bility of the evidence, it provides only for the cases in the second
branch. In my view, therefore, of the Act, (though I admit my
Lords that the Act is very vague and unsatisfactory), the second
branch of the section does not apply to a witness whose permanent
residence is abroad, and consequently the evidence in this case
was receivable without proof of the inability of the witness to
attend. Now, my Lords, when I have stated this, what great
weight must be given to the unanimous opinion of the Judges of
Scotland, by whom these very Acts of Sederunt were framed, and
by whom the law under such Acts are daily administered? It
would indeed require a very strong case to overrule a construction
which has had their sanction, and is one which the Act fairly ad-
mits of. The only other objection raised to the interlocutor, is
the charge of the Lord Ordinary to the jury. Now I confess I

should have been better satisfied if he had made the charge in the May 10. 1852. way he was desired. In point of law no evidence was required to be given of consideration for the bond. Now the Judge was de-^{Sutton, &c. &c.} Ainslie sired to tell the jury this, and that the presumption was, that it was given for value, until the contrary was proved, and it would have been better if he had so laid down the law; but the objection taken is only technical, for what was the recommendation of the Judge to the jury but that they should find for the defender, unless it had been proved that the consideration for the bond was money won at play? The objection, if at all, should have been therefore to using the word "recommend," though in truth the recommendation of the Judge amounts to a direction. It was therefore substantially right, and although I should have liked it better if it had been in the form desired, it cannot on that account be overruled. I move, my Lords, therefore, that the interlocutor be affirmed, but certainly without costs.

Interlocutor affirmed without costs.

Robertson & Simson, Solicitors, Westminster, Agents for Appellants.

Spottiswoode & Robertson, Solicitors, Westminster, Agents for Respondents.

COURT OF SESSION.

FIRST DIVISION.

On this the first day of the Summer Session, Lord Colonsay May 20. 1852. (McNeill) having been appointed Lord Justice-General of Scotland and President of the Court of Session, in room of the Right Honourable David Boyle resigned, the usual oaths were administered to his Lordship, who then took his seat on the bench as President of the whole Court.

Also this day the Lord Advocate (Anderson) presented the Queen's letter appointing him a Lord of Session in room of Lord Colonsay promoted, and was remitted to the usual trials as Lord Probationer.

Also the same day the Solicitor-General (Inglis) having presented his commission as Lord Advocate, in room of Adam Anderson, Esquire, appointed a Lord of Session, took the usual oaths and his place within the bar accordingly.

(It being the Queen's birth-day the Court then adjourned till the following day.)

FIRST DIVISION.

No. 267.

CAMPBELL and Others v. PRINGLE and OTHERS.*Process—Reclaiming Note—Objection to Competency.*

May 21. 1852. This was a reclaiming note by the pursuers against an interlocutor of Lord Ordinary Colousay, in an action at their instance Campbell, &c. v. Pringle, &c. against certain persons as the provisional committee of the Berwickshire Central Junction Railway.

On the reclaiming note appearing in the single bills to-day,

Brown for Sir T. Dick Lauder's trustees, who were defenders, objected to its competency. The statement of the trustees contained an article in these terms: "Of this date, the printed circular (set forth in appendix No. 1,) . . . was prepared and thereafter circulated," &c. The statement, therefore, was incomplete without the circular, which, by this reference to it, formed part of the record. Accordingly, in the note to the Lord Ordinary's interlocutor, express reference is made to the circular. The pursuer therefore should have printed the appendix containing the circular as part of the record. In the case of *Wilson and others v. Macara*, 9th March 1847, 9 D. 903; a similar objection was repelled only on the ground that the Lord Ordinary made no reference to the document not printed in his note. The inference, therefore, is that if it had been printed, the objection would have been sustained.

J. Shaw was for the pursuer.

The COURT holding that the appendix formed no part of the record which the reclaimers were bound to print, repelled the objection.

John Murray, S.S.C., Pursuers' Agent.

Scott, Rymer and Scott, W.S., Defenders' Agents.

FIRST DIVISION.

No. 268.

SAWERS v. MATHESON.*Process—Reclaiming Note—Appendix.*

May 21. 1852. In this case the pursuer was under age, and an objection to his proceeding in the action was stated by the defender in his defences. Sawers v. Matheson. The pursuer stated that he had an administrator-in-law, and an order was pronounced by the Lord Ordinary (Rutherford) to have

him sisted. He was not sisted; and an order was pronounced for May 21. 1852. the appointment of a *curator ad litem*. After repeated failures to have such appointment made, and an order with certification, the *Sawers v. Matheson*. Lord Ordinary pronounced decree assoilzieing the defender in respect of the pursuer's failure to obtemper the order. He now reclaimed to be reponed, stating that he had come of age, but produced no proof or certificate of this fact.

Craufurd, for the defender, objected to the competency of the reclaiming note on this ground. The pursuer should have produced with his reclaiming note immediate proof of his now being of age, just as a party reclaiming to be reponed against a decree for failure to lodge a paper must produce the paper with his reclaiming note.

Gifford was for the pursuer.

The Court repelled the objection, and remitted to the Lord Ordinary to repone on obtaining proof of the pursuer's age.

James Bell, S.S.C., Agent for Pursuer.

John Bowie, W.S., Agent for Respondent.

SECOND DIVISION.

SCEALFS v. WIGHTON.

No. 269.

Process—Expenses—Decree in Absence—Reduction.

(Sequel of case reported *ante*, p. 586.)

This was a reduction of a decree in absence, in which reduction May 22. 1852. the pursuer had been successful, and been found entitled to expenses. The case now came before the Court on the Auditor's report. *Sceales v. Wighton.*

In the decree which was now reduced, a sum of expenses had been decerned for. The defender in the reduction pleaded as a preliminary defence, that the pursuer was not entitled to be heard in the reduction without first paying those expenses, and the pursuer of the reduction admitting that plea, had paid the expenses; in respect of which payment the Lord Ordinary held the defence obviated, and the cause proceeded.

The question now was, whether having succeeded on the merits, these expenses which he paid as the condition of his being heard in the reduction were to be included in the expenses of process to which he had been found entitled. The Auditor reported this point to the Court.

May 22. 1852. *Moir was for the pursuer, Pattison for the defender.*

Sceales v. Wighton. The LORD JUSTICE-CLERK. I cannot see why the party is not to get all the expenses here, if it turns out that the action in which decree was pronounced ought never to have been brought. It becomes a matter of principle, and not of form.

LORD MEDWYN. I differ. The question is, whether having been obliged to pay a certain sum of money, in order to be heard, the party is to be repaid that sum as part of the expenses of process. I do not think it is part of the expenses of process, and the practice of the Court has not been to consider it so.

LORD COCKBURN. I rather take the view of Lord Medwyn. I do not see much justice in a party creating expenses by not appearing, and then re-claiming them. It is expenses created by his own failure.

LORD MURRAY concurred with Lord Medwyn and Lord Cockburn.

The COURT held that the pursuer of the reduction was not entitled to repayment of that part of the expense which was created by his own default, viz., the expense of enrolling, taking decree, taxing the account of expenses, and extracting, but allowed him repetition of the remainder of the expenses.

John Murdoch, S.S.C., Pursuer's Agent.

John Murray Jr., S.S.C., Reclaimer's Agent.

FIRST DIVISION.

No. 270.

SUTHERLAND v. SUN FIRE INSURANCE OFFICE.

Fire Insurance—Right of Insurance Co. to reinstate.—Circumstances in which held that a Fire Insurance Company had not lost the right of reinstating the person insured.

May 22. 1852. This was an action for the recovery of the sum of L.1200, being the damage done to the pursuer's shop by fire. The pursuer, who is a bookseller in Leith Street, Edinburgh, effected an insurance of his shop, &c., with the defenders, against fire, the sum insured being L.1200. The policy provided, that "persons insured sustaining any loss or damage by fire, are forthwith to give notice thereof at the office, and as soon as possible afterwards, deliver in as particular an account of the loss or damage as the nature of the case will admit of, make proof of the same, &c., and in case any difference shall arise between the office and the insured, touching any

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loss or damage, such difference shall be submitted to the judge ^{May 22. 1852.}
ment and determination of arbitrators, indifferently chosen, whose award in writing shall be conclusive and binding on all parties ; and in every case of loss, the company reserves the right of reinstatement, in preference to the payment of claims, if it should judge the former course to be more expedient ; but when any loss is settled and adjusted, the insured will receive immediate payment for the same without any deduction or discount."

Sutherland r.
Sun Fire In-
surance Office.

A fire took place in the pursuer's shop, on 12th April 1851 : immediate information was given of it to the company by letter on the 13th, and two valuators, one named by the pursuer, and the other by the defenders, were appointed to value the stock, and ascertain the loss. They entered on their duty on the 15th, and the valuation was broken off on 19th April, owing to some dispute between the parties, but by whose fault did not appear. The pursuer on the 25th lodged a claim, showing his loss to be L.1305 : 14 : 2*½*. This was referred to the head office of the company in London. Some delay took place, and then a negotiation was attempted for settlement, which failed ; then a proposal to refer to arbitration was made by the company on 19th May, and declined by the pursuer; and at last, on 23d May, the company offered to reinstate the pursuer.

The present action was brought by the pursuer, concluding for payment of the L.1200. The pleas of parties will be seen from the opinion of the Lord Probationer (Anderson) before whom the case was heard.

The Lord Ordinary (Robertson) pronounced an interlocutor, in which he " Finds that even on the assumption of the accuracy of the whole averments made by the pursuer, nothing occurred as between him and the Insurance Company, whereby the right of reinstatement in preference to the payment of the claim, if the company should judge the former course to be more expedient as reserved in the policy of insurance, has been lost by the said company, and to this extent sustains the defences and decerns ; and before further answer, and with the view of carrying through such reinstatement, remits to Mr P. S. Fraser, bookseller in Edinburgh, to whose nomination as reporter the pursuer consented, without prejudice to his plea on the point of acquiescence, to inquire into the circumstances at the sight of the parties or their agents, and to report what is necessary and proper to be done with the view of carrying through such reinstatement, reserving in the meantime all question of expenses."

The pursuer reclaimed.

May 22. 1852. *Moir* was for the pursuer, *Pattison* for the defendant.

Sceales v. Wighton. The LORD JUSTICE-CLERK. I cannot see why the party is not to get all the expenses here, if it turns out that the action in which decree was pronounced ought never to have been brought. It becomes a matter of principle, and not of form.

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John Murdoch, S.S.C., Pursuer's Agent.

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FIRST DIVISION.

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loss or damage, such difference shall be submitted to the judge ^{May 22. 1852.} and determination of arbitrators, indifferently chosen, whose award in writing shall be conclusive and binding on all parties; ^{Sutherland v.} ^{Sun Fire In-} and in every case of loss, the company reserves the right of reinstatement, in preference to the payment of claims, if it should judge ^{surance Office.} the former course to be more expedient; but when any loss is settled and adjusted, the insured will receive immediate payment for the same without any deduction or discount."

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The present action was brought by the pursuer, concluding for payment of the L.1200. The pleas of parties will be seen from the opinion of the Lord Probationer (Anderson) before whom the case was heard.

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The pursuer reclaimed.

May 22. 1852. *Moncreiff and Craufurd* were for the pursuer ; *Mure and Neaves*
for the defenders.

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surance Office.

LORD PROBATIONER ANDERSON. The pursuer here maintains, *First*, that the defenders had lost the right to reinstate, (1.) in respect of the valuation to which they had agreed, and which shewed their intention to repay the loss in preference to reinstating ; and, (2.) in respect of the length of time they have allowed to elapse from the date of the fire before making the offer, which should have been made instantly after its occurrence. *Secondly*, even supposing reinstatement was competent, the pursuer maintains that the second finding of the Lord Ordinary is ill-founded, inasmuch as there ought to have been a remit to a jury, that being the only way in which the case could be extricated.

In answer the defenders maintain that the reserved power to reinstate was not necessary to be exercised instantly on the fire taking place, but that a certain time must be allowed to elapse for the office to consider the course they were to take. They deny that the valuation is to be regarded as an arbitration for the fixing of the amount they were to pay, and that all that was intended by it was to enable the parties to come more easily to a judgment as to the course to be taken. And holding the reinstatement competent, it is said, the only course by which the case could be extricated, was by a remit such as is made.

The case turns on the clause in the policy. The words at the close reserving to the Company the power to reinstate are quite unqualified and absolute. There is no limitation imposed in regard to the time within which the Company must make this choice. It is quite plain it could not be intended that the choice should be exercised immediately upon the loss taking place. Until the claim of the insured is made and supported by evidence the Company is not placed in a position to enable them to exercise it. The right to reinstate may indeed be waived or barred, but a case must be made out so as to prove such waiver or bar, and the question arises, is such a case alleged here ? Now it is said by the pursuer that the valuation was in reality an arbitration to fix the sum of damages the Company were to pay. But the pursuer himself states on record that the object of the appointment was "for the ascertaining and adjustment of the amount of loss by damage to the stock." He does not say it was a remit to bind both parties. And if it was an arbitration, why did the pursuer immediately afterwards lodge his claim with the company ? His course was clear. It being a pending submission, he should have said, " I will lodge my claim with the

arbiters not with the Company." Further, if it was an arbitration, May 22. 1852. why is he here claiming £1200? He should have brought an action to compel the arbiters to go on. Therefore it cannot be held that the entering into this remit is to debar the Company from choosing to reinstate. Suppose the amount of stock and of damage had been ascertained, it would then have been competent, under the clause in the contract, for the Company to have said, "there is the amount of the stock, we exercise our option."

Was there then such delay on the part of the Company to make their choice, as to bar them from making it? The claim was lodged on 25th April. The Company was an English one, and therefore time must necessarily be occupied in correspondence with London. It materially enters into the consideration that Sutherland kept no regular books, according to his own statement, which was an additional reason for the Company delaying to determine the course to be taken. Now, there is a letter on the 22d March, offering a settlement; that offer is refused. Another offer to refer to arbitration is made, and also refused. All these were negotiations for settlement fair on the part of the Company, and which cannot be imputed to a wish for delay. The offer of arbitration was refused, and then they offer on 23d May to reinstate. It appears to me that their right to make the option of reinstating was not barred by delay.

In regard to the other point, whether the question should have gone to a jury, or should have been disposed of by a remit, such as the Lord Ordinary has made, it appears to me not to be a case belonging to the class in which jury trial is indispensable. The question is one of discretion. The Lord Ordinary could not do better than take the mode he has taken of determining the reinstatement. Reinstatement is the replacing *in forma specifica* the different articles damaged or destroyed. What would have been the issue sent to a jury, or their duty. Not to ascertain the whole value, but to ascertain each individual article that composed the stock at the date of the fire, and its estimated value at the time. A case more unfitted for a jury could not well be conceived.

FIRST DIVISION.

(Here the Lord Probationer having completed the trials assigned him, had the usual oaths administered to him, and took his seat on the Bench by the title of LORD ANDERSON.)

May 22. 1852. LORD PRESIDENT (M'Neill.) The Lord Probationer's opinion seems to me to be substantially correct. As to the first part of Sutherland v. Sun Fire Ins. Co. the Lord Ordinary's interlocutor, there can, I think, be no doubt. He finds that the Company have not lost the right to reinstate.

Now it does not appear to me the statement of the pursuer is such, as assuming it to be correct, excludes the right of the Company to reinstate. The course of investigation by the two valuators does not seem to me to be such as takes away the right of the Company to reinstate. It took place before the pursuer gave in his claim, which, by the policy, it was incumbent on him to give in, and which, till they received, the Company were not in a condition to exercise an option. If their right to reinstate was not barred by the appointment of valuators, the question is, was it barred by lapse of time? I think not. On the 25th the claim of the pursuer was given in, and the answer was, that immediate communication would be made to the directors. Of course they had a right to time to consider. On 9th May they gave notice of proposal to settle. That could not exclude their right to reinstate. The proposal proves election, and on 19th they propose an arbitration. That is rejected, and then they propose to reinstate.

To this extent I think the Lord Ordinary was undoubtedly right. But then he goes on to remit to Mr Fraser. I have some doubt whether such a proceeding was competent under this action at all, for it is brought merely for payment. The answer to the action is, the defenders have right to reinstate and have offered to do so, and in the face of that offer you cannot proceed with action for payment. But the pursuer says the proposal to reinstate, and adjustment of the reinstatement is within his action, and he says, that preparatory to it there must be investigation, as to the facts, by jury trial. The defender has not reclaimed against this interlocutor; he does not conclude that the action shall be at once turned out of Court. Now I cannot see how we can investigate these facts by a jury; the investigation before a jury would require to be of such a kind as the record is not prepared for, namely, an inquiry into the value of each article. Therefore as both the parties seem desirous to deal with the matter of reinstatement under the action, the only question remaining is, what is the proper course of procedure to bring about the reinstatement? The mode proposed by the Lord Ordinary is the best, and perhaps the action should remain in order to see whether reinstatement does or does not take place, because it may be a question whether, if the defend-

ers do not take proper steps to reinstate, the pursuer may not have his remedy.

LORD CUNINGHAME. The only question now raised is whether the Insurance Company, by what took place immediately after the fire, lost their option of restoring the premises, and became bound to pay the loss in money, as it may be ascertained. I see nothing in the case to sanction such a conclusion. The parties appointed mutual valuators for the purpose, as admitted by the pursuer himself, to ascertain the condition of the stock and the apparent amount of the loss. That was necessary and expedient in whatever way the loss was compensated, and it was just as necessary if the premises were to be restored, or if the loss were to be paid in money. Till that preliminary inquiry took place both parties were in the dark. Hence the mere act of the defenders consenting to the appointing of neutral men to report the loss, was not equivalent to a discharge of the option, or any thing like it. If the valuation and report were intended to alter in any respect the right of the insurers under the written policy to restore the consumed premises, the new agreement should have been in writing, and would certainly have been constituted in that manner if both parties had so agreed. As to the objection that the defenders were precluded by delay, there is not the least ground for such a plea. The loss took place on the 13th April; the chief extent of it was reported on the 25th, when the insurance agents said they would write to London for instructions. It was impossible for any parties in the situation of the defenders' agents to act with more punctuality and promptitude.

LORD IVORY. I came with difficulty to the same conclusion, but on somewhat different grounds. In the policy there are two courses of settlement, of which the Company is bound to say which they mean to follow. Now a doubt somewhat pressed on me whether, when the pursuer lodged his claim on 25th April, the period of time had not arrived when the Company must make their choice. And it does appear that by the proposal of a settlement, and an arbitration, they had chosen the course of payment rather than reinstatement. But by refusing these offers the pursuer again set them loose. I therefore concur.

The COURT adhered.

James Marshall, S.S.C., Agent for Pursuer.

Archibald M'Neill, W.S., Agent for Defendants.

FIRST DIVISION.

No. 271.

SIMPSON v. YOUNG.

Process — Reclaiming Note — Bill Chamber — Act of Sederunt, 24th Dec. 1838, sec. 6.—A. presented a note of suspension of a charge on a decree of the Sheriff Court, dismissing a petition for interdict; and the Lord Ordinary refused the note. A. reclaimed. Objection to the competency of the reclaiming note, on the ground that the appendix did not contain the petition and answers in the Sheriff Court action as required by Act of Sederunt, 24th Dec. 1838, sec. 6, repelled.

May 22. 1852. Simpson presented to the Sheriff of Forfarshire a petition for interdict against Young the trustee for Simpson's creditors. Young put in answers, in which he *inter alia*, proponed a preliminary defence, which the Sheriff sustained, and thereupon dismissed the action, finding the petitioner liable in expenses. The petitioner was charged upon the decree for expenses, and presented a note of suspension on juratory caution, which the Lord Ordinary on the Bills (Cowan) refused. The petitioner then presented a reclaiming note—the appendix to which consisted solely of the note of suspension and answers and pleas in law.

Goodall for the respondent (Young,) objected to the competency of the reclaiming note, on the ground that it did not contain, in the appendix, the initial steps of the Sheriff Court action, as required by Act of Sederunt, 24th December 1838, "to regulate proceedings in the Bill Chamber," in the case of suspensions of final judgments of inferior judges. In the case of a final judgment, the 6th section of the Act of Sederunt required the appendix to contain a copy not only of the note of suspension and answers, but "also of the summons and defences, or record (if any,) in the Inferior Court."

Pattison for the petitioner. The 1st and 2d Vict. c. 86, sec. 4, provides for the review by suspension of two classes of cases:—1st, of those offered upon caution, and 2d, of those offered on no caution, or on juratory caution, to which last class, this case belongs. In the *first* class of cases there is a provision in the Act for the transmission to the Court of Session of the Inferior Court process, thus enabling a claimer to get access to, and to print copies of the summons and defences and record. But in the *second* class of cases, there is no such provision; and as a claimer has thus no means of access to the Inferior Court process, the rule of the Act of Sederunt requiring the summons and defences to be printed in the appendix, cannot have been intended to apply to such a case.

LORD PRESIDENT. The provision of the Act of Sederunt is di- May 22. 1852.
rectory not compulsory. The summons and defences are not re-
quired to be printed in the appendix, under the sanction of the ^{Simpson v.} Young.
nullity of the reclaiming note, and as the objection is merely tech-
nical we cannot view it with much favour. I am for overruling it.

LORD CUNINGHAME concurred.

LORD IVORY was of opinion that the objection was not well-founded. As the sustaining of the objection made to this reclaiming note would have the effect of throwing the party out of Court, and as it appears from the case on the print, that the former papers are not at all necessary for the consideration of the case, it is necessary to look carefully into the objection. The terms of the 6th sec. of the Act of Sederunt are these: "in the latter case,"— that is, the case of an interlocutor in an advocation or suspension, remitting with instructions—"and in all suspensions of final judgments of inferior judges, there shall be appended to the note a copy of the note of suspension or advocation, with the statement of facts or reasons of advocation, and note of pleas in law and the answers thereto, and also of the summons and defences, or record (if any) in the Inferior Court." Now, it will be observed that, while the Act of Sederunt makes mention of a "statement of facts or reasons of advocation" there is no mention of a statement of the facts or reasons of *suspension*, an omission which implies that such notes of suspension as, like the present, contain a statement of facts or reasons, were not intended to be made subject to the rule. Again the action before the Sheriff was of a summary nature, and originated in a *petition* to which *answers* were given in. But the Act of Sederunt requires a copy of the *summons* and *defences*. Now, in this case there are no *summons* and *defences*; and although, in this summary case, the petition and answers may be regarded as analogous to the summons and defences in an ordinary action, yet as the objection is founded on the want of strict and technical compliance with words of the Act of Sederunt, it is pertinent to observe that such strict compliance was impossible.

Objection repelled.

James Bell, S.S.C., Agent for Reclaimer.

Graham Birney, W.S., Agent for Respondent.

HOUSE OF LORDS.

No. 272.

MITCHELL v. CULLEN.

Law Agent's accounts—Edinburgh and local law agent—Principal and agent.

—A party through his local law agent employed a writer to the signet in Edinburgh to conduct certain litigation on his behalf in the Court of Session, and incurred a considerable professional account to the latter, the greater part of which was settled; but there was a balance about which they differed, and on account of which the Edinburgh law agent brought an action: *Held, reversing the judgment of the Court of Session*, and in construction of the correspondence between the parties, that the payments made by the local agent to the Edinburgh law agent must be imputed specifically to the credit of the employer, and could not be allowed to enter into the state of the general account between the two law agents; the balance claimed therefore disallowed.

May 11. 1852. The appellant, who is a merchant in Glasgow, had occasion to employ, through Mr Kerr, his law-agent there, the respondent, a writer to the signet in Edinburgh, to attend to his interest in certain litigations in which he was involved, depending in the Court of Session.

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Cullen.

In reference to these litigations accounts were incurred to the respondent, amounting to nearly L.700.

The appellant had a meeting with the respondent in Edinburgh on 13th October 1848, when the accounts between them were adjusted and settled, excepting a sum of L.172, 2s. 3d., as to which they differed. This sum was composed of L.120, being the amount claimed by the respondent of accounts incurred to him in relation to a process Mitchell v. Ranson, and of L.52, 2s. 3d., being the balance alleged by the respondent to be due to him by the appellant on account of another process, Dick v. Mitchell. For this sum of L.172, 2s. 3d. the respondent brought an action against the appellant. With respect to the sum of L.120 incurred in the process Mitchell v. Ranson, the question was, whether that amount had not been restricted to L.110, and afterwards settled, except as regards a balance of L.10, (which was tendered to the respondent before he brought his action), by L.150 remitted to the respondent by Kerr in November 1845, and which it was contended by the appellant was specifically on the account of Ranson's case and a Mr Fould's account (in which latter the appellant was not concerned), but which was denied by the respondent, he contending that that payment was made by Kerr generally to account, and that the respondent was therefore entitled to apply it

to the general accounts between him and Kerr. This question May 11. 1852: depended on the construction to be put on correspondence between the parties, the material portions of which will be found in the *Mitchell v. Callen.* Lord Chancellor's judgment.

The Lord Ordinary, by an interlocutor of 4th June 1850, held the accounts claimed by the respondent in respect of the process *Mitchell v. Ranson*, still due, but found that the balance claimed by the respondent for accounts in the process, *Dick v. Mitchell*, had been settled. The Second Division of the Court of Session, however, by interlocutor of 19th June 1850, found the appellant still liable in both claims.

Against these interlocutors the present appeal was brought.

Bethell, Q.C., and *Moncreiff* for the appellant; *Rolt*, Q.C., and *Anderson*, Q.C., for the respondent.

LORD CHANCELLOR. It is, my Lords, much to be lamented that there should be this litigation about so small a sum. I have so often however had occasion this session to make such observations in appeals from the same quarter, that I fear they will have but little weight. The questions in this case have arisen in this manner: Mr Mitchell being involved in litigation, employed Mr Kerr as his representative, through whom Mr Cullen, the respondent, was engaged. Now, my Lords, as I understand the law of Scotland, Mr Cullen holds two persons liable to him as his debtors. This is no doubt a very advantageous thing for Mr Cullen, but I am afraid Mr Mitchell has a corresponding disadvantage from it, and that he is liable to account for it to each of the parties. Such a law must often be productive of serious inconvenience, and the sooner it is altered the better. The question which has arisen in the present case is principally owing to this double character that is recognised by the Scotch law, for we accordingly find the correspondence partly with Kerr, and partly with Mitchell; the latter sometimes following up what had been begun by the former. My Lords, there was a matter of *Mitchell v. Ranson*, in which costs were due from Mitchell to the respondent, and the first question for your Lordships is, whether a sum of £150 which was paid by Kerr, and which in part related to what Mitchell had nothing to do with, did bear specifically upon the costs in *Mitchell v. Ranson*. This depends on certain letters, and I confess I can have no doubt as to the construction to be put upon them. I do not, my Lords, understand that there is any difference between the learned counsel as to the law on the subject; there can be no doubt as to the

May 11. 1852. I was acting liberally, and I am fully impressed with that idea still. You can remit me L.100 to-morrow, and I shall leave the odd L.20 to be settled on a future occasion, when we will not differ about it." He there says, "you can remit me L.100 to-morrow, and I shall leave the odd L.20 to be settled on a future occasion, when we will not differ about it." Then on the same day, the 27th February, Kerr sends Cullen an order for L.400, with a letter, in which he says, "you must accept L.300 in full payment of the Percy accounts, and L.100 in payment of the account in Dick against Mitchell." That, my Lords, must mean, you must accept L.100 in full of the account in Dick v. Mitchell. Cullen acknowledges this in this letter of his to Kerr of the 28th February, thus :—"I am favoured with your letter dated the 27th, to which is prefixed bank order for L.400, the receipt of which I beg to acknowledge. As requested, I will go over my accounts again, but I am afraid I cannot modify them more than I have done. When the outlays, &c. are extracted, the profit is not great for professional labour." Cullen, in this letter, takes care to make a general acknowledgment, which would enable him to appropriate the money to any account, but I think it is clear that that letter is an acknowledgment of the receipt of the L.100, in payment of the L.120. Now, in the letter of Cullen to Mitchell, of the 7th Nov. 1848, Cullen does not deny that he agreed to accept L.120 in full; he only says that the L.20 has not been paid. Yet in the accounts which he sent in, he entered the whole L.152, giving credit for the L.100, and claiming the balance L.52 as due. It is, my Lords, a most unrighteous demand, and wholly without foundation, and therefore for the reasons already mentioned, I hold that the interlocutors must be reversed.

Interlocutors reversed.

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| <i>Deans and Rodgers, Westminster,</i>
<i>Robert Deuchar, Solicitor, Edinburgh,</i>
<i>Surr and Grubble, Lombard Street,</i>
<i>London,</i> | { Agents for the Appellant.
{ Agents for the Respondent. |
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COURT OF SESSION.

FIRST DIVISION.

May 25. 1852. This day Charles Neaves, Esquire, presented his Commission as H. M. Solicitor-General, in room of John Inglis, Esquire, promoted to the office of Lord Advocate; and having been duly sworn in, took his place within the Bar.

FIRST DIVISION.

No. 273.

MURRAY v. BRUCE.

Poor Law Act—Parochial Board—Board of Supervision.—*Held* that a parochial board were entitled to modify a previous rule of assessment to the effect of levying the rate on the true or substantial value of the subject assessed, instead of the nominal rent or the rent actually paid, and that without applying for the approval of the Board of Supervision.

This was a reduction at the instance of James Murray, ^{May 25. 1852.} ~~at North Brora, Sutherlandshire, against Robert Bruce, collector of poor rates in the parish of Clyne, in the same county, to set aside a minute of meeting of the parochial board of that parish, dated the 14th day of May 1849, whereby *inter alia* the board appointed the inspector for the parish to prepare a valuation of all lands and houses therein paying under L.2 of rent, and report thereon to the next meeting of the board, with a view to have the same charged with parochial assessment; and two other minutes of meetings of the same parochial board, whereby they instructed the inspector to serve notices of assessment upon all whose houses and lands should be of a value equal to or exceeding L.2 of yearly rent, whatever might be the actual rent paid, adopted the new roll of assessment made up by the inspector, and directed the collector to proceed with the collection of the assessments therein contained.~~

The pursuer is a tenant at will of the Duke of Sutherland, paying a yearly rent of L.1, 10s.; but under the new roll of assessment he was sought to be assessed on a rent of L.4, 10s., that being alleged to be the true annual value of his house, and the ground of reduction insisted upon was, that the above resolution of the 14th of May 1849 was *ultra vires* of the parochial board, in respect, it was inconsistent with a previous resolution, dated the 3d November 1845, in which, founding upon the 34th section of the Poor Law Act, the board resolved that one-half of the assessment should be imposed upon the owners of all lands and heritages within the parish, and the other half upon the tenants of lands and other heritages whose actual rents amounted to L.2 and upwards; of which resolution the Board of Supervision approved, and it had ever since been the manner and rule of assessment in the parish. The summons alleged that the parochial board had not applied to the Board of Supervision for approval of the departure from the rule of assessment existing prior to the

May 25. 1852. 14th May 1849, which approval Murray pleaded ought to have been obtained.

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The defender pleaded that the rent which the pursuer alleges he pays for his possession is merely the nominal rent, the true annual value of the lands he holds being L.4 : 10 : 10. That there was no inconsistency between the resolution of 1849 and that of 1845, the exemption given effect to by both, viz. of persons whose annual rent was under L.2, being truly and substantially the same: That the exemption of classes of individuals from assessment is entirely within the control and discretion of the parochial board, and that the resolutions, in reference thereto, do not require the sanction of the board of supervision.

The Lord Ordinary (Cowan), "Repels the reasons of reduction, sustains the defences, assails the defender from the conclusions of the action and decerns; finds the defender entitled to expenses," &c.

The pursuer reclaimed.

Logan and Lord Advocate for the claimer.

Donaldson and Solicitor-General for the respondent.

LORD PRESIDENT. I think the interlocutor of the Lord Ordinary ought to be adhered to. The first thing we have to look to is the § 34 clause of the statute, under which power was given to the parochial board to select one or other of three manners of assessment. Each parochial board having resolved on one manner of assessment, shall report its resolution to the Board of Supervision for approval. In this case the parochial board, by minute of November 1845, adopted the first mode mentioned, viz., on the rents. And they add an explanation in reference to what they had in view. They say "one-half of the sum required to be imposed upon the owners, and the other half of the assessment upon the tenants and occupants, of lands and heritages within the parish, to be rated according to the annual value of the lands, &c.; but the board agrees to exempt from assessment all tenants and occupants of lands paying an annual *bona fide* rent for the same, not amounting to L.2 sterling." Now a difference of opinion is expressed by the parties as to the true meaning and legal effect of this addition to the selection of the mode of assessment.

In the *first* place, we cannot put on it any construction inconsistent with, or contradictory of, the leading part of the resolution. The leading part is that they shall impose assessment on

the tenants, to be rated according to the annual value. There-^{May 25. 1852.} fore if we find any interpretation, not a constrained one, which can be given to this addition to the minute consistent with the *legal meaning and execution of the statute, that is the meaning which it ought to receive.* Now I observe in the minutes of this board the word *rent* is used in various senses, and it is worthy of remark that in the very minute now complained of the word *rent* is used to express *annual value*. What does that expression, "*bona fide rent*," mean? If you take it in connection with the previous part, it is the real annual value of the subject. But, further, I apprehend this condition is not one going to the essence of the selection of the mode of assessment. I apprehend it is an explanation of what the parochial board had in view in reference to a matter within their own province, and under the power to exempt classes of subjects when the collection of the assessment from them would not be equivalent to the cost, and therefore where it was an advantage to all who were rateable not to proceed with it.

That being the view I take of this minute of the board, let us see the grounds of reduction libelled. The first is of style; the second I cannot read as any other than a ground of reduction founded on this, that that passage I have now read was such an integral part of the minute selecting the mode of assessment, that any departure from it was incompetent without the sanction of the board. As to this reason, I think, in the *first* place, for the grounds stated, the true interpretation has not been put on the passage adjected to the minute adopting the particular mode of assessment. Next, supposing the view of the parochial board to be that the *rent* should be the criterion, it was not an integral part of the manner of assessment.

It has been argued that the interpretation put on this part of the minute by the parties since 1845 was conclusive of the meaning of the board at the time; that it meant *rent* and not *annual value*, because the subjects were dealt with as assessable in proportion to their *rent*. Now, *rent* in its strict sense is not a matter within the statute. *Annual value* is the thing. The *rent* is only taken in most cases as the proper criterion of the value. There is nothing to prevent the parochial board proceeding to consider whether subjects, either by change in themselves or their actual condition, have not increased their real value since 1845. Therefore,

May 25. 1852. as to the ground set forth in the second reason of reduction standing naked as it does here, I concur in the Lord Ordinary's view.
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*Murray v. Bruce.* There was no incompetency in the board proceeding to ascertain the real value of these subjects, without going back to the Board of Supervision.

But then, it is brought before us that there are circumstances here in which the pursuer is entitled to our judgment, and which go to annul the proceedings. First, he says it was incompetent for the board, at the period they did, to enter into any inquiry into the roll for that year on two grounds, (1) it was at a wrong period of the year, and (2) that already the board had resolved on the rate of assessment, that it should be a certain per centage on the rental as then assumed, and now having assumed it upon a supposed rental, they proceed to increase the rental of the parish, retaining the same per centage of assessment, and thereby raise a larger sum for the support of the poor than the previous resolution held to be necessary. But I apprehend that when the board proceeded to consider the assessment of parties, it was competent for any rate-payer to say, A. B. and C. have been exempted altogether who should not have been. But if the principle of the objection now taken were good it would exclude the competency of correcting the roll by adding any party overlooked.

But secondly, I do not see that the exception is within this action. It is a totally distinct and separate ground of objection from that forming the second ground of reduction.

**LORD CUNNINGHAME.** The present appears to me to be a very clear case, in which I agree entirely in the views of the Lord President. Indeed, I conceive that the question here raised by the pursuer is founded entirely on a mistake, or misapprehension of the statute.

The pursuer in argument confined his challenge to the second reason of reduction alone, setting forth that the resolution of the parochial board explaining and limiting the class exempted, to apply to possessors of lots not worth £2 *per annum* in present value (thus throwing *rent* out of view), was *ultra vires* of the local board, without the consent or approval of the Board of Supervision. With reference to that plea, I hold that the statute gave no power of control or revision at all to the Board of Supervision over the *exemptions* from assessment agreed to by the parochial board, which was naturally and properly to the latter alone, who were most interested, and the best judge of the exemptions neces-

sary and proper. The statute no doubt has provisions, giving the May 25. 1852. Board of Supervision what I think a salutary power of control over certain resolutions of the parochial boards. It seems to have been from the first foreseen that the election by a majority greater or smaller, as the case might be, of one of the three modes of assessment competent under the 34th clause of the Poors' Act, might give rise to exciting questions, injurious, and perhaps invi-dious in the different communities in which the parochial board acted; and therefore it was enacted, that the mode of *assessment* should be subject to the approval, and should not be altered without the consent of the Board of Supervision. But the Act went no further. In particular, the power of exempting certain classes of indigent rate-payers from assessment given by the 42d clause, is not accompanied *with any reference to the Board of Supervision*, and therefore may be exercised each year without their control. To use a popular phrase, parochial boards, in classifying exemptions, may do what they like with their own; there is no restraint on the benevolence or rigour of the board acting as the sole administrators of the assessment. Hence the second reason of reduction which was alone insisted on in debate, falls to the ground.

With respect to the resolution itself, which the parochial board modified as passed in 1849, and which is now complained of, I am clear that it was within the powers of the parochial board, and agreeably to a sound construction of the Act. In this parish there seems to be many cottars, who possess lots of unimproved ground for small rents; while the ground is afterwards meliorated by buildings, fences, and cultivation of the tenants. The original rent by the proprietor, in such cases, is equivalent to the feudities of house owners in town, in which case the highest rent which the buildings and improvements of the feu'd lots are capable of yielding, is the rule of assessment under the 37th clause of the Act, as it is given for all the accommodations, and not the original rents payable to the over-superior, which in general is paid for the bare ground.

It is said that the lots rented in the present case are resumable by the superior at pleasure. But I presume that when so resumed, the over landlord must pay meliorations to the tenant removed. If so, the possession is justly assessed at the rate which the premises, as improved, are capable of yielding.

LORD IVORY. I concur. All we have to consider here is whether the objection to the assessment can be sustained upon the grounds of reduction in the record. One only is insisted in, and

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Bruce.

May 25. 1852. it turns exclusively on the absence of sanction by the Board of Supervision to what is called an alteration of a previous resolution as to the mode of assessment to which it had been already called to interpose its authority. The question then is, was it necessary this resolution of the parochial board containing the alteration should be submitted for approval to the Board of Supervision? This turns on the 34th §. Now by that clause it is the general principle of assessment which the parochial board is to fix and submit to the review of the Board of Supervision, who have nothing to do with the exemptions allowed. If the Board of Supervision interfered farther than this, they would be acting *ultra vires*. I agree as to the interpretation put upon the minute, that the annual value and *bona fide* rent is the real value. The statute uses the word *rent* in its § 37 evidently in that meaning. The resolution of 1849, therefore, makes no alteration on the principle of assessment laid on in 1845.

The COURT adhered, and found the defender entitled to additional expenses.

*L. Mackintosh*, S.S.C. Agent for the Pursuer.

*Hugh Ross*, W.S., Agent for the Defender.

## FIRST DIVISION.

No. 274.

ARNOLD and Mandatory v. ATKINSON.

*Process—Reclaiming Note; Competency of—Act 13 and 14 Vict., c. 36, § 11.*—A party presented a reclaiming note to be reponed against an interlocutor dismissing an action, in respect of failure to revise a paper or sist a mandatory. The reclaiming note was held to be incompetent, as not having been presented within ten days:—*Held* competent for him now to reclaim within the twenty-one days against the same interlocutor as against a final interlocutor.

(Sequel of case, *ante*, p. 610.)

May 25. 1852. This was a petition for the recal of Atkinson's sequestration. The petitioner having failed to lodge a revised paper and to sist a mandatory, the Lord Ordinary (Cowan) "dismisses the petition, finds the petitioner liable in expenses, &c." The petitioner presented a reclaiming note to be reponed against this interlocutor as against a decree by default. But, as will be seen from the previous report, the note was held to be incompetent, not having been presented within ten days from the date of the interlocutor.

The petitioner now presented a reclaiming note against the

same interlocutor, as against a final interlocutor, praying the May 25. 1852. Court "to recal the said interlocutor, and to allow the petitioner <sup>Arnold, &c., v.</sup> a proof of the averments in his petition, and thereafter, upon con- sidering the same, to recal the sequestration, &c.

*T. Mackenzie*, for the respondent, objected to the competency of the reclaiming note. The interlocutor reclaimed against has been held by the Court to be a decree by *default*, and not an interlocutor on the merits. True, a different prayer is here inserted, but that will not alter the nature of the interlocutor. *Falla v. Graham*, 14th Jan. 1851.

*Pattison*, contra. The former reclaiming note prayed to be reponed; but this brings the case before the Court on the merits. A similar course to that here taken was followed in *Thomson v. Innes*, 1st July 1851, XIII. D., 1260.

LORD PRESIDENT. The point here raised is difficult, and former cases are perhaps not altogether reconcileable. Still I think the reclaiming note is competent. The question depends on this, whether or not the interlocutor is to be regarded as an interlocutor "disposing in whole or in part of the merits." The petition is for recal of a sequestration, and steps are being taken to make up a record. Now the interlocutor undoubtedly disposes of the merits; —whether it proceeds on a consideration of the merits is another question. The question then comes to be, whether the words "disposing in whole or in part of the merits," are limited to the case where the merits are considered on a closed record. I cannot see that such a construction must be put on the clause; and it would be a hard thing to exclude a party from all further consideration of the merits of his cause on so doubtful a construction of the words. But in looking at § 12 I am relieved from doubt. It says that "it shall not be competent to reclaim against any interlocutor of a Lord Ordinary, not being an interlocutor disposing in whole or in part of the merits of the cause, pronounced before the closing of the record. Provided always, that any interlocutor pronounced before the closing of the record may be reclaimed against, with the leave of the Lord Ordinary, at any time within ten days from the date of pronouncing the same, or without the leave of the Lord Ordinary, at any time within ten days from the date of the interlocutor closing the record." Here the question presents itself, whether this is an interlocutor which a party would be entitled to reclaim against without leave of the Lord Ordinary; for the same words are used here, "disposing in whole or in part of

May 25. 1852. it turns exclusively on the absence of sanction by the Board of Supervision to what is called an alteration of a previous resolution as to the mode of assessment to which it had been already called to interpose its authority. The question then is, was it necessary this resolution of the parochial board containing the alteration should be submitted for approval to the Board of Supervision? This turns on the 34th §. Now by that clause it is the general principle of assessment which the parochial board is to fix and submit to the review of the Board of Supervision, who have nothing to do with the exemptions allowed. If the Board of Supervision interfered farther than this, they would be acting *ultra vires*. I agree as to the interpretation put upon the minute, that the annual value and *bona fide* rent is the real value. The statute uses the word *rent* in its § 37 evidently in that meaning. The resolution of 1849, therefore, makes no alteration on the principle of assessment laid on in 1845.

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*Pattison*, contra. The former reclaiming note prayed to be reponed; but this brings the case before the Court on the merits. A similar course to that here taken was followed in *Thomson v. Innes*, 1st July 1851, XIII. D., 1260.

LORD PRESIDENT. The point here raised is difficult, and former cases are perhaps not altogether reconcileable. Still I think the reclaiming note is competent. The question depends on this, whether or not the interlocutor is to be regarded as an interlocutor "disposing in whole or in part of the merits." The petition is for recal of a sequestration, and steps are being taken to make up a record. Now the interlocutor undoubtedly disposes of the merits; —whether it proceeds on a consideration of the merits is another question. The question then comes to be, whether the words "disposing in whole or in part of the merits," are limited to the case where the merits are considered on a closed record. I cannot see that such a construction must be put on the clause; and it would be a hard thing to exclude a party from all further consideration of the merits of his cause on so doubtful a construction of the words. But in looking at § 12 I am relieved from doubt. It says that "it shall not be competent to reclaim against any interlocutor of a Lord Ordinary, not being an interlocutor disposing in whole or in part of the merits of the cause, pronounced before the closing of the record. Provided always, that any interlocutor pronounced before the closing of the record may be reclaimed against, with the leave of the Lord Ordinary, at any time within ten days from the date of pronouncing the same, or without the leave of the Lord Ordinary, at any time within ten days from the date of the interlocutor closing the record." Here the question presents itself, whether this is an interlocutor which a party would be entitled to reclaim against without leave of the Lord Ordinary; for the same words are used here, "disposing in whole or in part of

May 25. 1852. the merits," but it adds the words, "pronounced before closing the record," &c. Now I apprehend that this interlocutor, which Arnold, &c., v. deals with the whole case, and excludes the petitioner from obtaining the purpose for which the action was brought, is such an interlocutor as he is entitled to have brought under consideration of the Court on his own motion without leave of the Lord Ordinary; and it would be competent for us to deal with it, now that it is here, without sending it back. Looking therefore at the 11th and 12th sections together, I am of opinion that this was a case in which the party was entitled to reclaim of his own accord, and that the limitation of the statute does not apply, and on that ground I think the note competent.

**LORD CUNINGHAME.** As the interlocutor under review goes farther than merely to declare the certification or foreclosure of the party for not lodging a paper; and as the petition here is not a mere application to be *reponed*, but a reclaimer against a decerniture on the merits, I agree with your Lordship in the clear exposition you have given of the import of our regulations applicable to this case, and think that the present reclaiming note cannot be rejected as incompetent.

At the same time that the present note cannot be thrown out, I am clear that it will be competent to the Court, when the case is advised on the merits, to exercise their judicial discretion, by carefully guarding against any abuse that such a course of proceeding as that exhibited by the reclaimer might afterwards give rise to in practice. If there be no means at present of deciding the case, except that taken by the Lord Ordinary, it will, at the proper stage, be considered if we ought not to make such order by giving priority or otherwise, as may indemnify the respondent and secure prompt discussion in future.

**LORD IVORY.** This reclaiming note does not pray to be *reponed* against an interlocutory judgment. It deals with the case as absolutely disposed of by the Lord Ordinary, and it calls on us,—whether rightly or wrongly will be afterwards settled,—to take up the case on the merits. Now that alone shews us the note is not incompetent, because where a party asks a judgment on the merits, his reclaiming note is a reclaiming note on the merits. An old case, *Rait v. Stewart, &c.*, 18th July 1846, which occurred before the passing of the recent statute, throws light on the present question. In that case the Lord Ordinary, in respect of a failure by the defender to lodge a minute which had been ordered, decerned in terms of the libel. A reclaiming note was presented,

unaccompanied by the minute, and praying—not to be reponed—but May 25. 1852. that the interlocutor should be altered, and the defences sustained. <sup>(Arnold, &c., v.</sup> The Court held the reclaiming note was perfectly competent, as Aitkison. the prayer was on the merits. This shews that a distinction was then held to exist between a claimer to be reponed, and a claimer on the merits. But it is said the case of *Falla* has decided the present question. But there the party merely asked to be reponed—there was no prayer to dispose of the merits. But in the case of *Thomson* there was a reclaiming note first to be reponed, and then another on the merits, and the Court held the latter competent. It is said that in that case the record had been closed, but here it is not. But that makes no difference. There may be decree by default after the record is closed, as well as before. If, for instance, there was a failure to sist a mandatory after a record was closed and decree pronounced in default, would it not be competent to reclaim on the merits? is that not deciding on the merits in respect of failure? There would be *res judicata*; and so it is even before closing record. Therefore the course taken in *Thomson* is the same as that taken here; and in *Thomson* full adherence was given to *Falla*. It would indeed be hard to hold that such a slip in procedure was to bar a litigant from a consideration of the merits of his cause.

Turning to the recent statute itself, it is impossible to put such a construction on it as would compel us to hold this reclaiming note incompetent. Sec. 11, when speaking of a judge disposing in whole or in part of the merits, does not mean that the Lord Ordinary shall have applied his mind to deal and decide on the merits. The question is, is it an interlocutor which drives the party out of Court, decides against him, and gives expenses? for that is an interlocutor disposing of the merits. It is not an interlocutory but a peremptory judgment. What leads to the judgment on the merits is a different affair. A distinction is drawn between mere orders in the course of a cause for the advancement of a cause, and those which shall have an effect beneficial or injurious for one or other party, as regards the principal question.

The COURT repelled the objection.

*James Bell*, S.S.C., Reclaimers' Agent.

*Thomas Dunn*, S.S.C., Respondent's Agent.

## SECOND DIVISION.

No. 275.

Petition, YOUNG, for Interim Execution.

*Appeal—Interim Execution—Statute, 48 Geo. III., c. 151, sec. 17.*(Sequel of case reported *ante*, pp. 476, 639.)

May 25. 1852. This was a petition for interim execution pending appeal. On  
Pet. Young,  
&c. the 11th March last, the Court made an interim appointment of a factor, allowing answers to be given in to the petition by the second box day in the ensuing vacation. Answers were lodged, and the case was now called to be disposed of.

*Millar* for the petitioner. The question now is whether or not the petitioner is entitled to interim execution at this stage of the proceedings. The Act 48 Geo. III. c. 151, sec. 17, leaves the matter to the discretion of the Court, and in the circumstances of the case the prayer of the petition ought to be complied with. *Murray*, Nov. 23. 1811, F. C.; *Alexander*, Feb. 25. 1820, 20 F. C. 108; *Glass v. Pentland*, March 6. 1823, 2 S.; *Norvull v. Smith*, June 25. 1828; *Kerr v. Scott*, July 11. 1829, 7 S. 893.

The *Lord Advocate* for the respondents argued that as the effect of granting this application would be virtually to defeat the appeal, it ought to be refused.

**LORD COCKBURN.** It has been already decided that the affairs of this Company are to be wound up, not by the surviving partners but by a factor appointed by this Court. This judgment has been appealed; therefore, if interim execution is now granted the appeal is made practically futile, because, to a certainty, before the appeal is heard, the thing complained of in the appeal will be concluded. On the other hand, there is to be considered the injury resulting from the delay of the concern not being wound up, and there being no person to take charge of the estate in the meantime. Therefore there is evil either way. But balancing the two evils we must hold the interlocutor previously pronounced by the Court to be correct, and more likely to be affirmed than reversed, and therefore we must now follow it up. I think the present application therefore should be granted.

The other Judges concurred.

The COURT pronounced the following interlocutor:—"The Lords having advised the petition for Andrew Young for interim execution pending appeal, with answers thereto for Daniel Col-

lins and Peter Feeley, and heard counsel thereon; Grant interim <sup>May 25. 1852.</sup> execution pending appeal, so as to enable the judicial factor to carry into effect the appointment of the Court; the petitioner, &c. Pet. Young, the said Andrew Young, finding caution to free and relieve the said Daniel Collins and Peter Feeley, of all loss and damage which may be occasioned by, or in consequence of the interim execution hereby allowed in the event of the judgment appealed against being reversed by the House of Lords, and decern."

*James Gordon, Jun., W.S., Petitioner's Agent.*  
*Baxter and Macdougall, W.S., Respondents' Agents.*

## SECOND DIVISION.

BORROWS v. COLQUHOUN.

No. 276.

*Lease—Bankruptcy—Possession—Partnership—Interdict—Competency.*—A tenant under a lease excluding creditors became bankrupt. The landlord sequestered for his rent, but allowed the bankrupt to continue in possession. The bankrupt thereafter entered into a partnership subject to the terms of the lease, and the landlord accepted rent as from the copartnery. The trustee on the sequestered estate and the landlord having, after the lapse of two years, entered into an agreement for their mutual interest, applied, *currente termino*, for interdict against the bankrupt and his partner continuing any longer in possession:—*Held*, that such a proceeding was competent and proper in the circumstances.

This was an advocation from the Sheriff-Court of Lanarkshire. The question related to the competency of an interim interdict, and the following, which are the material facts, are taken from the special findings in the interlocutor of Court. The estate of Jeremiah Borrows was sequestered on the 24th day of February 1848, and at the time of the sequestration the bankrupt was in possession of certain seams of coal and iron-stone in the lands of Dryflat belonging to the respondent, Mr Colquhoun, under missives of lease dated in October 1843 and February 1844, the endurance of the lease being for fourteen years from and after the 15th day of July 1843, and the rent of the subjects £100 yearly, or, in the option of the landlord, a specified lordship payable half-yearly. The missives of lease contained an express stipulation, that "subtenants, assignees, and creditors shall not be allowed to possess this lease, but are strictly prohibited under the penalty of paying double the annual-rent or lordship in the option of the proprietor,

May 25. 1852.  
Borrows v.  
Cloquhoun.

May 25. 1852. without the consent of the proprietor being first asked and obtained in writing." At the date of the sequestration there were arrears of rent due to the landlord, and the annual-rent unprovided for except by the hypothec over the machinery which belonged to the trustee on the bankrupt's estate. For some time after the sequestration, as no arrangement was entered into by the landlord and the trustee, the bankrupt was allowed to carry on the work, in order to make any profit he could out of the same, he paying the rent with the aid of friends or otherwise.

Borrows v.  
Colquhoun.

In these circumstances Arthur Connor, brother-in-law of Borrows, paid the arrears of rent, and entered into a contract of copartnery with him under the firm of Borrows and Company, and subject to the provisions of the lease. Subsequently Colquhoun, the landlord, by his factor, accepted payment as from "Jeremiah Borrows and Company" of the rent stipulated by the lease for three half-yearly terms. In February 1850 the landlord and trustee entered into an agreement, under which, acting in concert for their mutual benefit and advantage, they presented a petition to the Sheriff of Lanarkshire praying for interdict against the destruction of the property, and to prevent Borrows and Connor any longer interfering with the premises. To this petition answers were lodged by the respondents, who pleaded that the Company being in possession, with the sanction of the landlord, it was incompetent to turn them summarily out of possession, at least during the currency of a term. Interim interdict was granted, and the respondents advocated the cause. A record was made up in this Court on the question of interim interdict, and thereafter the Lord Ordinary (Cowan) recalled the interdict. His Lordship held, that after the recognition by the landlord of the bankrupt, and the advocates Borrows and Co., as the parties in possession of the subjects of the lease, subsequent to the sequestration, "he had no power *currente termino* to eject the advocates summarily, and far less could he competently ask for an interdict; the effect of which truly was not to preserve but to invert that very state of possession he had himself recognised." The agreement entered into between the landlord and the trustee could not, in the Lord Ordinary's opinion, better his position. The trustee and creditors having for two years refrained from all interference with the subjects of the lease, and allowed the bankrupt to continue his possession, and to make arrangements with the other advocate for carrying on the works under the lease, the Lord Ordinary considered that even with the

concurrence of the landlord the possession of the bankrupt and of May 25. 1852. Borrows and Company could not be summarily interrupted by the trustee and creditors; and, at all events, a process of interdict at Colquhoun. In their instance appeared to him to have been quite an incompetent procedure.

The landlord and trustee reclaimed.

*Pattison and Penney* were for the reclaimers.

*W. Ivory and Patton* for the respondents, referred to the cases of *Blackburn*, 10 D. 590; *Presbytery of Dunoon*, 13th July 1844, 6 D. 1262.

The LORD JUSTICE-CLERK. After full consideration I am of opinion that error has been validly assigned against this interlocutor. I acknowledge fully in the class of cases to which it is applicable the principles stated by the Lord Ordinary as to application for interdict. But when any state of possession is founded upon as a reason for refusing an interdict, I apprehend the principle on the other hand to be quite clear that such possession must either have the foundation of some *prima facie* title or at least have resulted from the assertion of a right so decidedly made as to call for immediate interruption, but which interruption not having been given timely, the possession comes to have the sanction for the time of acquiescence. But in every view which can correctly be taken of this case, the possession, as it is termed, is plainly without any pretence of title, and, moreover, did not only not originate in any assertion of any right or title, but by the very confession of the respondents, solely in sufferance by parties whose legal right and title they do not dispute. The clause in the lease is as explicit as it is peremptory; and one object of the concluding part of the proviso, as to the landlord's consent in writing, was plainly to exclude, by the lease itself, any such questions as those now raised.

Borrows was sequestered in February 1848. All right and title which he had was taken out of him by the sequestration. The bankrupt had no longer any title of possession against the trustee, and was divested of all property which had belonged to him, including the machinery, so far as moveable, and divested of all *title and pretext for possession*. This important result has, I think, been overlooked. As a necessary result of the agreement between the landlord and the trustee, the petition is presented to the Sheriff without delay. That petition, if there was any disposition seen on the part of the tenant to continue the working, was

May 25. 1852. the appropriate and proper, and ordinary remedy against a party  
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Borrows v.
Colquhoun. who literally had no title of possession of any sort, and no pre-
text for altering the character of that possession, which was
purely and exclusively by the sufferance of the landlord and trustee.

Consider the petition first as regards the application respecting the machinery, at the instance of the trustee. Connor knew that the bankrupt was divested of any title to the lease, and that the whole machinery was conveyed by the sequestration to the trustee for creditors. Borrows, therefore, could give him no right or title of possession, and the whole facts apprised him of that. To this part of the case, this important part of the application, no answer was attempted, and the only remark which could be made was simply that this part of the petition was really for the landlord's ultimate benefit. Of course it is, but it is the exercise of the trustee's right in order to carry out the agreement with the landlord. Hence the trustee is directly enforcing his rights under the sequestration, and neither the bankrupt nor Connor has the slightest colour or shadow of claim for continuing their possession against the trustee one hour.

But if the case is further and separately to be considered as an application by the landlord apart from the application by the trustee, will the case stand more favourably for the respondents? The bankrupt was divested by the sequestration; as an undischarged bankrupt in arrear he could not have continued the lease. His right was taken out of him; his title of possession destroyed. He could not assign or subset, even if not divested, still less after sequestration. His possession was confessedly mere sufferance. Without the consent of the trustee the landlord could not recognise any separate and independent right in the bankrupt, nor could he in any way affect the latter's right and title of possession to the machinery, if he could make anything of it. In the meantime he gets payment of rents, and then the receipts are founded on. That these were after the first for Borrows and Co. I consider of no importance; nor have I been able to understand what sort of title the respondents wish to derive from them. An assignation or sub-lease, with consent of the landlord, who had no power to make such from Borrows to this company, it cannot be said that such receipts can import.

But then it was contended that these notices of Borrows and Co. impart a sanction or acknowledgment of that company, as being in possession, in some way not explained, separate from, and independent of, Borrows' situation as the sequestered bankrupt.

How that conclusion can be arrived at was not explained, nor May 25. 1852 could any such possession, independent of *Borrows*, be conceivable in the circumstances, for he had been divested—the title was in *Borrows v. Colquhoun.* ; the trustee, and by tolerance alone was he allowed to work.

The other Judges expressed opinions in accordance with the views of the Lord Justice-Clerk.

The COURT pronounced an interlocutor, by which they found that the “occupation of the work and machinery was wholly by sufferance of the landlord and trustee, and that the tenant had no title whatever of possession, and made no assertion of any right or claim to any such: Find, that though assisted in the payment of rent by his brother-in-law, calling themselves *Borrows and Company*, they had, and could have, no separate title as a company by assignation or sub-lease from the landlord or from the trustee: Find that the notice of such company in some of the receipts for rent granted by the landlord’s factor, the terms of which are not proved to have been known to the landlord, did not even, if granted by the direction of the landlord, import any acknowledgement of any right to, or title of, possession in the work, or in any degree alter the quality and character of the possession which originated wholly in sufferance, and that such cannot be at all pleaded on against the trustee: Therefore repel the reasons of advocation, and remit the cause to the Sheriff; but with this instruction and authority to him, that as the record in this Court embraces the whole merits which can arise under the petition, the Sheriff do now hold the record in this Court to be the record under the petition on the merits, and proceed *de plano*, in conformity with this interlocutor, to repel the defences, and to grant the prayer of the petition to continue the interdict, and to declare the same to be perpetual, prohibiting all further proceedings and discussion before him: Find the claimer entitled to expenses, both in this Court, and so far as incurred in the Inferior Court, and decern, &c.

Gibson and Fraser, W.S., Reclamer's Agents.

William Lorimer, S.S.C., Respondent's Agent.

SECOND DIVISION.

No. 277.

SAMUEL v. EDINBURGH and GLASGOW RAILWAY Co.

Expenses—Auditor's Report—Fees to two Counsel, and the Agent of Pursuer before bringing action.

May 25. 1852. This case came before the Court on the Auditor's report. The action was for damages, in respect of the imperfect construction of a line of railway.

Samuel v.
Edinburgh
and Glasgow
Railway Co.

Part of the expenses claimed by the pursuer, who had succeeded in his action, included the expense of his agent visiting the spot in order to enable him to prepare the summons, and also of his two counsel inspecting the locality. This was disallowed by the Auditor as not being a proper item of expense against the other party.

Young appeared for the pursuer.

Patton for the defender.

The COURT held that this charge could not be considered as part of the expenses of process; and therefore approved of the Auditor's report.

J. F. Wilkie, S.S.C., Agent for Pursuer.

David Smith, W.S., Agent for Defenders.

FIRST DIVISION.

No. 278.

MILNE v. LEYS.

Petty Customs.—By the Table of Petty Customs of Aberdeen, all timber brought into town is subjected to a certain duty, but the table contains an exception in favour of articles passing through the town “if only in transitu, and not for sale, or to be used in town;” *Held* that wood brought into town, there manufactured into sleepers, and then exported, had been “used in town” in the sense of the table, and was therefore liable to duty.

May 26. 1852. This was an advocation from the Sheriff-court of Aberdeen. The question in the action related to certain dues claimed by the magistrates of Aberdeen on timber brought into Aberdeen, there manufactured into sleepers, and then carried out of the town. The claim was rested by the magistrates on a table of dues enacted in 1798, and which imposes certain duties on all timber brought into town. The same table contains this exception, “but all meal, grain, and every other article passing through the town, if the proprietor or person having the charge thereof shall produce sufficient documents, or make oath, if desired, that the same is really in transitu, and not for sale, or to be used in town, is not liable in the payment of any custom.”

Milne v.
Leys.

Milne is a railway contractor, and brought wood into Aberdeen, which he there manufactured into sleepers, and then carried away for use; and the action originated in a petition by Milne to

the Sheriff of Aberdeen against Leys, who is tacksman of the May 26. 1852.
bell and petty customs of Aberdeen, to compel him to return ^{Milne v.} certain portions of the timber seized by him as liable to duty. ^{Milne v.} Leys. Milne pleaded that the wood used by him came within the exceptions in the table as wood merely passing through the town.

In the Inferior Court the Sheriff-Depute, reversing the decision of the Sheriff-Substitute, found for the respondent, holding that the wood was not within the exception. But the Lord Ordinary (Robertson), on the cause being advocated, returned to the view of the Sheriff-Substitute.

Leys claimed.

The COURT allowed the record to be opened up, and condescension and answers to be given in, and proof led as to the usage.

Moir and Solicitor-General were for the claimer.

Shand and Deas for the respondent.

LORD PRESIDENT. The question turns on the meaning of the words used in the exception in the table, when it exempts from liability articles which "are really in *transitu*, and not for sale or to be used in town." Is the timber converted into railway sleepers only in *transitu*? Now Milne may either export his sleepers from Aberdeen and sell them in some other place, or he may take orders for them previously to importing them, then import the wood into Aberdeen, make it into sleepers, and then sell it; or he may import it, convert it into sleepers, and sell it in Aberdeen. This last would bring it within the case of wood sold in town, and therefore liable. But in the other two cases, the question is, is wood brought into town, manufactured there into sleepers, and then carried out, wood which is used in town? is the degree of operation to which it has been subjected such as to entitle us to say it has been used? Cases may be put as to which there could be no doubt that the articles must be said to have been used, as for instance, bullion converted into knives and forks. There the bullion has been used for the purposes of manufacture: it is not necessary the knives and forks should be used in Aberdeen. Is then the process to which the wood here is subjected such as to bring it under the class of raw materials brought into town to be used for the purposes of manufacture? Timber may be cut into lengths for stowage; that could not be said to be a using of it for the purposes of manufacture. It would only be an operation for aiding its transit. But the operation here, as appears from the

May 26. 1852. evidence, adds one-tenth or one-twelfth to the value of the article.
Milne v. My feeling is, that it is a manufacture, and a very profitable one,
Leys. and that the exemption does not apply.

We find by the proof that wood cut into deals has not been exempted from duty. The conversion into sleepers is even a more changing operation. But it is said we must look to the use and wont in regard to levying this duty; and unless there is such use and wont for levying this tax on wood converted into sleepers, there can be no sanction for it. If we were to enforce that rule in its letter, it would exempt from liability every species of timber in regard to which there can be any novelty in the manufacture bestowed on it, because in reference to it there could of course be no usage. Sleepers, for instance, were unknown till recently. We must look to the general matter of timber, and the principle of exaction in regard to it, and consider whether the timber in question is brought into town and used, that is, subjected to such extent of manufacture as brings it fairly within the description of raw materials converted into a new article.

LORD CUNINGHAME. I agree in thinking that we can have little hesitation in sustaining the claim of the burgh and their collector. The question is, if timber brought into the town to be manufactured into *sleepers* for railways is entitled to exemption as raw material *in transitu*? Such a plea seems to be founded on a palpable misconstruction of the most simple and intelligible article in the table. But as such imposition and taxes are often capable of limitation or explanation by *use and wont*, a proof was allowed here, which we are now called on to consider; and the evidence appears to me to be conclusive in support of the custom. It is proved that wood imported for the construction of ships sold to strangers, customers at a distance, has constantly paid custom; the same usage has prevailed as to wood formed into staves for barrels to be exported to foreign places; and wood sawn into beams for houses, and deals for roofing houses at a distance, have always paid custom. Is there any distinction between timber so manufactured and used, and timber formed into railway sleepers? It is difficult to perceive any feasible distinction.

The importer's plea, however, comes to this, that right or wrong timber brought to the port of Aberdeen, for sleepers, has been exempted; and his most relevant or plausible plea comes to this, that he is entitled to a *possessory* judgment from an uninterrupted usage of seven years. But I conceive that there are no legal grounds for that plea. If we are right in the con-

struction of the table of dues, the traders who claimed an exemption from petty custom on timber imported for manufacture, were acting not only without a title, but *against the title* of the burgh, *Milne v. Leys.* which of itself is fatal to the possessory claim. Besides this particular importer (Mr Milne) has not shewn that he has had seven years' exemption in his own trade to support a *possessory* defence. But that is not all. It is matter of public notoriety, that the usage and trade of railway sleepers in Scotland is of recent origin, insufficient in any case to found a *possessory* judgment.

There being no grounds for a possessory judgment; there is really nothing else in the case to create any difficulty. We must look to the plea for modifying the table and exempting wood for sleepers, just as such claim would have been maintainable about the commencement of that recent trade in 1842; could a legal ground, for example, have been established for the exemption in that year? I am clearly of opinion that it could not.

LORD IVORY agreed with the other Judges.

The COURT "recall the Lord Ordinary's interlocutor submitted to review: advocate the cause; Find that the timber referred to, as imported by the said George Milne into the burgh of Aberdeen, was liable to payment of custom as specified in the table of petty customs for the burgh, and did not come within the exemption from custom allowed by that table in regard to articles passing through the town, and proved to be really *in transitu*; therefore refuse the said George Milne's petition to the Sheriff, complaining of the exactation of custom on the said timber, and decern, and find him liable in expenses, both in the Inferior Court and in this Court, but subject to some modification, &c.

Shand & Farquhar, W.S., Agents for Advocator.

Barron & Haggart, W.S., Agents for Respondent.

SECOND DIVISION.

Petition, MRS WIGHTON and OTHERS for Judicial Factor. No. 279.

Trust-Settlement—Bankruptcy of Trust Estate—Beneficiaries.

This case was moved to-day in the single bills, and the point for the consideration of the Court was as follows:—The late Alexander Morison died in 1848, leaving a trust-disposition and settlement in favour of trustees, who all declined to accept. By this settlement the trustees were directed to pay a number of

May 26. 1852 legacies to various parties, and, amongst others, to the petitioners.

Pet. Wighton,
&c. Mr Morison's estates were sequestrated under the Bankrupt Act in 1849, and William Thoms, banker in Dundee, was confirmed trustee.

The petitioners applied for the appointment of a judicial factor, in room of the trustees under the settlement who had declined to act; and they set forth in the petition, that if their interests were properly attended to and protected, a very considerable reversion of the deceased's means and estate would remain over for them and the other beneficiaries, after payment of all his just and lawful debts.

The COURT doubted the competency of the application, as the estates had been sequestrated under the Bankrupt Statute; but they were of opinion that the beneficiaries under the settlement might themselves appear in the sequestration, and appoint a mandatory to act for the whole, and thus save expense, and that, therefore, the present publication was unnecessary.

The case was continued till to-day for consideration, when *Macfarlane*, for the petitioners, stated, that after the opinion expressed by the Court, he would withdraw the petition.

Lockhart, Morton, Whitehead & Greig, W.S., Agents for the Petitioners.

SECOND DIVISION.

No. 280.

CAMPBELL v. CALEDONIAN RAILWAY COMPANY.

Railway Company—Passenger Luggage—Liability.—Circumstances in which *Held* that a Railway Company is liable for the value of a passenger's luggage lost on their line, although such luggage was not addressed.

May 27. 1852. This was an advocation from the Sheriff-Court of Glasgow. The action was originally brought for the value of luggage lost by the pursuer, Donald Campbell, when travelling on the Caledonian Railway. Proof was led for both parties, and the Sheriff having found for the pursuer, the Railway Company advocated.

Campbell v.
Caledonian
Railway Co.

The facts, as detailed in the special findings of the interlocutor of the Court, were these:—The pursuer arrived at the Caledonian Railway Company's station in Glasgow, on the evening of Sunday the 12th of May 1850, and had with him a leather portmanteau and carpet bag filled with ordinary wearing apparel. He announced that he was to go to Edin-

burgh, and obtained his ticket for that place, to go by a train ^{May 27. 1852.} then about to start; and he informed the porter of the company, ^{Campbell v.} who took possession of his baggage, that it was to go to Edin-Caledonian ^{Railway Co.} burgh, and it was received accordingly in order to be sent there. The baggage, however, was not sent to Edinburgh, nor taken out of the van in which it was placed, when it became necessary, owing to the arrangements of the Company, to transfer the pursuer and his baggage, at the Carstairs Junction station, from the train by which he left Glasgow to another, which was expected to arrive, by which he was to be carried to Edinburgh. The luggage was not afterwards recovered.

The Lord Ordinary (Robertson), upon the motion of the advocates, reported the cause to the Second Division of the Court.

Baillie and *the Lord-Advocate* appeared for the advocates (Caledonian Railway Company), and argued that the Company were not responsible for the baggage. It was not directed, and the pursuer did not look after it himself. *Angell* on the Law of Carriers, p. 134; *Story* on Bailments, ed. 1846, p. 537; *Tomlins*, Law Dict. *voce Carrier*, 3d head.

Cook and *T. Mackenzie* for the respondent (pursuer) were not called on.

The authorities referred to by the Sheriff, in his note appended to his interlocutor finding for the pursuer, were Bell's Commentaries, I. p. 467; *Robertson v. Dunmore*, II. Bosanquet, 47; *Brook v. Pickwick*, 26th May 1827, IV. Bign. 217; Chambers and Paterson, p. 356; *Angell* on the Law of Carriers in America, p. 112, 113.

THE LORD JUSTICE-CLERK. I am of opinion that judgment must be given against the advocates. While there is certainly an important principle of law involved in the case, yet I am anxious to state no point of law as to the liabilities of a Railway Company as to luggage of passengers, which the special facts of this case do not necessarily raise. The Company undertook to carry the respondent from Glasgow to Edinburgh, and they further undertook to carry his luggage, which was lodged in a luggage van. And here, at the outset, two observations occur, which appear to me to be of importance. The first is, that whatever the servants of the Company do in such circumstances must be taken as the act of the Company; and the second is, that a court of law cannot split down the obligation of the Company into the various duties and acts of the different

May 27. 1852. servants they employ, such as station-masters, porters, and guards. Each ought to give the other the information necessary to perform the contract undertaken on the part of the company, of carrying the passenger and his luggage. Further, the change of carriage or van at Carstairs is not a fact at all in favour of the Company—quite the reverse. It imposed on them greater care, and attention, and vigilance as to the arrangements required to ensure the due execution of their contract in all particulars, and required that their officers at Glasgow attending the train, and at Carstairs, should be attentive to every thing necessary to ensure that the passenger and his luggage should be duly transferred at Carstairs from the carriage and van going to Carlisle, and placed on those which were to go to Edinburgh when they arrived from the south. I lay aside as being immaterial in the circumstances, the fact that the luggage of the respondent had no address. They might have insisted on one being put on. But they received the luggage as that of a passenger going to Edinburgh, and so were bound to forward it. It is proved that there is no *ticket* put on the luggage going to Edinburgh by that train, although the very occasion on which a ticket was most required. As a matter of fact, it is fully proved that the Company undertook to carry the passenger's luggage as it was delivered to them, to Edinburgh; and that being the case, their liability in law is clear. All the authorities quoted by the Company are quite inapplicable to the facts proved.

LORD MEDWYN. It was not contended on the part of the railway that the company, on taking into their custody the luggage of a passenger travelling in a railway, and placing it in their luggage van, was not liable for the safe delivery of it at the terminus of the passenger, but it was argued, that if not bound actually to look after it himself, the passenger was bound to enquire for it, and, at all events, should have his name upon his luggage, that it might be identified. In the present case there was no name on his portmanteau and carpet bag, and he did not enquire for them at the Carstairs Junction till after the train for Carlisle was gone, when, if not taken out, it was too late. Had the pursuer inquired for it, the loss would have most probably not occurred; but this is not sufficient to justify the inference, or raise the plea that the loss arose through his neglecting to remind the officials of the company of their duty, which, I think, as common carriers, lay upon them. When the luggage was brought to them at Glasgow it was taken possession of by their porters, and packed in the van

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without objection that it had no address. And I cannot find that May 27. 1852. the law of England shifts the responsibility of a carrier under such circumstances as occur here. Nothing was rested on the Carrier's ^{Campbell v.} Caledonian ^{Railway Co.} Act of William IV., and therefore, on the whole, I am not for relieving the railway company from this loss of the pursuer's luggage, the value of which is proved in the usual way.

LORD COCKBURN. I am of the same opinion. The facts of the case are few and simple. The mere taking the luggage, I think, implied a contract to re-deliver it. The company take the man and his luggage for a particular ticket; and therefore the money, I should think, is spread over the whole concern. It applies to the luggage as well as the passenger himself. The luggage was not addressed. This was very foolish on the part of the man; but the company take it as it was. If they should advertise that they will not take luggage without being addressed, it would be a great mercy to travellers, and a wise thing for themselves. But no matter how the luggage is lost. It is lost to him; and the company are liable for it unless they shew that it was lost by his own negligence, which they have failed to do.

LORD MURRAY agreed.

The COURT pronounced an interlocutor by which they "Find in point of law, that the company, by those acting for them, undertook to convey the baggage as delivered to them to Edinburgh, along with the pursuer, and that they failed to implement and fulfil that undertaking, and did not convey and forward said baggage to Edinburgh, or subsequently deliver it to the pursuer: Find that the value of the lost effects has now been ascertained in point of fact by the oath *ad litem*. Therefore, decern against the defenders in terms of the conclusions of the libel, and find them liable to the pursuer in the expenses of the Inferior Court process, taxed at L.46, 2s., besides the dues of extract: Find the pursuer also entitled to expenses in this Court, and remit the account of the same to the Auditor to tax and decern."

*Hope, Oliphant & Mackay, W.S., Advocate's Agents.
John Ross, S.S.C., Respondents' Agent.*

SECOND DIVISION.

M'QUEEN & Co. v. NICOLL.

Letter of Obligation—Implement—Illegal Consideration—Bankruptcy.—

Circumstances in which *Held* that a letter obliging the writer to grant a bill, being the result of an arrangement under which certain of his creditors acceded to the writer's discharge as a bankrupt upon composition, was granted for an illegal consideration, and could not be enforced.

May 27. 1852. This was an advocation from the Sheriff-court of Dundee.

M'Queen & Co. Nicoll. The action was brought to enforce implement of an obligation contained in the following letter:—"Yeaman Shore, Dundee, 20th November 1846. Messrs Andrew M'Queen and Company, iron merchants, Glasgow,—Gentlemen, I hereby bind and oblige myself to grant you a bill, from 1st September 1847, at six months, for seventy-five pounds, for value received. Fifty pounds of the same to be renewed at maturity for six months longer. I am, gentlemen, your most obedient servant, (Signed) THOMAS NICOLL."

The defence was, that this letter could not be enforced, the defender having received no value for the same, and he having been concussed into granting it in consequence of an arrangement made by the defender's brother with the pursuers, which was illegal, under the Bankrupt Act, 2 and 3 Victoria, cap. 41, § 85. The facts were these:—In June 1846, the Dundee Iron Company, of which the defender was a partner, became bankrupt, and was sequestrated. The pursuers were large creditors of that Company. A composition was offered to the creditors, which was accepted, and in consequence the partners of the Company were discharged under the statute in August 1846. This letter was granted in November thereafter. The defender's statement was, that his brother, who was also a partner of the Company, had signed an obligation in name of the Dundee Iron Company, and addressed to the pursuers, obliging the Company to grant their acceptance at six months for £150, as soon as they were put in possession of their discharge, in consideration of the pursuers' acceding to the offer of composition, and their using their endeavours to persuade other creditors of the Dundee Iron Company to do so. The defender's brother had granted a bill for one-half of that sum, which bill was retired by him when it was due. The defender repudiated the arrangement, but the pursuers, by threats of legal proceedings and otherwise, succeeded in concussing the defender into granting the letter which is the foundation of the action, and which the defender refuses to implement for the reasons stated. There was produced in process a draft obligation by the Dundee Iron Company to John Robert-

son and Co., written in pencil, of the following tenor :—“ If you May 27. 1852. succeed in persuading Andrew M‘Queen and Co. to accept our [~] composition of 10s. p. £, and for them to use their endeavours to Co. v. Nicoll. persuade other crs. also, we hereby agree and bind ourselves to grant you our a/ce. at 6 mo. p. £250, as soon as we are put in possession of our discharge.”

The defender referred the whole cause to the oath of the pursuers.

The Sheriff found for the pursuers, holding that “ the defender having obtained his discharge under the statute when he granted said letter of obligation to the pursuers, he is legally bound to implement the same.” The defender advocated the cause. The Lord Ordinary (Rutherford) “ Finds, in point of fact, that the obligatory letter upon which the action is brought was granted as the result of an arrangement under which the pursuers acceded to the defender’s discharge upon composition ; finds, in law, that it was granted for an illegal consideration, and it is therefore void as a ground of action, assoilzies the defender, and decerns,” &c.

In a note appended to his interlocutor, his Lordship remarked— “ The question at issue, as involving the only point of legal and available defence, is, whether the obligation which is the ground of action was granted for illegal consideration. The mere absence of value would be no defence. But the defender maintains the obligation was illegal, being in contravention of the statute 2 and 3 Vict. cap. 41, sec. 124, and falling under sanction of nullity. That it was granted after the discharge may be of consequence in the question of evidence, but cannot affect the result if granted for illegal consideration. The Lord Ordinary cannot read the depositions without coming to the conclusion, that the letter on which the action proceeds was granted in respect of the pursuers’ acceptance of the composition. That the parties were in communing for a sum to be paid, on condition of the pursuers’ acceding, is clear from both depositions ; and though they seem to have avoided the dangerous word *preference*, the proposition contained in the pencil draft is clearly illegal under the statute. It certainly does not appear that any obligation was written out in terms of that draft ; but it is plain from the statement of M‘Queen, who was left to finish the transaction, that the pursuers agreed to take the restricted sum of L.150 ; and though there is no evidence of any writing having passed to that effect, M‘Queen states it was so arranged, and Robertson treats it as an obligation ;” and his Lordship refers to the depositions of other parties, which leave no

May 27. 1852. doubt on his mind "that the obligatory letter on which the action
 is brought was granted for an illegal consideration."

M'Queen & Co. v. Nicoll. The pursuer reclaimed.

Logan and Deas were for the reclaimers ; *Patton and the Lord Advocate* for the respondent.

The COURT pronounced the following interlocutor :—" Refuse the reclaiming note, and adhere to the interlocutor reclaimed against ; find the claimer liable in additional expenses."

Lockhart, Morton, Whitehead and Greig, W.S., Reclaimers' Agents.
L. M. Macara, W.S., Respondent's Agent.

SECOND DIVISION.

No. 282.

SIM v. WATSON.

Process—Advocation—Petition—Alternative Prayer—Sheriff's Interlocutor.

May 27. 1852. This case was reported verbally by Lord Rutherford. Sim presented a petition to the Sheriff of Glasgow, setting forth that the respondent, Watson, had taken a house on lease from him for twelve months from Whitsunday last, but had not occupied it, and therefore praying to have Watson ordained to furnish the house ; failing which, to find security for the rent ; failing which, to pay the rent of the house under deduction of the interest between and Whitsunday next. Watson lodged answers to this petition, denying that there had ever been a lease of the house, and the Sheriff-substitute refused the prayer of the petition and assailed the respondent. Sim appealed to the Sheriff-depute, who "decerned in terms of the prayer of the petition."

Sim v.
Watson.

Watson thereupon advocated the cause, and Lord Rutherford now stated that as there were three alternative conclusions in the petition, and the Sheriff had decerned in terms of the whole of them, and farther, as the Sheriff had not pronounced any findings as to the facts he thought proved, he did not know how to proceed with the case.

Monro was for the pursuer ; *Logan* for the respondent.

The LORD JUSTICE-CLERK proposed to remit the case back to the Sheriff, with instructions to frame his interlocutor in accordance with the Act of Sederunt, and to state which of the alternative prayers he intended to grant.

LORD COCKBURN. I take a different view. I am not disposed to teach judges their duty at the expense of litigants, and I therefore think that the Lord Ordinary should be instructed to advocate the cause and dispose of it himself.

LORDS MEDWYN and MURRAY concurred with Lord Cockburn, and the Court instructed the Lord Ordinary accordingly.

L. M. Macara, W.S., Pursuer's Agent.

Lockhart, Morton, Whitehead and Greig, W.S., Defender's Agents.

HOUSE OF LORDS.

INGLIS, Appellant ; and The GREAT NORTHERN RAILWAY COMPANY and OTHERS, Respondents.

No. 283.

Railway—Action for Calls—Cancellation—8th Vict., c. 17—Authentication of Register of Shareholders, and of Minutes of Meetings—Power of the Court to alter Issue after Trial.—A cancellation of shares, and an issue by the company of new shares in lieu thereof, does not, any more than a forfeiture of shares, destroy the company's right of action for calls against the holder of the cancelled shares at the time the call was made.

Where the register of shareholders consists of several volumes, the company's seal fixed to the last volume of the series is a sufficient authentication within 8 and 9 Vict., c. 17, sec. 9, to make the register evidence, though the name of the defender as shareholder appears only in the volume to which the seal is not attached.

The 8 and 9 Vict., c. 17, sec. 161, which makes the entries of minutes of meetings signed by the chairman thereof evidence, does not exclude other evidence of the fact. It is competent, therefore, for the company to prove what was done at those meetings by independent evidence.

Where a meeting has been adjourned, the signature of the chairman to the minute of the adjourned meeting is sufficient.

The Judicature Act, 6 Geo. IV., c. 120, sec. 34, does not prevent the Court, when directing a new trial, to alter the issue which has been tried.

The present action was brought by the respondents for the sum of £.34, being the arrears of two calls on eight shares of the Great Northern Railway Company, held by the appellant. Defences having been lodged by the appellant, and the record closed, an issue was approved of by the First Division of the Court of Session, which embodied this question, “Whether the defender (appellant) is the holder of eight shares of the Great Northern Railway Company, and as such is indebted and resting owing to the pursuers (respondents) in the amount of the two calls before

May 17, 1852, specified." This issue was tried by a Jury before the Lord Pre-
 sident, on the 29th December 1849, when a verdict was returned
Inglis v. Great Northern Rail. for the appellant.
 Company, &c.

A bill of exceptions was presented against certain rulings of the learned Judge, which resulted in the Court, by interlocutor of 9th July 1850, sustaining the 5th exception in the bill, and granting a new trial.

On the 29th November 1850, the respondents moved the Court "to alter the issue, by deleting therefrom the following words at the beginning thereof, viz., 'Whether the defender is the holder,' and substituting therefor the words, 'Whether the defender was, at the date of making the calls after-mentioned, respectively the holder?'" The reason assigned for making this application, as appeared from a minute lodged by the respondents, was, that the respondents, under the provisions of the Companies' Clauses Consolidation Act, had declared the appellant's alleged shares forfeited by a resolution of the directors, on 27th August 1850; that this resolution had been confirmed at the half-yearly general meeting of the company, held on the 29th of August following; and, farther, that on 26th September 1850, the directors of the company had, under the powers conferred on them by the "Great Northern Railway Acts Amendment Act," 12th and 13th Vict., cap. 84, cancelled the shares which had been previously forfeited.

In answer to the motion thus made, the appellant pleaded, that the proposed alteration on the issue was incompetent; more especially as the ground assigned therefor was solely attributable to a change of circumstances caused by the respondents themselves. And it was farther explained, that the respondents, by the forfeiture and cancellation of the shares in question, and the issue of certain new shares in lieu of those which they had cancelled, had raised a larger sum than that which was represented by the cancelled shares, including the calls sued for. Thus—

| | | | | | | |
|---|---|---|---|------|----|---|
| One old share, value, | - | - | - | L.25 | 0 | 0 |
| Deposit paid thereon, | - | - | - | 3 | 15 | 0 |
| <hr/> | | | | | | |
| Difference, | - | - | - | L.21 | 5 | 0 |
| <i>Amount raised</i> in lieu thereof, viz.:—two | | | | | | |
| L.12, 10s. shares issued at L.11, 12s. 6d., | | | | 23 | 5 | 0 |
| <hr/> | | | | | | |
| Surplus per share, | - | - | - | L.2 | 0 | 0 |

The First Division of the Court of Session pronounced an inter-

locutor allowing the alteration of the issue to be made. The altered May 17. 1852. issue was tried by a special jury before Lord Robertson, on 24th ^{March 1851,} when, in order to prove that the appellant was a share-^{Inglis v. Great Northern Rail. Company, &c.} holder in the company, the respondents tendered as the statutory evidence of the fact, a series of volumes purporting to be the register of shareholders. The last volume, called the supplemental volume, contained a recapitulation of the contents of the other volumes, and also the seal of the company, but the seal was attached to such last volume only, and not to the volume in which the appellant's name appeared. The appellant's counsel objected to the admission of this register as not being in terms of the statute, but Lord Robertson ruled that it was admissible, and to this ruling the counsel for the appellant excepted.

To prove that the calls were made, the respondents produced in evidence, certain minutes of the finance committee, making the calls in question ; and upon its being objected, that there was no evidence of the appointment of such finance committee, the respondents further tendered minutes of the board of directors of the 18th and 19th August 1846, and also of the 1st September 1846. The minute of the 18th August, contained the appointment of the finance committee, but that minute was not signed by the chairman. It however terminated with the following resolution, "that the board do now adjourn till to-morrow at 11 o'clock," and the minute of the 19th August commenced as follows : "At the meeting adjourned from yesterday," and that minute had the signature thereto of the chairman, at such adjourned meeting, who was also the chairman at the meeting held on 18th August. The secretary of the company deponed that this was one continuous meeting and minute ; he also stated that he was present when the finance committee was appointed, and he proved that the minutes of 1st September 1846, began thus, "minutes of the last meeting, held 18th August, read and confirmed." This minute was signed by the chairman. The appellant's counsel objected at the trial, that the evidence of the appointment of the finance committee was not admissible, because the minute of the 18th August was not signed. This objection was however repelled, and the evidence received, whereupon the appellant's counsel tendered their second exception.

The jury found a verdict in favour of the respondents, and the exceptions having been afterwards argued before the First Division of the Court of Session, their Lordships, by an interlocutor of 9th July 1851, disallowed the same. There were other excep-

May 17. 1852.tions, but these were not insisted on. Against this judgment the appellants now appealed.
Inglis v. Great Northern Rail. *Bethell*, Q.C., and *Anderson*, Q.C., for the appellants; *Phipson* for the respondents. The argument was heard on the 19th and 20th April last, when their Lordships took time to consider their judgment which was now delivered. The sections of the statutes relied on, and the authorities from the reports which are relevant to the argument, will be found sufficiently stated in the Lord Chancellor's judgment.

LORD CHANCELLOR. This was an action brought by the Great Northern Railway Company, against a holder of a few shares, for two calls, amounting together to L.34. The right to bring the action in Scotland is given by the 8th and 9th Vict. c. 16, sec. 164, which Act is incorporated in the 9th and 10th Vict. chap. 71, (local,) being the Act establishing this railway company, and although some argument was raised upon the particular wording of the clause, yet I think that it gives to the company all the remedies provided by the Companies' Clauses Consolidation (Scotland) Act, 1845.

The first question raised before your Lordships, was, that the Court below had no power to alter the issue. This objection depended upon the 6th of George IV., chapter 120, section 34, which gives power to the Court to direct a proper issue, or to alter the issue as delivered, and which provides that if either party should object to the issue as sealed by the Court, he may within ten days apply to the Court, and the Court may make such order as the justice of the case may require, which order shall be final. Under this statute, it is insisted that the Court had no power to alter the first issue. Several decisions on this legislative provision were cited at the bar, but they do not apply to the case before the house, and it was at last admitted by the counsel for the appellant, that the point had never been decided. The finality mentioned in section 34, refers to the issue as settled, but that section contains no terms of restriction or exclusion to prevent the Court when directing a new trial to direct an issue better calculated to meet the justice of the case, than the first proved to be, and I am of opinion, that they have that power, and that this objection cannot be sustained.

Your Lordships have already seen why the issue was altered, but this requires a little further explanation. The 8th and 9th of Vict., cap. 17, sec. 27, enacts, that in any action or suit to be brought by the company against any shareholder to recover any

money due for any call, it shall be sufficient for the company to May 17. 1852. aver that the defender is the holder of one share or more in the company, and is indebted to the company in the sums claimed; *Inglis v. Great Northern Rail. Company, &c.* and by the 28th sec. it is enacted, that on the trial or hearing of such action or suit, it shall be sufficient to prove that the defender at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made and such notice thereof given as directed by this or the special Act. Now the new issue adopted the very terms of section 28, which by law would equally have applied to the first issue which was framed under section 27, and it would not have been necessary to have altered the first issue, if the shares had not been cancelled subsequently to bringing the action. It is quite settled that the term "is" means "at the time of calls made," *Belfast and County Down Railway Company v. Strange*, 1st Exchequer Reports, 739. And the statute has received a liberal construction, *East Lancashire Railway Company v. Croxton*, 5th Exchequer Reports, 287.

The provisions of the Companies' Clauses Consolidation Act which apply to this case, enable the company to enforce the payment of calls by action or suit, and give power to the company to forfeit shares for non-payment of calls, whether the company have sued for the amount of such calls or not. And it has been decided that this right to declare shares forfeited is not an alternative remedy with the right of action, but that the words of the Act are cumulative, *Great Northern Railway Company v. Kennedy*, 4th Exchequer Reports, 417. And indeed it is not disputed by the appellant that if the shares in question had been merely declared to be forfeited, the right of action would have remained. But it was insisted that the cancellation superinduced upon the forfeiture, and the issue of new shares dissolved the contract and destroyed the right of action. The power to cancel the shares was given to this company by 12 and 13 Vict., cap. 84, (local) which enacted that where the market price of shares which might be forfeited for non-payment of calls should be such as to render it impossible for the company to sell the same so as to realise a sum equal to the arrears of calls due, it should be lawful for the company to cancel the same shares and to issue so many new shares, and of such nominal amount, as they might think fit, provided that the capital to be represented by such new shares should not in the whole exceed the capital represented by the unpaid portion of the shares. After a declaration of forfeiture, the directors ultimately, in September 1850,

May 17. 1852. cancelled the shares in question, and this was long after the institution of the action.

Inglis v. Great Northern Rail. Now unless some solid distinction can be shewn as regards the Company, &c. interest of the shareholder, between forfeiture and cancellation, it

appears to me, my Lords, that the same rule must prevail as to both. Much argument was raised upon the right to issue new shares so as to make up the amount of capital in the company, but it does not appear to me that this is an objection, if it be one, which it is competent to the appellant to make. The Companies' Clauses Consolidation Act provides in every way for the real interests of the shareholder, even after forfeiture. And in the *Great Northern Railway Company v. Kennedy*, (cited above), Mr Baron Parke and Mr Baron Alderson were both of opinion that if the forfeited shares were converted into other shares, the shareholder against whom an action for calls had been brought, would be entitled to the benefit, in satisfaction *pro tanto*, so that on applying to the Court to stay proceedings on payment of the portion of the debt and costs, beyond the value of the new shares, the Court would stay the proceedings accordingly. If, therefore, the forfeiture of shares, and the conversion of them into other shares, where there is no direct power to cancel the original shares and to issue new ones, would give the original shareholder any benefit to which he might be entitled, after payment of the calls and costs; it cannot vary the case that a direct power is given to the company to cancel shares and issue new ones, for the right of the shareholder to the benefit of the new shares would be precisely the same as in the first case. The power to cancel only arises where, after forfeiture, the arrears of calls cannot be raised by a sale, and therefore the right of action to recover the deficiency remains in the company. This view of the case answers the objection which was strongly urged at your Lordship's bar, that the alteration of the first issue excluded the appellant from shewing that a change of interest had taken place, because that could not go in bar of the action, but the defender would be entitled to any benefit to be derived from such change, notwithstanding the recovery in the action; and the interlocutors, I think, have reserved to the appellant the means of enforcing any rights to which he is entitled.

At the trial of the second issue, the counsel for the appellant tendered evidence to prove the cancellation of the stock and the issue of new shares, &c., but that evidence was rejected by the learned Judge who tried the cause. And his rejection of that

evidence formed part of the bill of exceptions. Now, Lord Fullerton, in delivering his opinion in the Court of Session, upon the hearing of the bill of exceptions, observed that this part of the bill of exceptions was not insisted on, as the cancellation of the shares, if it had any effect, might receive it in the accounting on that head, of which the pursuers admitted the competency, notwithstanding the verdict. This, my Lords, appears to me to be conclusive upon this head.

The appellant's remaining objections are technical ones. The first objection was, to the reception in evidence of the register of shareholders. The law enables companies to produce their registers as evidence, but provides that the book should be authenticated by the common seal of the company being affixed thereto. The objection was, that the register was contained in several volumes, and that the last of the series only had the common seal of the company affixed to it. There were several very bulky volumes—they followed each other alphabetically and consecutively, and manifestly formed part of the same series; and the last volume contained not only a completion of the register, but (which was not required by the Act of Parliament), at the end of it, and before the seal, a recapitulation of the contents of the preceding volumes. They were laid upon the table of this house, and every volume was a ponderous one. The contention was, that instead of being enclosed in several bindings for the sake of convenience, they ought to have been bound in one volume, which would have rendered it impossible to make use of them in the course of business. I think, my Lords, it would be contrary to the real meaning and spirit of the Act to put this restricted construction upon it. These volumes did together constitute a book, containing a register of the shareholders, to which the common seal of the company was properly affixed. I rather think that if the common seal had been affixed to every volume, the appellant would have considered the register still more objectionable.

The next exception to the ruling of the Judge, was, that the evidence of the appointment of the finance committee, which was necessary in order to prove the call, was not admissible, because a minute of a board of the 18th of August 1846, at which the finance committee was appointed, was not signed. Now this board was adjourned to the 19th of the same month, and the minute of the adjourned meeting is signed. The secretary to the company swore that it was one continuous meeting and minute, and that the next meeting was on the 1st of September, and that the

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Company, &c.

May 17. 1852. minute of it begins—"The minutes of the last meeting, held 18th August, read and confirmed"—treating the 18th and 19th as one Northern Rail. meeting. This is confirmed by the books. At all these meetings Company, &c. Mr Astell was in the chair; and he signed both the minutes of the adjourned meeting of the 19th of August, and of that of the 1st of September, and on the 27th of September, at a meeting, the minute of which was regularly signed by the chairman, all committees were reappointed, and all these proceedings took place before the first call. The objection was founded upon the 101st section of the Companies' Clauses Consolidation Act, which requires entries of minutes to be signed by the chairman of each meeting, and makes such entries evidence. But independently of the evidence furnished by the books of the company, the fact of the due appointment of the finance committee was proved by a witness, and his evidence was admissible evidence, for the Act confers a privilege but does not exclude other evidence of the fact. It is not necessary to make any further observation on these points, inasmuch as the validity of the minutes as signed, and the admissibility of the other evidence will be ruled by your Lordships in favour of the respondents upon the authority of *Miles v. Bough*, 3d Queen's Bench Reports, 845.

The result is, that all the objections urged by the appellant's counsel at your Lordship's bar have failed, and therefore I beg to move that the appeal be dismissed, with costs.

Interlocutors affirmed with costs.

Inglis and Leslie, W.S., Edinburgh, and
Law, Holmes, Anton and Turnbull, Westminster, } Agents for the Appellants.

Gibson-Craig, Dalziel and Brodie, W.S., Edinburgh, and
Baxter, Rose and Norton, Westminster, } Agents for the Respondents.

COURT OF SESSION.

FIRST DIVISION.

No. 284.

M'Ewan v. DONALD.

Debt—Rent—Cautionary Obligation—Law Agent.—Circumstances in which a cautioner for rent, who was also law agent for the principal debtor, who had absconded, was held liable for the balance of rent due May 28. 1852. by the latter.

M'Ewan v. Donald. This was a suspension at the instance of M'Ewan of a charge on an extract-decree of the Sheriff of Lanarkshire to make pay-

ment of the sum of L.10 sterling, being a half year's rent claimed May 28. 1852. from him as cautioner, in the circumstances which will be found set forth in the findings of the Lord Ordinary's interlocutor. The Donald. M'Ewan v.
liability of M'Ewan was pleaded in respect of the following letter signed by himself and Charles Cowan, a brother of the debtor :— “ Sir,—We hereby become bound to see you paid the rent of a shop in Cowcaddens, to be let by you to Mr Andrew Cowan, from Whitsunday 1846 to Whitsunday 1847, said rent being £20 sterling, and to be payable half-yearly or quarterly as you may wish. We are, Sir, your obedient servants, WILLIAM M'EWAN, 24. St Vincent Place. CHARLES COWAN, Rockvilla Factory.”

The Lord Ordinary (Robertson) pronounced the following interlocutor :—“ The Lord Ordinary having heard parties' procurators on the closed record and whole process, finds that the suspender, along with Charles Cowan, became bound to see the charger paid the rent of a shop, to be let by him to Andrew Cowan, from Whitsunday 1846 to Whitsunday 1847, being L.20, payable half-yearly or quarterly, as the charger might wish; finds that Andrew Cowan, having entered into possession, appears to have left the shop and absconded, and a demand having been made on the suspender for the sum of L.8, as the balance of the rent due at Martinmas 1846, the said sum was paid by him, and a receipt taken ‘on account of his cautionary obligation for Andrew Cowan’; finds that the said shop was, with the knowledge and approbation of the suspender, sublet to a person of the name of Corrie, from the 1st February 1847 to the then ensuing Whitsunday, the suspender having undertaken, by letter of 29th January 1847, to arrange with Mr Corrie for that period, and, in the postscript to which letter he writes—‘ I will pay you, in terms of my letter, the rent due at Whitsunday’; finds that, on the 1st February 1847, the suspender received from Mr Corrie L.3 to account of the rent payable from that date till Whitsunday, said rent being L.5, 10s., and agreed to pay three-fourths of any taxes which Mr Corrie might pay for the year from Whitsunday 1846 to Whitsunday 1847; and on the 6th of February 1847, the suspender farther received from Corrie the sum of L.2, for which he granted a receipt, as the balance of the rent up to the said term of Whitsunday; finds that the suspender never paid any part of this sub-rent to the charger, to whom the sum of L.10 for the half year's rent, from Martinmas 1846 to Whitsunday 1847 is still due; finds that, as Charles Cowan and Andrew Cowan can neither of them be traced, the action before the Sheriff was well directed

May 28. 1852. against the suspender; and in respect of the terms of the original cautionary obligation, as construed by the suspender's letter and whole conduct, and also in respect of what actually occurred relative to the possession of the premises after Andrew Cowan had left the same; finds that the suspender is liable in the half-year's rent concluded for; therefore, repels the reasons of suspension, remits *simpliciter* to the Sheriff, and decerns; finds the suspender liable in expenses," &c.

The suspender reclaimed.

Moncrieff and *Pattison* for the claimer. M'Ewan is bound expressly as cautioner, with Andrew Cowan as principal, and Charles Cowan as co-cautioner. We plead that our principal should be discussed, or our co-cautioner called. The only exceptions to this are, *first*, where the principal is bankrupt; *second*, where the principal or co-obligant are out of the country. This is different from the ordinary defence of all parties not called, where if the pursuer don't know the addresses of the parties, the defender is bound to furnish them or give up his defence. Here the pursuer selected his own obligants in the bond, the principal as his own tenant, and the *onus* of proving that he is out of the country lies upon him.

E. S. Gordon, contra. This case falls within the exceptions to the general rule. The defender is agent for Andrew Cowan, so that the objection comes ill from him. Charles Cowan is brother to Andrew. Every exertion has been made to find out the address of these parties but in vain. We are entitled to assume that these parties are out of the country, since their own agent don't know where they are.

The *Lord Advocate* for the pursuer was not called on.

LORD IVORY. This defender is agent for Andrew Cowan, and must have been in communication with him. The case of *Gammell*, 1st July 1825, is in point.

LORD PRESIDENT. The defender admits that he was Andrew Cowan's agent. If his agent can't find him out, surely the pursuer is not bound to do so. The case is free from doubt.

LORD CUNINGHAME concurred.

The COURT adhered to the *Lord Ordinary*'s interlocutor, "with the variation, that instead of remitting *simpliciter* to the Sheriff, they find the letters orderly proceeded and decern, and find the claimer liable in additional expenses."

James Bell, S.S.C., Agent for Suspender.

J. A. Macrae, W.S., Agent for Charger. .

FIRST DIVISION.

MACONOCHEE v. THE GOVERNORS OF THE TRINITY HOSPITAL OF EDINBURGH. No. 285.

Held that it is not enough to entitle a party to pursue an action of reduction-improbation, and declarator of non-entry as superior—he having succeeded to the superiority as singular successor—that he has produced an instrument of sasine in the superiority in his favour, but that the vassal has a right to insist for production of the warrants of his infestment, and all mid-couples connecting him with the former superior.

This was an action of reduction-improbation, and declarator of non-entry against the defenders, as vassals of the lands of Maiden-craig, Park, and others, of which the pursuer alleged he was superior. It appeared that before 1800 the *plenum dominium* as to both property and superiority stood vested in the defenders. The *dominium utile* was separated by a feu right which the defenders granted to Sir James Stirling, Bart., with relative sasine in his favour, dated 18th February 1800. The *dominium directum* was afterwards (in terms of certain intermediate articles of roup) conveyed to Mr Kerr of Blackshiels, 14th May 1800; and it is as *singular successor* under this superiority title that the pursuer now claims right. In his summons he set forth that he had acquired the superiority in virtue (1.) of a crown charter of resignation in favour of Kerr, dated 2d June 1800; (2.) disposition and assignation by Kerr to the Earl of Morton, which specially conveyed the unexecuted precept of sasine contained in the said crown charter; (3.) disposition and assignation by the Earl of Morton to the pursuer, specially conveying the unexecuted precept of sasine; and (4.) sasine following thereon, dated 31st March, and recorded 22d April 1802. In the meanwhile the *dominium utile* had been reacquired by the defenders from Sir J. Stirling, by disposition dated 23d, and on which sasine followed 27th February 1801.

It appeared that the vassals had never recognised the pursuer as their superior, had paid to him no feu-duties, nor had they obtained from him any renewal of their investiture, and that they had, so late as 1847, paid to Mr Kerr's trustees the arrears of feu-duty, amounting to since 1802. They now being called on by the pursuer to take an entry for a composition of a year's rent, refused to do so; and the pursuer brought this action to have the disposition from Sir J. Stirling, and infestment following thereon, reduced, and all other deeds affecting the lands set aside, and to have declarator of non-entry against the vassals. The convey-

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Trinity Hos-
pital, &c.

May 28. 1852. ance to Kerr contained a condition that he should enter all vassals
 Maconochie, for an elusory duty, and each conveyance contained this clause,
 Governors of which also appeared in the pursuer's sasine. But he demanded
 Trinity Hos- pital, &c. a full year's rent of composition.

The pursuer did not produce the assignation from Kerr to Lord Morton, and in these circumstances, amongst other defences, the defenders pleaded that the pursuer had produced no good or valid title to the superiority of the lands in question; that his infest- ment has no warrant in any of the titles produced; his right to be infest rests on the mere assertion of a notary.

The Lord Ordinary (Ivory) sustained this defence, and assailed from the whole conclusions of the libel, and decerned with ex- penses. In his note, after pointing out that the amount of compo- sition asked from the defenders gave them a material interest in objecting to the pursuer's title, he proceeds to say,— “But even had it been otherwise, it is thought they (the defenders) are warranted in insisting that the pursuer shall produce a complete progress. It is, no doubt, laid down, (*Stair*, 2, 4, 6,) that, in the general case, ‘Superiors nor their donators need not instruct their superiors' right, but the vassal must acknowledge it, *or disclaim him upon his peril.*’ But the same authority expressly adds,—that this ‘will not hold, if the right of superiority be *newly acquired, and no infestment given to the vassal or his prede- cessors by virtue thereof.*’ And in another passage, he still farther says,—that ‘*disclamation taketh no place, if it proceed through ignorance upon any probable ground, which may several ways occur: First, as to the whole fee, when the case is not betwixt the first superior and the first vassal, but betwixt their successors: as, if the vassal should deny a person to be his superior's heir in that superiority through any doubtfulness of his being lawful heir, &c.: —but much more, when the superior is singular successor to the first superior; or the vassal singular successor to the former vassal,*’ (*Ibid*, 2, 11, 29). *Bankton* (2, 11, 24,) is no less distinct:—‘Where the pursuer is *singular successor in the superiority*, he will be obliged to produce his progress thereto, before the defender be bound to answer; unless the defender has formerly owned his right by taking charters from him.’ And so, accordingly, it was decided, *E. Queens- ferry*, 18th January 1681, D. 3557; which differs, in this respect, from the pursuer's authority of *Innes supra*, where the ‘vassal or his author had once recognised the pursuer as superior, by taking an entry from him.’ Nay, the present learned Professor of Scots Law lays the rule broadly down, even in the general case,—that, ‘ac-

cording to modern practice, the superior may be required to produce his title, so that the vassal may be satisfied that he is entitled to enter him, and can give a valid entry.'—*More's Illust.*, p. 207. May 28. 1852.
Maconochie v.
Governors of
Trinity Hos-
pital, &c.

Ross and Dean of Faculty, for pursuer, cited *Stewart*, 9th February 1749, Kilk. 389; *Gillespie*, 24th July 1764, D. 2860; *Craig*, 10th July 1838, 16, S., 1332, and 2 Rob., 446; *Innes*, 20th November 1844, 7 D. 141; *Stair*, 2, 4, 6; *Ersk.* 2, 5, 41.

Macfarlane and H. Robertson contra, *Ersk.* 2, 3, 38.

LORD PRESIDENT. It has been contended on the part of the pursuer, that in an action of declarator of non-entry, it was not incumbent on the superior, in any case, to exhibit more than his sasine. On the other hand, it was contended as a general proposition, that in no case was the sasine of the superior a sufficient title. I am not inclined to concur in either general proposition. The circumstances of each case must be looked to.

The usual form of such an action as the present is one of the most complex that we have, and we must look to its machinery, the result it is intended to accomplish, and the means by which the ends of the action are to be obtained. The pursuer calls for exhibition of the defender's titles, that they may be reduced; he insists, that as the party infest in the lands, he only is entitled to possess them, and if, the titles of the vassal being produced, he shall be found in non-entry, that he (the pursuer) is entitled to certain rights. The action, then, proceeds on the principle that the pursuer is a party having right to lands, and is, in the event of the failure of the vassal to do certain things, entitled to possession.

Now the superior has not produced the assignation from Kerr to Lord Morton, and therefore the only deed which connects him with Kerr. On the other hand the defenders have never acknowledged the pursuer as superior, but have on the contrary, so late as 1847, paid to Mr Kerr's trustees, the arrear of feu-duty. But the superior has an infestment on record. I don't think any importance is to be attached to the antiquity of that infestment. There is no question of prescription. It is the same as a recent infestment, or more objectionable, because a lapse of time, without exercise of the alleged right of superiority, places the vassal in position of being able to say, "I knew Kerr as my superior, and will not acknowledge you."

Now in the proper sense, there is no competition here between the pursuer and defender, as to any particular right or estate. It is a separate estate which the vassal has, and a separate estate

May 28. 1852. which the pursuer has. But still there is a competition, because
the pursuer says he is entitled to insist on reduction of the vassal's
title, and to possess the lands ; and he must have a title to main-
tain that part of his action as well as any other part of it. And
although a distinction is to be drawn between the different
parts of the action and its different stages, and although a
distinction exists between the evidence necessary in regard
to these different parts, still we cannot throw out of view that
it is disclosed on the face of the action, that the object for which
the pursuer comes into Court is to have it found that he is entitled
to refuse an entry unless he gets a year's rent. Now a party com-
ing into Court with an action having this object and conclusion,
must exhibit such a title as will support this conclusion. The
question then comes to be, because the parties stand in the alleged
relation of superior and vassal, whether that is a sufficient ground
for holding that in all such questions between the superior and the
vassal, even where the superior is a singular successor, production
of his sasine is enough.

Now the general rule undoubtedly in regard to the evidence
afforded by sasines, is that a sasine does not prove its warrant.
There may indeed be questions where it is not necessary to pro-
duce more than a sasine. But is it a sufficient ground for insist-
ing in such an action as this ? I think not. Is it universally a
rule as regards questions between superior and vassal, that a
sasine is enough ? I think not. This proposition was maintained,
and passages were cited from Stair and Erskine in its support, as
well as several cases. But in several of these passages, there is
ambiguity as to the meaning of the word "infestment," and as to
what is meant by infestment being enough, or not being enough ;
for, in some of these cases, it means that the party pursuing must
at least be seized in the lands, and that in some of them he requires
to exhibit his investiture. And in that part of Stair where he
treats of declarators of non-entry, he puts exception to the rule of
the superior being required to produce only his sasine ; and he has,
especially, the case where the pursuer's right proceeds on adjudica-
tion and appraising. I apprehend that when a party comes for-
ward as a singular successor, he must exhibit something more than
the instrument of sasine. If the Earl of Morton had come for-
ward here, being infest on the alleged assignation from Kerr, and
come forward on that sasine, would the charter in favour of Kerr
have supported the sasine ? No. For unless there was something
more than a charter, it would be against the sasine ; and is not

the next step just the same? I think the vassal is entitled to May 28. 1852.
 something more than the mere sasine, and therefore, looking to the facts disclosed here, there is not sufficient evidence to support Maconochie v. Governors of Trinity Hos-
 pital, &c.

LORD CUNINGHAME. It appears that each assignation and the sasine in favour of the pursuer, repeated verbatim, the obligation of Kerr to enter the hospital, and their vassals, for the elusory payment specified in the charter to Kerr. The title thus constituted appears to me insufficient to support the pursuer's claim as laid in record, either in the present or in any other of the same import that can be instituted.

I. Suppose there were no peculiarity in the titles, so far as produced, I am of opinion that the chasm in the productions here would be fatal in cases of non-entry generally. The want of the assignation to Lord Morton is a plain and indisputable defect and chasm in the title. Such a defect would not have been dispensed with in the old procedure before courts of freeholders, where questions of title were constantly tried: and the authorities quoted in the Lord Ordinary's note shew that the production of a sufficient and complete title by a superior is still more rigidly required, in the penal action of non-entry and reduction.

The production of such a title here, connecting the pursuer with the grantee of the crown charter founded on, is peculiarly necessary. The pursuer has claimed the position and rights of a *singular successor*. It has been mentioned that the obligation imposed on the crown vassal to infest the hospital, and the *tenants and vassals* on payment of an elusory composition is contained in the crown charter, and was also inserted in Mr Kerr's disposition to Lord Morton. The defenders are manifestly entitled to have that distinctly ascertained by exhibition of this part of the title.

II. Even from the clauses contained in the incomplete production of title-deeds in process, which have been already specified, I conceive that the titles, so far as exhibited, are totally insufficient to support the action now in dependence, as explained and urged on record. The pursuer pleads that he shall not be bound to enter the defenders *without payment of a year's rent as composition*. Does his title, as produced, bear out or refute that claim? It is contrary to the charter founded on—to the rights of the pursuer himself and his predecessors—and to the special reservation in his infestation which appears to have been taken under the burden. I am not aware on what legal plea a special *reservation and condition* in a crown grant can be resisted

May 28. 1852. by an assignee of the charter producing both a conveyance and ~~infeftment~~, with the reservations repeated at length in the right Governors of ~~Trinity Hos-~~ granted to himself, and subsequently in his own infestment. It is not easy to see on what ground Mr Kerr, the original granter of the charter, could, upon that deed, and his previous conveyance from his authors, have refused an entry to the defenders on payment of the full composition fixed in his title. If Mr Kerr's obligations be not effectually transferred to his successor and to the pursuer by the series of deeds before quoted, it would be difficult to conceive how any fair and full agreement in such transactions, between superiors and feuars, and their successors, could ever be made binding on singular successors.

LORD IVORY. I adhere to my former opinion. This is not a mere declarator of non-entry, but of reduction-improbation of defender's title; and what the pursuer seeks in this action is the first step towards getting at the conclusion, that the pursuer only is entitled to the land. Now the defender is entitled to say, you are not to come into competition with my real right without producing a real right of your own; and unless you produce your warrant with your sasine, you cannot come into competition with my real right. I think it impossible this action can be maintained by the bare production of a sasine. It is said on the authority of Erskine and Stair, that infestment is enough. But the word does not mean the mere instrument of sasine. *Stair*, 2, 3, 12 and 19. *Ersk.* 2, 6, 51. It means the investiture of the superior.

The COURT adhered to the Lord Ordinary's interlocutor, "under the variation, that instead of assoilzieing from the whole conclusions of the action, they dismiss the action and decern," &c.

Menzies and Maconochie, W.S., Pursuer's Agents.
Cunningham and Bell, W.S., Defenders' Agents.

FIRST DIVISION.

No. 286.

DUNLOP'S TRUSTEES v. ALEXANDER'S TRUSTEES.

Diligence against havers for recovery of writings—Specification—Examination of haver.

May 29. 1852. This case was reported verbally to the Court by Lord Rutherford. ~~Dunlop's Trustees v. Alexander's Trustees.~~ It was an action of declarator to have it found that the Commercial Exchange Company of Glasgow were *de facto* bankrupt in June 1848, and were thereby in terms of their contract, dissolved as at that date, and that the defenders, who had sold out subsequent to

that date, were liable to relieve the pursuers of a share of the losses May 29, 1852. of the Company. After defences had been given in, and during the time allowed for revisal, the pursuer obtained a commission and diligence directed to the Judge Ordinary of the Court, for recovery of the books of the Company, or at least exhibition thereof, that excerpts might be made therefrom of such entries as bore upon the subject-matter of the action. On executing the diligence Mr Robert Jamieson, writer in Glasgow, the haver in whose charge the books were, appeared and deponed that "he is willing to give the pursuer's agents access thereto, that they may take such excerpts therefrom as may fall under the call: that the books and papers are at present in the custody of Mr Peter White, accountant, Glasgow, who will at the deponent's request exhibit them as above: that the deponent, or Mr White, will exhibit at a subsequent diet the books and papers from which excerpts may have been taken, that the excerpts may be compared at sight of the commissioner."

The commissioner adjourned the diet to a future day, when Mr White appeared as a haver, and stated his willingness to allow the pursuer to have access to the books mentioned in the specification, and to make such excerpts therefrom as they thought fell under the call. The diet was again adjourned, and at the next diet, the haver produced excerpts from the books, and the books themselves, that the commissioner might certify the accuracy of the excerpts. The pursuer did not put the question whether the haver had any more documents falling under the diligence, and it was proposed on behalf of two of the defenders, Lord Belhaven and Mr Donald Lindsay, that this question should be put to him. The pursuer objected that the question was incompetent, in respect the diligence was not at the instance of the party proposing to put it. The commissioner (Mr Glassford Bell), sustained the objection, and the defenders appealed to the Lord Ordinary (Rutherford). His Lordship, in now reporting the case, expressed his opinion that the question was a competent question, and should have been allowed.

The COURT were unanimously of opinion that the question was not only competent and proper, but one which the commissioner should himself have put if the pursuer did not do so; and they instructed the Lord Ordinary to remit to the commissioner to allow the question, and to proceed with the examination of the haver.

Walker and Melville, W.S., Agents for pursuers.

Dundas and Wilson, C.S., { Agents for Lord Belhaven
and Donald Lindsay.

FIRST DIVISION.

No. 287.

HUME v. BAILLIE.

Agent and Client—Liability of Agent for Failure to do Diligence—Summons—Relevancy—Competency of Arrestment.

May 29. 1852. This was an action against a law agent for the recovery of L.275, with interest, being the value of a bill due to the pursuer by Lechmere, which Baillie had been employed to recover, and on which it was alleged he had failed to do proper diligence. The summons set forth that the pursuer had transmitted the bill in question to the defender, "on 24th August 1839, with instructions to take the necessary steps for recovering the contents thereof, and intimated that the said Richard Lechmere was to officiate as one of the knights at the Eglinton tournament, and had with him two valuable horses besides costly accoutrements. . . . That in place of arresting the horses of the said Richard Lechmere, which were known to him to be in the stable of the Earl of Eglinton, or his accoutrements, which he saw in the house of Mr Murray, the innkeeper at Irvine, the defender, forgetting his duty to the pursuer, was dissuaded from arresting in security, and took Lechmere's verbal promise, and the verbal promise of Sir William Allan. . . . that Lechmere should appear at his house in Edinburgh on a certain day, when the charge given on the bill would have expired and ultimate diligence be in readiness for execution, failing payment of the debt." That Lechmere failed to appear. "That by the failure of the defender to arrest the horses and accoutrements of Lechmere, or otherwise to put said diligence in execution, the said defender failed in his duty as agent to the pursuer, and has rendered himself personally liable for the sum contained in said bill," &c.

In defence, besides other grounds founded on, it was pleaded that no relevant ground had been libelled, inferring personal liability against the defender.

The Lord Ordinary (Wood), found the libel relevant.

Baillie reclaimed.

Logan, (with whom the *Lord Advocate*) for reclamer. The defender could not have done the diligence which it is complained he omitted to do. As to his accoutrements, they were in Lechmere's room in the inn where he was staying, and therefore in his own possession. 2. Bell's Com., 17. In regard to the horses, although

in Lord Eglinton's stable they were not in his possession, so May 29, 1852.
as to be arrestible in his hands. *Nelson v. Smith*, Hume, p. 31.

Moncreiff (with whom *Donaldson*) for pursuer. Defender did Baillie.
not obey his instructions. *Chaplin*, 5th Feb. 1849. As to the
articles in the inn, they were in possession of the landlord. He
had a lien over them for the amount of his bill, and that lien de-
pends on possession. 2 Bell, 103, *Fraser*, 10th Dec. 1760, M.
749; *Brown v. Blackie*, 13 S. and D. 149, 26th November 1850.
Other diligence might have been done by the defender.

LORD PRESIDENT. There may be very nice questions as to the
circumstances in which arrestment may be competent or not ; but
when it is stated merely, that a party was at the tournament, and
the opportunity was to be taken of his being there of arresting
horses in the stable of Lord Eglinton, and accoutrements at the inn,
it would require some more statement in record to shew a case of
competency of arrestment ; and such a case is not here presented.
It is said, other courses of diligence might have been resorted to.
That is not a sufficient statement in a case of this kind. The
action would not have stood had it been laid thus, " instead of tak-
ing proper steps to follow out instructions, he did not take them,"
without stating the mode he should have taken. Therefore, as
the record stands, it appears to me the libel is not relevant.

LORD CUNINGHAME. I concur. As the record is now framed,
I am of opinion that no relevant action is libelled against the de-
fender. Taking the pursuer's allegations *pro veritate*, that the
horses said to have been Lechmere's were in the stables of Lord
Eglinton as a host, I apprehend that the best authorities in the
law tend to shew that the host cannot be made an arrestee, but
that the possession remains with the *guest*. At all events, the
law on this point is so unsettled and uncertain, that I cannot en-
tertain a personal action against a law agent for not using arrest-
ment, and taking his chance of what the debtor promised to give
within a few days afterwards.

LORD IVORY. I come to the same conclusion. The only point
in the case is the validity of the arrestments. In regard to the
arrestment, I think a man is entitled to take his ease at his inn
without being subject to such interference with articles in his
custody. I need not go into the question of lien farther than to
say, that possession sufficient to support lien is not sufficient to
support arrestment; *Cuninghame*, 5th Sept. 1848. In regard
again to the arrestment of the horses in the stables of the Earl of

May 29, 1852. Eglinton ; Lechmere was there as a guest, and the stables were open for all. But that it could be said that the Earl of Eglinton was possessor of them all, is to say, that no man can give hospitality without danger of being dragged into a law-suit, as the raiser of a multiplepoinding.

Hume v.
Baillie.

Interlocutor reversed.

John Young, S.S.C., Agent for Reclamer.
David M. Adamson, S.S.C., Agent for Respondent.

SECOND DIVISION.

No. 288.

SAMUEL v. EDINBURGH & GLASGOW RAILWAY CO.

Process—Expenses—Decree in Agent's name restricted—Partial Success in Action.

(Sequel of case reported, *ante*, pp. 16 and 737, Nos. 10 and 277.)

May 29, 1852. This case was again before the Court to-day for the adjustment of the question of expenses.

Samuel v.
Edinburgh
and Glasgow
Railway Co.

Patton, for the defenders, now moved the Court to correct an omission in the interlocutor, to the effect of allowing the expenses of the defender to be deducted from the amount of the pursuer's claim, for which decree had been allowed to go out in his agent's name, and to restrict the agent's decree to the balance. *Halliday*, 6. Shaw, 406.

Young, for the pursuer, admitted that the question of the expenses had been formerly allowed to be adjusted on the footing of the motion now made.

The COURT pronounced the following interlocutor :—

“ *Edinburgh, 29th May 1852.* — The Lords having heard counsel, and considered their admissions of what took place at the bar at advising, on the motion of the defenders, Find the defenders entitled to retain the sum of L.10 of damages to account of their expenses, and to deduct L.10 : 19 : 1, being the balance thereof from the sum of expenses found due to the pursuer, and restrict the amount thereof, for which decree is to go out in name of the pursuer's agent to L.161, 8s.”

J. F. Wilkie, S.S.C., Agent for Pursuer.
David Smith, W.S., Agent for Defenders.

SECOND DIVISION.

BROWN v. KIDSTONE and WATERS.

No. 289.

Patent—Publication—Prima facie title—Interdict.—A patent for an invention was not obtained for Scotland till some months after it had been obtained for England. In the interval a description of the invention had appeared in a magazine circulated in Scotland:—*Held* that this publication created such a *prima facie* objection to the patentee's title, that he could not interdict parties in Scotland alleged to be using the invention without a licence.

This was a reclaiming note against an interlocutor pronounced May 29. 1852. in the Bill Chamber, passing a note of suspension and interdict in the following circumstances: In January 1840 the late Samuel Brown obtained letters-patent applicable to England, for an alleged invention of a mode of manufacturing casks and other vessels, and in terms of the usual condition in letters-patent, he enrolled a specification of his invention in the Court of Chancery of England in July 1840. In November 1840 a Scotch patent for the same invention was applied for, and a specification was lodged in the Chancery in Scotland in reference to the Scotch patent in April 1841. But previous to the application for the Scotch patent, an account of the invention was published in the *Mechanics' Magazine* for August 1840—which work is in general circulation both in Scotland and in England. This interdict was now sought by the widow of the patentee against the respondents, who are merchants in Glasgow, on the allegation that they are using the patent without a licence, and so violating and infringing the pursuer's right as patentee, to her loss, injury, and damage. The respondents denied that they used the invention of Mr Brown, and they pleaded that even if they had used it in Scotland no relevant complaint could be made against them; because in consequence of the invention having been used and published in England, and also in Scotland, several months before the Scotch patent was applied for or obtained, the alleged patent for Scotland is void and null.

The Lord Ordinary on the Bills (Cunninghame) passed the note, holding that it was “a novel and hypercritical plea, that a publication of the specification in a magazine, taken from the English patent, annulled the Scotch patent if no one but the patentee used the invention prior to the recording in Scotland.”

The respondents reclaimed.

More and the *Lord Advocate* for the reclaimers, argued that the

Brown v.
Kidstone, &c.

May 29, 1852. doctrine laid down by the Lord Ordinary was opposed to the principle of the patent law in England. If a disclosure is made before Brown v. Kidstone, &c. a patent is applied for, the party is not entitled to take it out.

Wood v. Zimmer, Holt's Reports, p. 58, Bell's Commentaries, vol. i. p. 211; *Brown v. Annandale*, 8th July 1841, 3 D. 1189; House of Lords, 25th February 1842, 1 Bell, 70, and 8 Clark and Finnelly, 437; *Roebuck*, 8 Clark and Finnelly, p. 447, n.; *Sted v. Williams and others*, 8 Scott's Reports (new series), 29th June 1844, p. 449; *Carpenter and Smith*, Webster's Cases on Patents, p. 530. *In re Griffiths*, Hyndmarsh, p. 534.

Logan and the *Solicitor-General* were for the suspenders (pursuers.)

LORD MURRAY. I take the view maintained in the argument of Mr More and the Lord Advocate, but I think that the specification in England was only for the benefit of people in England: But still was not that a publication, and is it not to be treated as any other publication? If that be so, the person has himself to blame that he has not secured himself by getting a Scotch patent.

LORD MEDWYN. That may be a good view to take in disposing of the case, but we are not now at that stage. We are simply to regulate possession in the meantime, till the question be tried whether the patent be good or bad; and I think the party ought to adopt the plan which has been done before in this Court, where the respondent undertook to keep an account of his manufacture, until it be settled whether the claim of the patentee be good or bad. And I must say, that unless we actually come to the point of saying the patent is a bad one, the party ought to be obliged to keep an account. It may be that that tends to confusion; but it can only arise when the party using the patent is a wrong-doer, and therefore I think it is an important circumstance here that there is a way to adjust the rights of parties, not stopping any party from using the patent, unless we are prepared to say at once, that in consequence of the publication, the patent is good for nothing.

The LORD JUSTICE-CLERK. We are not in a case of the trial of this patent, and without expressing an opinion about it, we are asked at present to interpose by interdict to stop the works carried on by the reclaimer. And this raises the question, not whether there is here such a statement of use as appears to be a contravention of the patent, but whether in the circumstances disclosed there has been such a *prima facie* title made out as will entitle us

to interpose on behalf of the pursuer in the way we are now asked May 29. 1852. to do. It has for many years been laid down, by high and venerable authority in our Courts, that the fact of merely raising an action for the trial of a right, gives the pursuer a right to come to the Court and apply for interdict against any one whom he says is encroaching on his alleged right. I dissent from that doctrine altogether, as I have ever humbly resisted it, unless in circumstances of such a state of possession admitted by the defender himself, as imply a clear title, and so would justify us in interposing by interdict to prevent an encroachment on it.

Now there is a good patent in England, and the specification was enrolled in 1840. After the Union I hold that that was for the benefit of the whole lieges of the kingdom, and I hold that to be the result of the judgment in *Brown and Roebuck*. But we have the fact not disputed, that before the patent is taken out for Scotland there is publication of the invention in Scotland; a description of this manufacture is openly and distinctly given in a practical work. Now, where is the difference between publication and use in this case? The publication is to enable parties to use the invention as soon as their works can be altered to use it. Is therefore this patent so clear from all *prima facie* objection in the first instance, that we are to interfere to stop the works which it is said are using the invention? It may be shewn that there was not *mora* on the part of the patentee, the circumstances attending which may be important when the trial arises, but the case now comes before us in a worse shape than if there had been irregularities on points of form. The Court will not interfere in matters of interdict, unless the *prima facie* title be clear and unencumbered by reasonable difficulties, and not liable to doubt, whether it may not be ultimately sustained. Otherwise, the Court ought to abstain from doing any thing to support that title, as, by interdicting works from using the invention. I see no ground on which we can grant this interdict.

LORD COCKBURN. The scheme of adjusting this difference by saying the respondent shall keep an account, has certainly an air of plausibility about it, and indeed there are very few cases in Court that could not be disposed of in the same way. But when the party says, I deny your right to interdict me, and I will not keep an account, the Court will only interfere with interdict in a case *prima facie* good. Now I am of opinion that there is no such case stated here. The suspender complains that the patent in Scotland has been infringed. Very well. If he wanted his patent

May 29, 1852. to be respected in Scotland, he ought to have taken his patent out for Scotland. But he does not do so, but takes it out only Brown v. Kidstone, &c. for England, which is however like sending a man with a trumpet to every town in England to proclaim his invention. And now he says, I did this locally for England, and you Scotchmen have no right to open your eyes and ears as to what is done in the south; you have no right to know of my invention, far less to use it. This is the *prima facie* case before us, and I think the appearance of it is against interdict being granted.

The COURT therefore "alter the interlocutor reclaimed against, recal the interdict, and remit to the Lord Ordinary to pass the note."

D. J. Macbrair, S.S.C., Agent for Suspender.

George More, W.S., Agent for Respondent and Reclaimers.

OUTER-HOUSE.

Before LORD ANDERSON.

No. 290. JOHN HAY v. JOHN THOMSON and GEORGE BELL.
Process—Competency—Statute 50 Geo. III., c. 112, § 28.

June 1, 1852. The pursuer, as inspector of the poor of the parish of Edinburgh, raised this action against the defenders, the inspectors of Hay v. Thomson, &c. the poor of the parishes of St Cuthbert and Wick respectively, libelling that between the dates of 7th August 1851 and 28th January 1852, he had expended the sum of L.4, 7s. in alimenting a pauper who was legally chargeable against one or other of the parishes represented by the defenders. The summons, which was signeted on 23d February 1852, concluded, (1.) for repayment of the said sum of alimentary advances as already made; (2.) for any future alment which might be advanced by the pursuer; and, (3.) for declarator that either one or other of the defenders' parishes was bound to free and relieve the pursuer's parish of all future advances which might be made to the parish.

In defence it was stated for the parish of St Cuthbert that the pauper was apprehended for theft soon after the termination of the account of alment sued for, and, on 13th March 1852, was sentenced to seven years' transportation; that the action being for a sum far within the statutory amount of L.25, was incompetent in the Court of Session.

Donaldson, in support of the objection. In no possible circumstances could the pursuer's advance exceed the sum of L.4, 7s. already disbursed, as the pauper was apprehended before the action was raised, and has been transported for seven years. The other conclusions of the summons were therefore inapplicable to the case, which was simply one for payment of L.4, 7s. in the Supreme Court, and therefore plainly incompetent.

Shand for the pursuer. There are two good answers to the objection, (1.) the Supreme Court is the only court in Scotland in which both defenders could have been convened; and, (2,) in such discussions as to the competency of summonses, the conclusions of the summons are alone to be looked at, and here they go much beyond the simple demand for repayment of L.4, 7s. No part of the conclusions is inapplicable. It is quite possible the pauper may return, and become again a burden on St Cuthbert's.

LORD ANDERSON. I would willingly dismiss this case if I could, as the sum is so small. I am more moved by the first answer made by the pursuer to the objection than by his second. There are cases, I think, where it has been held that, if it is pretty clear that all that can be recovered is within the statutory amount, although the conclusions may be larger, the Court will not sustain the summons. But it is undoubtedly the practice to cess more parishes than one in cases like the present, and this can only be done in the Supreme Court, where, as in the present case, the parishes are not in the same county. On this ground I must repel the objection.

James Morgan, S.S.C., Pursuer's Agent.
J. R. Stodart, W.S., Defenders' Agent.

SECOND DIVISION.

CRAIG v. M'CUBBIN, OR CRAIG and MASON.

No. 291.

Expenses—Husband and Wife—Divorce—Compensation—Agent. — A husband raised an action of divorce against his wife on the ground of adultery, in which he was ultimately successful. Before circumduction of her proof, the defender raised a counter-action of divorce against her husband, which action was dismissed:—*Held* that the husband was entitled to set off against the claims of the wife for the means of carrying on her defence, the expenses found due under the counter-action, in which degree had gone out in name of the agent.

June 1. 1852. This was a question as to expenses arising under the following circumstances. During the month of November 1850, the pursuer, Thomas Craig, paper ruler in Glasgow, raised an action of divorce against the defender, his wife. The action proceeded on several acts of adultery committed by the defender at various times, and with different persons, particularly with a person named James Craig. A proof was thereafter allowed on the 17th January 1851, and the pursuer's proof was concluded, and the term circumduced against him on the 14th February 1851. On the 14th March following, the defender was ordained to report her proof by the then ensuing box day under certification. This she failed to do. The action at the instance of the husband was finally disposed of by the Lord Ordinary on the 17th June, pronouncing decree of divorce, and this judgment became final. On the 5th May 1851, before decree had been pronounced, the defender raised a counter-action of divorce against the pursuer, libelling various acts of adultery, especially with Agnes Craig, daughter of James Craig already mentioned. This action was dismissed with expenses.

With regard to the matter of expenses, the Lord Ordinary (Robertson), on the 17th March 1852, pronounced an interlocutor, in which he approved of the auditor's reports, and decreed against the pursuer for the sum of L.133 : 15 : 11, being the taxed amount of said accounts; but that under deduction of the sum of L.50, paid to account of said expenses in the course of the process, and the farther sum of L.25 : 10 : 4, for which the pursuer obtained decree against the defender in the counter-action of divorce, at her instance, and which the pursuer was found entitled to set off against the expenses found due by him in this process, and under these deductions allowed decree to go out, and be extracted in name of the agent disburser.

The defender and the agent reclaimed against this interlocutor, in so far as it allowed the pursuer to deduct the last mentioned sum of L.25 : 10 : 4.

Pattison and *G. Bell* for the reclaimers referred to *Dixon*, 17th February 1841; *Hinshaw*, 12th December 1846.

Macfarlane and *Buchanan* for the respondent cited *Graham*, 28th November 1826.

LORD JUSTICE-CLERK. On the whole, I am for adhering, solely on account of the specialties of this particular case. I should be sorry to hold that in all such cases the expenses re-

covered by the husband necessarily form a deduction from the wife's June 1. 1852. claim for the means of carrying on the case. Neither do I mean to countenance the plea of the wife that this question might have been excluded by the husband giving the requisite sums, from time to time, regularly. I think it very important that the agent has a claim against the husband, and is not even bound to receive payment from his own client, as this puts him under obligation to conduct the case properly, instead of indulging his client in the luxury of wanton and useless litigation. Now this is a very particular case. The action is brought on the ground of adultery with several persons, among others one of the name of Craig. We must now hold that this was the fact, for decree has been pronounced, and has become final. During the progress of the case there is no plea of recrimination, whatever the relevancy of such a plea might be. Yet with whom does she say that the adultery on the husband's part was committed? Why, with the daughter of this man Craig. Surely she might have found out from her paramour that his daughter had committed adultery. But here, before circumduction of her term of proof in the first action, she raises this other action of divorce by means of the same agent. It is clear that this could be done only for the sake of annoyance. We must assume that the fact on which she founds might have been known a great deal sooner.

LORD MEDWYN was of the same opinion.

LORD COCKBURN. I concur; but I do not approve of the judgment being rested entirely on the specialties of the case. Perhaps it may be safe in general to rest on specialties, but I will not say that on the general question my opinion would have been different. The husband here brings a just and well-founded action. Instead of confessing, the wife makes a defence and receives expenses. This is hard enough in any case, but in such cases as the present, cannot, perhaps, be avoided.

LORD MURRAY also concurred.

The COURT pronounced the following interlocutor:—"Refuse the prayer of the reclaiming note, and find William Mason, S.S.C., one of the reclaimers, liable in the expenses of this proceeding, and remit to the auditor to tax the same."

John Leishman, W.S., Agent for the husband.

William Mason, S.S.C., Agent for the wife.

SECOND DIVISION.

No. 292.

NORTH BRITISH RAILWAY Co. v. JOHN HAY.

Railway—Statute—Compensation—Interdict.—1. Circumstances in which, after two previous arbitrations, the Court refused to sustain a third claim at the instance of a tenant whose farm had been intersected by a railway.

2. Specification of certain alleged grounds of damage which was found insufficient, and a minute ordered, containing more detailed explanation.

3. Interdict granted against a claimant to prevent his taking steps to follow out his claim of damages by proceedings before a jury under the Railway Acts.

June 3. 1852. This was a conjoined process of suspension and of declarator at the instance of the North British Railway Company against North British Railway Co. v. John Hay, farmer at Halfakell, in the county of Edinburgh. Hay.

The facts appeared to be these :

In the construction of the Edinburgh and Hawick line, afterwards incorporated by statute with the North British Railway, it became necessary to pass through the farm occupied by Hay. In virtue of the provision of the Lands' Clauses Consolidation Act, that in cases of dispute between the parties, the amount of compensation for land taken or affected during the railway operations may be settled by arbitration, the Railway Company and Mr Hay entered into a submission, of date the 5th and 7th January 1846. In this submission the matters in dispute were referred to certain arbiters, "for the purpose of determining the claims of the said John Hay against the said Company, with the whole powers and under the provisions contained in the said Act of Parliament," reserving to the tenant his claim against the landlord for deduction of rent. By the decreet-arbitral following on this submission, the arbiters, on the 2d April 1846, found Hay entitled to various sums for intersectional damages, for loss of shelter, for the hay crop, and for unexhausted manure and lime.

It was afterwards found that additional land would be required for the purposes of the railway, and accordingly the claims of the tenant for damages subsequent to the date of the previous submission, were referred to the same arbiters. In a very elaborate and careful decreet-arbitral, of date the 29th April 1847, embracing a great number of articulate findings, they found Hay entitled to various sums for damage done to the several fields, to

drains, for unexhausted manure, occupation for spoil-banks, and June 8. 1852.
from injury by carting, and by the cutting off of water-springs.

The tenant thereafter, on the 6th December 1850, served a notice on the secretary of the Railway Company, in which he claimed a further sum of L.1281 : 19 : 6 as still due to him, and which he set forth under three distinct heads,—viz., 1st, Value of the stock destroyed by the Railway Company prior to November 1847, enumerating several scores of sheep so destroyed; 2^d, Damage done to the water springs; 3^d, Permanent damage, with regard to which the tenant explained that his farm was composed of two kinds of pasture land, suitable respectively for summer and winter grazing—that by the intersection of the railway, those two portions were separated, that the sheep would not cross at the bridges without bounding and driving, and were never allowed to settle—the result of which was great loss to the claimant, by his being obliged to keep what was called a *flying* stock instead of a permanent one. These claims Hay required to have adjusted by a jury. In order to protect themselves against the penalties imposed by sections 36 and 37 of the Lands' Clauses Consolidation Act, the Railway Company, while denying their liability, presented a petition to the Sheriff, in which they maintained that the claim was wholly incompetent to form the subject of trial by jury as proposed. They then presented the note of suspension with which the process of declarator was subsequently conjoined. The conclusions in the action of suspension were for interdict against Hay taking, or attempting to take, any steps for obtaining a jury trial before the Sheriff under the Lands' Clauses Consolidation Act, or from anyways proceeding with his alleged claim. The summons of declarator concluded that the defender had already received full compensation under the previous awards. The claim under the second head was subsequently settled by the Company.

The Lord Ordinary (Robertson), on 20th March 1852, pronounced an interlocutor, recalling the interdict, and finding substantially in favour of the defender.

The Railway Company reclaimed.

Penney was for the reclaimers.

Macfarlane and *Lord Advocate* for respondents, referred to *Lawrence v. The Great Northern Railway Company*, Feb. 22. 1851, 6 Railway Cases, p. 656.

The LORD JUSTICE-CLERK. The question raised under the

June 3. 1852. last branch of the claim is an important one, as affecting submissions generally in such cases. This Court alone must decide what North British Railway Co. v. is the effect of the previous awards on the present claim. Here Hay.

the period at which the claimant might enforce his claims was very much at his own discretion. Railways in general are not prone to force on such questions, and the tenant, had he so chosen, might have waited until the full effect of the railway on his farm could have been seen. But he must have foreseen the general damage resulting from intersection by the railway, or from want of shelter so caused, and this he ought to have stated originally, or to have specially reserved and excepted. Here there is no such reservation or exception. There are two submissions, one nearly a year after the other. The tenant's attention must have been turned to the subject, and he might have brought under the second submission anything which he had omitted under the first. A suggestion was made that the arbiters should be examined, and that inquiry should be made of them, whether the damage now claimed was submitted to them, and whether or not they took this into account. I do not think such a course has ever been admitted. Arbiters may have been examined as to what they did during a submission, but it has not been ascertained whether they can be examined in an action of reduction of their decree. To allow an arbiter after the lapse of years, to be examined whether a particular claim was stated, and if not, what he would have done if it had been so stated, is a perilous proceeding. I do not say that a case might not occur where a new claim might competently be brought under these statutes, but it is unnecessary to decide the point here.

LORD MEDWYN. I entirely concur. No doubt it would be rash to say that there never can be grounds for such a second claim after there has already been one arbitration, because, what is the subject of the one may not have been the subject of the other; but here Mr Hay knew what sort of farm he had; he knew, or might have known the effects of its intersection by the railway; he might have reserved this claim, but the only reservation is that of his claim against the landlord; it would be dangerous to admit such claim of *piece meal* damages.

LORD COCKBURN. I concur. A practical man like the claimant must have seen the effect of severance of his farm by the railway—he must have been blind if he did not. I must add, that I think the policy of the law is, that a railway passing through a person's property, does not pay merely for getting through, but

also for being let alone, and not incessantly tortured by new demands.

LORD MURRAY also concurred.

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Railway Co. v.
Hay.

The COURT therefore pronounced the following interlocutor :—
 “ Alter the interlocutor of the Lord Ordinary in regard to the third head of the notice of claim against the reclaimers: Find that this Court must decide what was the extent and legal effect of the submissions and decreet-arbitrals, and whether the said third head of the claim can competently be insisted in after such submissions and decreet-arbitrals: Find and declare that the submissions and decreet-arbitrals referred to embraced all claims which the respondent could state as permanent damage during the currency of his lease, and that the third head of the claim is not now competent. And in the suspension and interdict, interdict, prohibit, and discharge the said John Hay, respondent, and all others acting under his authority, or for his behoof, from taking, or attempting to take any steps for obtaining a jury trial before the Sheriff under the Lands’ Clauses Consolidation (Scotland) Act, 1845, for the settlement or ascertainment of the third head of his alleged claim against the complainers, contained in his alleged notice of claim, bearing date 6th December 1850; and regard to the first head of said claim, before further answer, appoint the respondents to lodge a minute, stating explicitly in what manner and at what time he avers that the stock mentioned in that head of his claim was destroyed by the operations of the Railway Company, and by what operations of the Company, and the different portions of said stock therein mentioned, so severally destroyed, and on what portions of the lands.”

David Smith, W.S., Agent for Complainers.

William Hunt, W.S., Agent for Respondent.

SECOND DIVISION.

BELL v. STEWART.

No. 293.

Jurisdiction — Foreign — Nexus — Arrestment jurisdictionis fundandæ causa.—The subsistence of an action of multiplepoinding, in which a defendant not resident in Scotland has lodged a claim, is not sufficient to found jurisdiction against him at the instance of a third party not connected with that action, nor does it supersede the necessity of an arrestment *jurisdictionis fundandæ causa* at the instance of that party.

June 4. 1852.

Bell v.
Stewart.

The present action was brought against the defender, Charles Stewart, described as sometime residing in Canongate, thereafter residing in Pleasance, Edinburgh, and now in Manchester, or elsewhere in England. The object of the action was to constitute a debt alleged to be due by the defender, of the nature of promissory notes, or I O U. The defence was a plea of no jurisdiction. There had been no arrestment *jurisdictionis fundande causa* at the instance of the pursuer. On the other hand, it appeared that the defender had been born in Scotland, that he at one time resided there, and that the debt was incurred in that country. It farther appeared that the defender had an interest in certain heritable property, under a trust deed executed by his father and mother, by which they conveyed the heritable property to trustees, but under express directions to sell, in order to its distribution among the beneficiaries, of whom the defender was one. The defender had subsequently executed, in favour of his creditors, a disposition *omnium bonorum*. Besides this, he along with his brother and sister, had appeared as a claimant in an action of multiplepoinding, raised by the trustees under his father's settlement, with reference to certain proceeds of the trust estate which had accumulated in their hands, to which the father had right, if he were still alive, but to which the beneficiaries under the trust had right, if he were dead. It was on this latter point that the pursuer principally rested his answer to the plea of no jurisdiction. The Lord Ordinary (Rutherford) sustained the defence, and dismissed the action.

Bell reclaimed.

Pattison and *Lord-Advocate* for the claimer, argued that the dependence of the multiplepoinding, and the defender's claim in it, were sufficient to support the jurisdiction of the Courts here. The multiplepoinding fixed in this country the property which was the subject of the action, and thus accomplished the purposes of, and was equivalent to arrestment *jurisdictionis fundande causa*, which therefore became unnecessary, since the jurisdiction as regards the property in respect of the legal *nexus* was good without it. Ersk. I. 2, 19, and Notes; *Mansfield*, 17th June 1795, M. 2594; *Ashton*, 17th June 1773, M. 4835, and 1 *Hailes*, 526; 2 Bell's Comment., p. 68; *Millar v. Ure*, 23d June 1838, 16, *Shaw*, 1204.

J. Shaw and *Macfarlane* for the defender (respondent). It is not now contended that the defender has heritage in Scotland;

his interest is only personal, capable of being arrested, which tests June 4, 1852.
its nature. The plea of reconvention will not avail here, as *Bell v. Stewart.*
the pursuer can establish no connection between himself and the defendant's claim in the multiplepoinding,—besides it may turn out
that no part of the fund in that action is due to him. There
is no ground for the plea, that because some one has estab-
lished jurisdiction, therefore any other person has a right to
found on this. The fund must be fixed for the purpose of that
particular suit; *Smyth*, 16th November 1826; *M'Arthur*, 12th
January 1842; *Cameron*, 9th March 1838.

LORD MEDWYN. At one time, in the course of the argument, I was afraid that the interlocutor in this case might be running counter to the principle recognised in the case of *Mansfield and Co.* in 1705, and did not properly carry out the effect of that judgment, which I hold to be one of the most important and leading cases in our law. It was a unanimous judgment at a time when the Bench was occupied by very able Judges, the President (Hay Campbell), Justice-Clerk Braxfield, Eskgrove, Dreghorn, Methven, and Glenlee, and the rule laid down in the case of claimants in a multiplepoinding has been followed ever since. The same effect thus has been given to a moveable fund for distribution when *in manibus curiæ* in favour of parties called by the raiser of a multiplepoinding, as having, or pretending to have, a claim to it, as has now been given to the owner of an heritable estate in this country, that he need not be convened as a foreigner by a previous arrestment to found jurisdiction.

In the case then of a multiplepoinding for the distribution of personal property, which, by the process of multiplepoinding, has been fixed in this country, and is understood to be *in manibus curiæ*, if not actually consigned, the practice sanctioned by the Court in *Mansfield's* case has been, in so far as regards the parties called to establish their claims against these goods, followed, especially in the recent case of *Miller v. Ure*, 23d June 1838, by Lord Moncreiff, as distinctly expressed in his note, referring also to 2 Bell, 68, "as superseding the necessity of an arrestment to found jurisdiction where the sum or goods claimed are already the subject of a multiplepoinding," but it is confined to such a case so as not to be extended to a question of *status*, *Scruton v. Gray*, 1st December 1772. It is an exception from the general rule, and is not to be extended beyond what can be shewn by practice and precedent.

June 4. 1852. Now I am satisfied that it would be an extension of this rule fixed, as to direct and immediate claimants in a multiplepoinding, to allow this party, for he is not a comperear in the multiplepoinding, to have the benefit of this rule. Mr Bell can state himself only as a creditor of the claimant, and proposes to constitute his debt against one, who, *quoad* him, is a foreigner. This foreigner may have a claim to funds on which there is a *nexus*, in competition with other claimants, and may be properly called to pursue that claim, but his creditor as yet cannot appear with his riding interest on the claim of his debtor, till he constitutes his claim; and it is difficult to see how he can obviate the defence available *quoad* him, that the defender is a foreigner not subject to the jurisdiction of our Courts at his suit, without first founding jurisdiction against him by arrestment. No doubt if an agent be employed by a foreigner to pursue or defend him, in a suit in this country, he may be entitled, on the principle of reconvention, without using arrestment, to found jurisdiction to pursue his client for the expenses incurred; but the Court refused to extend this privilege to the agent in a sequestration against a foreign claimant in the sequestration, who had given no special authority for him to act, and in the absence of the party as not duly cited, most properly, even allowed the arrestee to protect his right, *Smyth* 16th Nov. 1826. But Mr Bell's debt does not arise from his being agent of his alleged debtor in the multiplepoinding. His claim arises on other grounds quite unconnected with the proceedings under that process, and therefore can derive no aid from them. We are not arrived merely at the point when we are to consider whether the riding interest should be sustained; we are but *in initio litis* in the constitution of the claim, the competition in the multiplepoinding may be at an end long before decree is obtained in this process, and the subject may have vanished, and been carried abroad or assigned away; there may be no interest to ride over, and therefore it may never come to be considered what effect should be given to the claim against the fund in this multiplepoinding, and the case of *Home's Trustees*, v. *Ralston's Trustees*, 13th June 1834, shews that such a riding interest is not admitted as a mere matter of course. It must be constituted in the first instance against a debtor liable to the jurisdiction of this Court at the instance of the pursuer, and how this can be without previous arrestment I do not see. I am therefore for adhering.

LORD JUSTICE-CLERK. I am decidedly of the same opinion. I never could see the application of the case of *Mansfield* to the

present case. There is no authority to support so singular a doctrine as that a party by his appearance in a suit subjects himself to any party or to any claim that may be made against him by a perfect stranger. We never can dispense with what has always hitherto been considered necessary, viz., *arrestment jurisdictionis fundande causa* not merely to fix the fund in Scotland, but to fix it for this party, and for this particular suit.

LORDS COCKBURN and MURRAY concurred.

The COURT therefore adhered to the interlocutor of the Lord Ordinary, with additional expenses.

James Bell, S.S.C., (Party) Agent for Pursuer.

John Murray, Jr., S.S.C., Agent for Defender.

HOUSE OF LORDS.

DYCE, *Appellant*, and LADY JAMES HAY, and LORD JAMES HAY, *Respondents.*

No. 294.

Servitude—Usage—Walking and Recreation—Title.—A right for the inhabitants of a town to use a private ground for walking and recreation cannot be prescribed for. This house therefore affirmed an interlocutor of the Court of Session, refusing an issue to try whether such a right had been acquired by use. Query if inhabitancy without residence will give a sufficient title to a claimant to sue for such right.

This was an appeal against two interlocutors pronounced by the Second Division of the Court of Session, in an action of declarator at the instance of the appellant, as one of the magistrates of the burgh of Old Aberdeen, against the respondents, of certain privileges or rights of servitude in and through a particular stripe of ground on the banks of the Don, in the vicinity of Aberdeen.

As originally framed, the claim in the summons was made not only on behalf of the inhabitants of the burghs of Old and New Aberdeen, Bridge of Don, and vicinity thereof, but of the public generally. But it was amended and restricted, and after alleging a right of public way, used and enjoyed as such through the grounds of Seaton, the property of the respondents, now concluded for declarator of the privilege or right of servitude claimed on behalf of the pursuer and the other inhabitants and heritors of Aberdeen, Old Aberdeen, village of Bridge of Don, and the vicinity thereof, or of Old Aberdeen, separately or in conjunction

Dyce v. Lady Hay, &c.

May 25. 1852. with one or more of these places, for the purposes set forth in the
subjoined issue.

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To the amended summons defences were lodged for the respondents, denying such right as claimed ; and the action having been remitted to the issue clerks, two issues were prepared. The first of these issues related to the alleged right of public way, and that issue was not now in dispute. The other issue was in these words, " Whether, for forty years prior to the said 1st of February 1848, or for time immemorial, the river bank or piece of ground lying between the river and the southern margin of the ground referred to as said footpath or road, inclusive of the space referred to as the said footpath or road, from, at, or near the said Balgownie Bridge up to a place on the said bank, a short way below the mansion-house of Seaton, and opposite, or nearly so, to the house of Kettoch's Mill, and at which place there is now, and has been for a long time back, a rough fence or paling across the said bank, with a gate or turnstile, or other passage for foot-passengers, being a distance or stretch of 823 yards or thereby, or some other, and what portion of the said distance has been resorted to, possessed, and enjoyed by the inhabitants and heritors of Aberdeen, burgh of Old Aberdeen, village of Bridge of Don, and the vicinity thereof, or of Old Aberdeen separately, or in conjunction with one or more of these places, for the purpose of recreation, and taking air and exercise, by walking over and through the same, and resting thereon, as they saw proper ? "

An objection was raised to this issue, and the matter was brought before the Lord Ordinary, who reported it without any opinion to the Lords of the Second Division. Their Lordships afterwards pronounced an interlocutor disallowing this second issue, and repelling the conclusions of the summons, in so far as it concludes, that " it should be found and declared that the portion of river bank or ground therein described, being the whole river bank or piece of ground lying between the southern margin of the ground referred to as said path, and the river, and extending as therein specified, is open to the pursuer and others therein mentioned, and that they are entitled, and have the right at all times to enjoy and recreate themselves thereon, in manner and to the effect therein stated, without let or hindrance from the defenders ; and that the said right and privilege should be reserved entire, as they are alleged to have been in time past, for the convenience, comfort, recreation, and health of the pursuer and othersforesaid, their families and dependants."

From this interlocutor, and a subsequent one decreeing for ex-^{May 25, 1852.} penses in favour of the respondents, this appeal was now brought.

Rolt, Q.C., and *A. J. Johnston* for the appellants. It is said ^{Dyce v. Lady Hay, &c.} that the servitude claimed by the appellants in this case is not known to the law of Scotland, and the first question to determine will be, whether such a right of servitude is maintainable, and the next question, whether the appellant, as an inhabitant of Old Aberdeen, has not a good title to sue for the servitude in question. With regard to the first question, that must depend on usage and prescription, for which there is the authority of institutional writers. *Lord Stair*, B. 2, tit. 7, sec. 1, 2, 9, and 13. *Erskine*, B. 2, tit. 9, secs. 2 and 3. *Bell's Principles*, secs. 979 to 993. In the present case, the town of Aberdeen is the dominant tenement, and it is for the use of such that the right is claimed, and to that it is sufficiently limited. Servitudes are as various as the ways by which property can be burdened, and it is not necessary that the particular servitude in question should have been previously known in law, in order to establish the right. This is illustrated by the case of *Sinclair v. the Magistrates of Dysart*, Mor. Dict. 14519, where a servitude of the liberty to bleach clothes on the property of the appellant was held by this house to be capable of being acquired by the inhabitants of the town of Dysart, by immemorial use and possession. A similar case to the present is that of the *Magistrates of Dundee v. Hunter*, 6 Dunlop, 12. The cases of *Home v. Young*, 9 Dunlop, 286; *Cleghorn v. Dempster*, 2 Dow, 40, are authorities to shew that a claim *spatiandi*, or of recreation over ground belonging to a neighbouring proprietor, is recognised by the law of Scotland; and *Abbot v. Weekly*, 1 Levinz. 176, where a custom for the inhabitants of a vill to dance in the plaintiff's close for their recreation, was holden in the English Courts to be a good one. Next the title of inhabitancy of the dominant town, gives the appellant a sufficient right to sue for the privilege in question. *Mercer v. Reid*, 2 Dunlop, 520; *Thorburn v. Charteris*, 4 Dunlop, 169; *Aikman v. the Duke of Hamilton*, 6 Wilson and Shaw, 64.

Anderson, Q.C., and *Pirie* for the respondents. The question as to the character of the servitude claimed, and the question as to the title of the appellant to sue for it, may more conveniently be considered together. A servitude of the nature here claimed, which is that to a right of recreation for the inhabitants of a town, by walking over and resting on the private grounds of a party, is a right not known to have been acquired by use. *Rodgers v.*

May 25. 1852. *Harvie*, 4 Murray's Jury Cases, 25, *per* Lord Moncreiff in giving his opinion in *Ferguson v. Sheriff*, 6 Dunlop, 1373, *Marquis of Breadalbane v. Macgregor*, 7 Bell's Appeal Cases, 43. There is a great distinction between the case where the servitude is sought to be established by a specific grant, and where it is attempted to be established only by usage, and this distinction will explain many of the cases. *Bell* in his *Principles*, 979, observes, "that within the description of a servitude, the law does not recognise many privileges or uses of property, which may be perfectly competent as the subject of personal contract." The case of *Dempster v. Cleghorn*, cited for the appellant, depended on an express contract. As regards the question of title to pursue, the case of the *Fewars of Dunse v. Hay*, Mor. Dict. p. 1825; and *Fitch v. Rawling*, 2 Henry Black, 393, shew that the title of inhabitancy of a burgh is not alone sufficient to maintain the present claim.

Rolt, Q.C., replied.

LORD CHANCELLOR. My Lords, in this case a very important question of law has been very well argued at your Lordships' bar, and now calls for your Lordships' decision. The right as originally claimed in the Court of Session, was by Mr Dyce who represented himself as being at present one of the magistrates of the burgh of Old Aberdeen, against Lady James Hay and Lord James Hay her husband, and the claim was of this nature. [His Lordship here stated the pleadings, and the proceedings in the Court below.] Now, my Lords, before your Lordships enter into an examination of the particular law which is applicable to this case, it will be necessary to consider the general nature of the right which is claimed. The property over which this right is claimed is an enclosed piece of ground. It is near the mansion-house and it is asserted by the appellant himself, and he means to try that right, that there is a right of way through it; whether it can be maintained or not is for a jury to decide; but it accounts for the public having had access to that particular field. Now it is just exactly that piece of ground upon which naturally and almost inevitably encroachments would be made, because the piece of ground, extending in length about half a mile, is of very moderate breadth, between the footpath and the river Don. It is of very moderate breadth in some places, I believe not more than a couple of yards or some such thing, in some places twenty yards, but varying in breadth; now therefore, nothing could be so easy as for persons going along the property to wander down to the edge of the river, on so narrow a piece of ground as divides the river from the foot-

path ; but it is an enclosed piece of ground, and that is not denied. May 25. 1852.
The pursuer puts his right simply and only upon inhabitancy. [—]
Now I have seldom seen a case better reasoned from the Bench, or more elaborately considered, than the present case ; and the Judges in the Court below stated (in which I entirely concur) that although this right as first claimed is restricted, yet that the restriction cannot alter the nature of the right when you look at the number of persons, some hundreds of thousands for example, for whom this right is claimed, with their families and dependents, and the nature of the ground. It is in effect a demand on the part of the public generally, to resort for recreation, exercise, strolling and lying down particularly ; for when they walk or tire themselves they claim a right of reposing themselves on the surface of the soil ; in that respect I think it varies from a great many, and indeed from all the cases that have been decided on the part of the appellant. I have not really heard a single authority cited, except that only case in which the point was not in fact decided, to which I shall call your Lordships' attention, and I am not aware of any authority which goes to establish this universal right. Your Lordships have been pressed very much with the case of the right of playing golf, but in that very case, although it is a pastime and healthful exercise, which the Courts would be inclined to cherish, it was established with difficulty by the law of Scotland ; and where the right has been shewn to have been exercised over the whole of a piece of ground, the Court, by its own power, has restricted the exercise of that right within boundaries and limits, and has ordered those limits and boundaries to be defined and set out ; and it is singular enough, that in this very case the appellant admits that this right may be restricted by the Court ; so that the claim is a general right to walk on the whole of this ground, and to repose on it and so on, with a power in the Court of Session to tell them in what direction they are to go and in what position they are to repose. That is the sort of right which is claimed.

Now, my Lords, before I enter upon the cases, there is one thing upon which I must particularly guard myself, and beg anxiously that it may not be understood that any opinion is expressed by this House adverse to that right, to which the right in question in this case has been improperly assimilated, I mean the public right of village greens and village play grounds, and such matters, which have been dedicated to the public. It is clear that the law of Scotland in this respect agrees with the law of England. Nobody can suppose that such rights can at all be affected by

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May 25. 1852. any decision at which your Lordships may arrive in regard to the right now claimed. There are a good many cases which I think also we should take care to except, and which in point of fact have no real bearing upon this case. Some of the most important cases which have been relied on, are cases in which the property belonged to a corporation, in which persons claiming under, and as part of the corporation, have claimed certain rights, that is, *inter se*, they say, this property belongs to us all, who represent the inhabitants; we the inhabitants, have certain rights of playing games and of easement or servitude; we have these rights as against you the corporation; you are trustees in effect for us. That has nothing to do with this case, which is the case of a corporation claiming a right in another man's soil adversely to him, not connected with it, having no more connection with Old Aberdeen than any other property which may happen to be at a distance from Old Aberdeen. Very considerable arguments have been pressed upon your Lordships, upon whether it is possible for Mr Dyce to represent the persons on behalf of whom he claims; whether looking at the law of Scotland, which in that respect differs from the law of England, he can be considered as having this dominant tenement which will apply to the servient tenement and give the right. I think your Lordships need not go into that point, because the decision upon the general point renders it unnecessary; but there is that question and a great many other questions, which it would be necessary for your Lordships to decide, and a very grave question as regards the appellants' title, if your Lordships were about to decide in favour of the appellant, and against the judgment of the Court below.

Now, my Lords, with these observations I will at once proceed to call your Lordships' attention to the authorities. The main authority, and indeed the only one in support of the appellant's case, is the Dundee case. The facts of that case are very simple. The lands of the proprietor of the estate of Blackness surrounded the piece of land in question on three sides, and the other side went down to the river: he said, I am entitled under an infestment, but that infestment is subject to a reservation to the town of a right of walking over it. Nobody doubts that you may reserve such a right, and no body doubts that you may if you please grant such a right. The inhabitants of Dundee said, no doubt we go over it, but we go over it as our own property, and we claim the right. The Court said, you, the inhabitants of Dundee, have not established any right be-

yond that which is admitted and is not claimed adversely to you, May 25. 1852. but the owner of the soil claims the soil subject to that very right; ^{Dyce v. Lady} you are entitled to that right, which he admits is your right with Hay, &c. the reservation, and you are entitled to nothing more. I consider therefore that case is deciding nothing on this ground. It shews that such a right may exist under a reservation. It does not shew that such a right could be established adversely unless on the infestment or the reservation, and I am not at all prepared to say that if the proper forms were adhered to, such a right may be granted; but I may here observe that it does not follow that because a right may be granted that is, that it is grantable by law, therefore it may be prescribed for; it is something to shew that a man may have done such an act, and it is another thing to find the right in what he may be supposed to have done.

My Lords, I am not aware of any other authority which really bears on this case on the part of the appellant. Your Lordships were very much pressed with the case of *Holme v. Young*. It does not touch the question; it shews generally what the law of Scotland is, but it does not touch this question at all. I entirely agree with the learned Judges below in what has been decided before this case in this respect. I think that there is nothing in the law of Scotland which prevents what are called new lights from coming under an old principle; and, therefore, the case of bleaching, which, because it was a new process, was in the first instance held to give no right in a case of this sort, was ultimately held, I think, to fall within the same rule as other proper easements; and, therefore, the law of this country and the law of Scotland frequently is enabled to adapt itself to changes in the circumstances of mankind, without doing violence to its original principle and rules; and although the case is a new one, that of bleaching, it falls within the same principle. But this, as I have observed, is an argument that cannot apply to this case, because nobody supposes that recreation, taking air and exercise, is any particular novelty or invention.

My Lords, the authorities on the other side appear to be as conclusive for the respondent as the appellant is destitute of any authority in his favour. The first case to which I would refer your Lordships is the case of Dunse, and there it was held that in Scotland a general right could not be maintained by inhabitants of a town generally to pasture on land. That, so far therefore as it goes, is in favour of the restriction of these rights.

Now the case of the *Marquis of Breadalbane v. Macgregor* is

May 25. 1852. an important case also on this subject. There you may say the right was claimed for the whole world ; in point of fact every body coming from the north to the south might claim a right to certain resting stances on a drove road, which, it was not contested, belonged to Lord Breadalbane. They said that the distance was too great for their cattle to travel without rest, and that therefore they were entitled to stop at convenient distances ; in point of fact, to depasture their cattle on the land adjoining the stances wherever it was necessary. The Court of Session so far gave way to that as to send it to an issue for trial by jury ; but your Lordships' House, upon very sufficient reasons, as I apprehend, decided that no such right existed ; that a mere right to use the road would give no possible right to have abiding places on the road.

My Lords, the next case is an infinitely stronger case, and is a clear decision, I consider upon this very question, I mean the case of *Harvie v. Rodgers*. Now, it appears by the report that the general right was not admitted to be tried, and the particular right was admitted to be tried ; and therefore there is no doubt, that as far as it appears, the right in question now claimed was not admitted. Lord Moncreiff, who was himself counsel in it, has made observations on that case, which entirely give an answer to the case as reported in the Jury Reports, (his Lordship here read passages from Lord Moncreiff's opinion in the case of *Fergusson v. Sheriff*, 6 Dunlop, 1373, in which he remarks on *Harvie v. Rodgers*.) It is clear that was a direct decision of the Court of Session against this right, and that decision was acquiesced in, and never brought by way of appeal to your Lordships' House.

My Lords, some important observations were made by Lord Eldon upon the right of servitude, which was claimed in the case of *Dempster v. Cleghorn*, 2 Dow, 40, and which was of playing golf over certain property, from which it is quite clear, that without laying down the rule of law in any distinct manner, the impression on the mind of Lord Eldon was, that no such right could be claimed as would be inconsistent with the rights of property. There can be no doubt that certain persons may obtain a right by prescription to play certain lawful games on another man's soil ; but whether you can have a right by prescription, which shall go to the extent of depriving a man of the soil which belongs to him, is quite another question. I have already said that it might be the subject of grant ; but if it is the subject of grant, does it therefore follow that it can be prescribed for ? Certainly not ;

because we establish a prescription, you must not be merely satisfied that the man had the ability to do the act, but also that it is an act which the party has done; but who can come to the conclusion that a man has made an indefinite grant to let in the whole of the public upon an inclosure near to his own house, for the purpose of their possession and enjoyment? It is inconsistent with the exercise of the rights of property; and although the Courts would be compelled to give effect to an actual sale of the right, yet the Courts would not admit a right of prescription which would go to defeat the right of the party who is entitled to the soil.

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Now, by the law of Scotland, these rights are much more circumscribed than they are by the law of England. It has been held that there can be no right to an easement in Scotland to give a man a right to fish for trout off the land of another in a navigable river. No doubt there may be such a right in England; therefore the law of Scotland is more stringent than the law of England, and the law of Scotland does what could not be done by the law of England. It restricts the right, which I think is a very strong argument against the general right here claimed. The appellant himself says he is willing to have it restricted; and it appears to me that that admission weakens his case—he could not help making the admission—but I think your Lordships will arrive at the conclusion that it would be utterly impossible to maintain the right, and at the same time to restrict it to any particular portion of this strip of land.

My Lords, the appellant, at the close of his case, brings to his aid the law of England, which he says is the same as the law of Scotland. I think he is mistaken. By the law of England the inhabitants of a town or place cannot prescribe for any easement generally in the soil of another. They may support it by custom—the custom becomes the law of the place—but then the custom is not to be supported at all unless it be a good custom and a reasonable custom; and they have therefore to shew that the right which they claim is reasonable. However, this case must stand or fall according to the law of Scotland, and I know that your Lordships will so far abide by that advice which it falls upon myself on this occasion to give, as strictly to decide this case upon the law of Scotland; and upon that law, as I understand it, I advise your Lordships to dismiss this appeal, and to affirm the interlocutor complained of.

May 25. 1852. Interlocutors affirmed with costs.

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Dyce v. Lady Hay, &c. | <i>Dodds and Greig, London; and
Lockhart, Morton, Whitehead and Greig, W.S., Edinburgh,</i> | } | Agents for the Appellants. |
| | <i>James Ross, S.S.C, Edinburgh; and James Davidson, Essex Street, London,</i> | | |

COURT OF SESSION.

FIRST DIVISION.

No. 295. Petition, SIR THOMAS BUCHAN HEPBURN, Bart.

11 and 12 Victoria, c. 36—*Entail Amendment Act—Petition to apply consigned Money—Heir born during Proceedings—Intimation.*—Under a petition to apply consigned money, intimation had been duly made to the three next heirs of entail: Subsequently an heir was born entitled to succeed second under the entail:—*Held* that intimation of the petition must be made to the new heir, and a tutor *ad litem* appointed.

June 4. 1852. This was a petition to apply money consigned by the North British Railway Company, as the price of land taken from the entailed estates of the petitioner.
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 Pet. Hepburn.

The Lord Ordinary (Cowan,) to whom the petition had been remitted, reported that at the date of presenting the petition and the remit to his Lordship, the heirs called under the petition were the petitioner's son and two daughters, who were the three next heirs entitled to succeed under the entail at the date of presenting the petition; that subsequent to the presenting of the petition, and the remit to his Lordship, a second son had been born to the petitioner, who thus comes to be the heir second in order entitled to succeed under the said entail. His Lordship referred to secs. 3 and 36 of the Entail Amendment Act, and intimated his own view to be that there was no necessity for calling the heir who had thus appeared subsequent to the presenting the petition.

The COURT, however, after consulting in the robing room with the Judges of the Second Division, recommended that the petitioner should lodge a minute offering to serve the petition upon the petitioner's second son, and upon such minute being lodged, that a tutor *ad litem* should be appointed to him, who might examine the proceedings.

A minute having been lodged, the Court authorised the petition to be served accordingly, and as the second son was resident furth of Scotland, they, in the exercise of the power reserved to them under the Act of Sederunt, remitted the *inducia* to twenty-one days.

Donaldson was for the petitioner.

J. and P. R. Kermack, W.S., Agents.

SECOND DIVISION.

BROWN v. FERGUSON.

No. 296.

Process—Suspension—Reference to Oath.

Ferguson charged Brown on a registered protest and imprisoned him. Brown presented a note of suspension and liberation, which was refused by Lord Medwyn, Ordinary on the Bills, and a certificate of refusal was issued to the charger. The suspender re-claimed, but the Inner House adhered and remitted to the Lord Ordinary to pronounce decree accordingly.

The case having again come before the Lord Ordinary, the suspender gave in a minute of reference to the oath of the charger. But it was objected to as now incompetent.

Lord Anderson reported the question to the Court.

Pattison was for the respondent, and
Macfarlane for the suspender.

LORD JUSTICE-CLERK. The rule of law is clear, that in every process reference to oath is competent before extract. I know of no authority laying it down to be incompetent in the Bill Chamber; for I doubt if *Young v. Patton*, 16th Dec. 1826, did go that length. Now in this case extract is competent for expenses. What is said to render reference to oath incompetent? The granting of the certificate of refusal surely cannot, when a reclaiming note was competent after that. Then how should judgment refusing the reclaiming note make it incompetent? The case is still in the Bill Chamber. No authority makes the rule, as to competency of referring to oath before extract, applicable only to the Court of Session. Nor has it been argued that the special remit to the Lord Ordinary for decerniture would make it incompetent if otherwise competent. I apprehend from the nature of the Lord Ordinary's inherent authority, whether in the Bill Chamber or Court of Session, he would have power to sustain the reference and proceed upon it. The same difficulty as to the power of the Lord Ordinary to receive

June 4. 1852. an oath of reference when a remit has been made to him to decern, would apply equally to ordinary cases as to cases in the Bill Chamber. But if we dispose of a cause on the merits, completely exhausting the whole cause, and simply remitting the account for taxation, I apprehend the Lord Ordinary would not only be bound to receive a minute of reference, but from his inherent power as Lord Ordinary, to sustain it. This case not being out of the Bill Chamber, it follows it is competent to give in a minute of reference.

LORD COCKBURN. I have no doubt the minute is competent. The case not being out of Court proved that the Judge was competent to receive the reference. My only difficulty is under the limits of remit to the Lord Ordinary, which was not to proceed with the cause, but to decern for expenses. Now in place of performing that solitary function, what is proposed is, that he shall receive the oath of reference, take a deposition, hear argument as to its import, all under a remit to do nothing but the mechanical process of decerning for expenses. But it is clear the case is not out of Court, and therefore at the last moment you may give in a reference to oath ; but how it is to be taken I don't clearly see.

LORD MURRAY. When a case is remitted to the Lord Ordinary for a particular purpose, it does not prevent him from doing that which, as Lord Ordinary, he is bound to do ; and it is as competent to take the oath in the Bill Chamber as in the Court.

LORD MEDWYN. I think the reference is competent.

The COURT, "on the report of Lord Anderson, Ordinary on the Bills, sustain the reference to oath, and remit to the Lord Ordinary to proceed therein as shall be just."

J. Leishman, W.S., Suspender's Agent.

John Rodgers, S.S.C., Respondent's Agent.

No. 297.

FIRST DIVISION.

Judicial Factor fined for neglect of duty.

June 5. 1852. A. B., a judicial factor, appeared to-day personally at the bar of the Court, in obedience to an order issued in consequence of his failure to submit to the Accountant of Court an account of his intromissions as factor, in conformity with the instructions issued by the Accountant to all judicial factors. He had now lodged his accounts as required, but the Court, in respect of his previous neglect to satisfy the Accountant as to his intromissions, and failure to apply for prorogation of the time allowed him for doing so, imposed upon him a fine of ten pounds, with the expenses of the proceedings against him.

FIRST DIVISION.

Petition, Mrs CARSINA GORDON GRAY of Carse, and HUSBAND. No. 298.

Act 11 and 12 Victoria, c. 36—Authority to Excamb—Petition—Next Heirs of Entail—Intimation.—Where a petition for authority to excamb lands had been duly intimated to the three next heirs of entail, but one of the heirs had died before the procedure had been brought to a close, intimation was appointed to be made to the next heir in the succession.

This was a petition for authority to excamb, and was reported June 5. 1852. to the Court by Lord Anderson. When this petition was presented, intimation was, as usual, appointed to be made to the Pet. Mrs persons next entitled to succeed to the entailed estate in question, Gray, &c. and which intimation had been duly made. But within these few days, authentic information had been received, that one of these heirs, Major James Coutts Crawford Gray, died in India on the 13th April. That was some considerable time after the service of the petition upon all the parties, but as doubts might exist whether, as Major Gray was one of the three parties originally called, the circumstance of his death, before the procedure had been brought to a close, does not render it necessary to give intimation of the process to the next prospective heir in the succession, it was considered proper to report the case for the instructions of the Court. The next heir of entail was Jessie Gray, daughter of the deceased Major Gray.

Currie appeared for the petitioner.

The COURT, “on report of Lord Anderson, and having considered the minute for the petitioner, grant warrant for serving the petition on the said Jessie Gray and her tutors, if she any has, and allow them to lodge answers thereto, if so advised, within fourteen days from the date of service.”

A similar interlocutor was pronounced in another petition presented by Mrs Carsina Gordon Gray of Carse, and her husband, for authority to grant a bond and disposition in security for provisions to younger children under the entail, and which was also reported to the Court by Lord Anderson for the same reason as the preceding petition for authority to excamb.

Graham Binny, W.S., Petitioners' Agent.

SECOND DIVISION.

No. 299.

Poor DUNCAN MACDOUGALL v. CLARK.

Process—Expenses—Incompetency of Advocacy—Sisting of Agent as party.
 —*Held* that a party suing *in forma pauperis*, was not entitled to advocate a cause against an interlocutor of the Sheriff, repelling objections taken on his part to modification and taxation of an account,—he having been found entitled to expenses,—unless the agent sisted himself as a party to the advocacy.

June 5. 1852. This was an advocacy from the Sheriff of Argyleshire. Macdougall made a verbal application to the Sheriff for parochial aid for himself, wife, and child. This was intimated to Clark, the inspector of the poor of the united parishes of Kilmore and Kilbride. The Sheriff thereafter appointed a procurator in Inverary to act as agent for the applicant, and to conduct his case *in forma pauperis*, and a record was made up.

After a proof for both parties had been led, the Sheriff found the applicant entitled to parochial aid, to an extent adequate to the maintenance of his daughter, and also to aid to a partial extent for himself and his wife; and farther, found him entitled to expenses, but subject to modification. The account of expenses having been taxed, objections to the taxation were given in by Macdougall, but these were repelled by the Sheriff-substitute, and the Sheriff, on appeal, adhered to the interlocutor.

Macdougall was put upon the poor's roll of this Court, and the present advocacy was brought by him to have the Sheriff's interlocutors, modifying the expenses and repelling the objections to the auditor's report, reviewed. On the case being called, the respondent gave in additional pleas to the effect, that the interlocutor, having reference merely to the expenses of the litigation in the Sheriff-Court, in which the advocator's agent, and not the advocator himself, had the interest, the Sheriff ought to have refused leave to advocate on juratory caution, unless the agent sisted himself as a party liable in expenses, and that the advocacy should not be allowed to proceed until the agent so sisted himself; and that failing his doing so, the advocacy should be dismissed.

The Lord Ordinary (Robertson) after hearing parties, found, “in respect the matter involved in the present advocacy regards merely the taxation of the account of expenses incurred by the agent for a pauper, that the said pauper has no legitimate interest in the said taxation, and that the agent has not sisted himself as

a party; and in respect of the provision contained in the 8th sec. June 5. 1852. of the Act of Sederunt, 12th February 1846, and of the authori- ^{ties referred to in the note of the Sheriff, Finds the action incom-} Macdougall v. petent, dismisses the same, and decerna," &c.

Against this interlocutor Macdougall reclaimed.

Wilson (with whom *Deas*) for the claimer. The Act of Sederunt, 12th February 1846, regulates the proceedings in such cases, and in the event of the pauper's success, he is, by sec. 8, entitled to charge fees as an ordinary litigant. Here he has done so, and the sum allowed as expenses is more than exhausted by sums allowed by the Auditor to commissioner's clerks and others, without any part of the outlay or charges of the agent appointed by the Sheriff to conduct the case being taken into account. The agent of a pauper on the poor's roll has a claim against the pauper for the expenses *bona fide* incurred by him in conducting his case, and which he has failed to recover from the opposite party. *Taylor v. Barr*, 11th March 1841, 3 D., p. 891. The advocate has therefore an interest to recover full expenses from the respondent. Besides, the pauper is not bound to find caution for the expenses of process—for even a party on the poor's roll, who has executed a disposition *omnium bonorum*, has been found not obliged to find caution. *Barry v. Geddes*, 30th May 1827, sec. 5, p. 727. In the cases referred to in Lord Ordinary's interlocutor, *Frazer v. Dunbar*, 6th June 1839, 1 D., p. 882, and *Walker v. Kelty's Trustees*, 21st June 1839, 1 D., 1066, there were assignations by the paupers, and it was in respect of these assignations that the judgments proceeded. The question here referred not to the taxation merely, but also the modification of the account of expenses.

E. S. Gordon, for respondents, was not called upon.

The COURT adhered.

J. M. Macqueen, S.S.C., Agent for Reclamer.

Baxter and Macdougall, W.S., Agents for Respondent.

FIRST DIVISION.

Petition, JAMES DEAN and OTHERS.

No. 300.

Trust Estate—Executor—Neglect of Duty—Appointment of Judicial Factor—Intimation.—A petition was presented by the beneficiaries under a trust estate, for the appointment of a judicial factor in room of the

executor, who, it was alleged, had left the country *animo remanendi*, and wished to appropriate the trust-fund:—*Held*, that before procedure, intimation must be specially made to the executor.

June 8. 1852. This was a petition at the instance of the beneficiaries under a trust-estate, for the appointment of a judicial factor under the following circumstances, as detailed in the petition:—The late James Williamson appointed Alexander Mitchell, then merchant in Ballater, to be his sole executor, with the usual powers. Williamson having died, Mitchell, the executor, was duly confirmed, and realised the greater portion of the estate. The residue amounts to L.177, 8s., and there is still a portion of the estate unrecovered. This balance of L.177, 8s. was invested by the executor in his own name, as executor-nominate of Mr Williamson, in the hands of the commissioners for the improvements of the harbour of Aberdeen, the voucher taken by him therefor being a promissory note. Soon thereafter Mitchell left this country and went to Montreal, or elsewhere in Canada, *animo remanendi*, and where he is now settled. An arrangement was made by which the funds should be managed in his absence by a legal firm in Aberdeen for the benefit of the beneficiaries. That firm became bankrupt, and the whole of the documents and vouchers connected with execruty then passed into the hands of Mr Francis Edmond, advocate in Aberdeen, where they still remain. The executor thereafter sent instructions, in November last, to Lewis Smith, bookseller in Aberdeen, to uplift the funds. “It appeared that Mr Smith had taken the necessary steps for getting possession of the promissory note and uplifting the funds, by intimation of his mandate to Mr Edmond, and to Mr Reid, treasurer of the harbour commissioners; and it further appeared that Mr Smith was in possession of letters from Mr Mitchell the executor, dated on or about 22d October last, and subsequent dates, whereby he was instructed to uplift the money from the harbour commissioners, and apply part of the sum in payment of a private debt due to Mr Smith himself by Mr Mitchell,” and also in payment of other private debts, “L.12 to the petitioner for his family, in name of interest, and to remit the balance to America to Mr Mitchell.”

The petitioner had arrested the funds, and these being now secured, this petition was presented for the appointment of a judicial factor in room of the executor, with power to carry into execution the purposes of the trust, and particularly with power to receive delivery of the deeds, papers, and vouchers of the trust in the hands of Mr Edmond—to examine the accounts of the

Pet. Dean, &c.

executor, and to realise and administer the trust-funds, all in June 8. 1852.
terms of the last will and testament.

This petition having been intimated on the walls and in the
Minute Book for eight days,

Pet. Dean, &c.

P. Fraser moved in terms of the prayer of the petition.

LORD IVORY. If a party appointed to an office does not perform it, he may be removed, and a judicial factor appointed; but until he is removed he is the legal holder of the estate—the executor confirmed—and how can you take it out of his possession by the mere nomination of a factor? An executor-nominate may reside where he pleases, and you cannot deprive him of an office without making him a party to the process.

The LORD PRESIDENT. Has any intimation of this petition been made to the executor?

P. Fraser. None under this petition.

The case was continued; and having been again called to-day,

P. Fraser. There are three positions in which the Court, with regard to trust-estates, have appointed judicial factors—where the trustee has died, become bankrupt, or gone abroad. *Blair v. Fraser*, 31st January 1835, 13 S. and D., p. 384. We do not want here to remove the trustee; but the estate is without management, and we therefore move to have a judicial factor appointed during his absence; *Miller*, 17th November 1849, 12 D. 911; *Watson v. Crawcour*, 17th February 1844, 6 D. 687.

The LORD PRESIDENT. The first thing which we have to consider is, whether on the statement of this petition, which not only refers to the business of the executor, but contains allegations of misconduct on his part—attempts to appropriate the money to himself, in short a breach of law—whether we are to enter on an enquiry of this kind, without some sort of notice or intimation to the party so accused of misconduct. To assume these allegations without any evidence of them, would be wrong, and so to enter into an *ex parte* enquiry, would be contrary to all right procedure.

LORD CUNINGHAME agreed.

LORD IVORY. I concur. I think that the proper and safe course here is, that the petition should be served in the regular way on the party whose abuse of office has led to the application. There can be here no question as to the safety of the funds. The question is, whether on an *ex parte* statement by the beneficiaries, this executor or trustee shall be denuded of his office without intimation to himself. I am not aware that that has been done in any

June 8, 1852. instance. I think that intimation should be made, and when we have the party here, we shall hear both sides of the question.
Pet. Dean, &c.

The COURT "before procedure, appoint the petition to be specially intimated to Alexander Mitchell therein mentioned, and therein stated to be now in Montreal, or elsewhere in America."

John Gellatly, S.S.C., Petitioners' Agent.

FIRST DIVISION.

HAMILTON v. HIS CREDITORS.

No. 301. *Act 6th and 7th Will. IV. c. 56—Cessio bonorum—Domicile of Petitioner—Examination upon Oath.*—At a diet of examination of a petitioner for *cessio bonorum*, it was objected that the petitioner's ordinary domicile was not within the Sheriff's jurisdiction. In reference to this objection, the petitioner was examined upon oath:—*Held*, that although there was no reference to oath, the proceeding was competent.

Construction of Oath.—Circumstances in which *held* that the petitioner's ordinary domicile was within the jurisdiction of the Sheriff of Edinburgh.

June 8, 1852. This was a reclaiming note against an interlocutor of the Sheriff-substitute of Edinburgh, pronounced in a process of *cessio bonorum*. At a diet of examination of the petitioner Hamilton, it was objected on the part of one of the creditors, "4th, that neither now, nor at the date of the petition for *cessio*, was the ordinary domicile of the petitioner in the county of Edinburgh." And in reference to this objection, "compeared the petitioner William Hamilton, who being solemnly sworn by the Sheriff, and being examined by the opposing creditor; depones, at the date of presenting my application for *cessio*, viz., on 6th April last, I was residing at the Water of Leith, and at this date. It is now nearly three months since I took lodgings there. . . . I have not had a house of my own for two years previous to that. I lived occasionally at Corrow Muir, in the parish of Lesmahagow, where my wife lives. . . . Since I came to lodge at the Water of Leith, I have been employed for nearly nine weeks with Mr Scott at Baberton, near Currie, and where during that period, I principally stopt, but occasionally came to the Water of Leith, still I had no lodgings at Baberton, I merely got a bed from good will. . . . Interrogated. Have you been living at Corrow Muir during the last nine weeks? Depones, No," &c.

The Sheriff-substitute "sustains the fourth objection; and in respect thereof, dismisses the petition."

Hamilton reclaimed.

June 8. 1852.

Pattison for the claimer. The only proof offered in this case was the declaration of the petitioner. But there is nothing in the Act of Parliament, or relative Act of Sederunt, which means that a party is to be examined on oath, on a question of this kind. It is only relative to the state of his affairs, that he can be so examined.

LORD IVORY. Where is the preliminary objection to the jurisdiction of the Sheriff?

The LORD PRESIDENT. There has been no examination of his affairs. This is the whole examination.

Logan, for the respondent. The statutory examination can only proceed in the event of no objection being taken to the jurisdiction. It is competent to state, as a preliminary objection, that the party suing for *cessio* has no domicile.

The LORD PRESIDENT. The objection raised by the Court is, whether no objection having been taken by the party at the time to the Sheriff's jurisdiction, meets that difficulty.

LORD IVORY. With regard to stating the objection, the statute says nothing. This, therefore, must be dealt with by us as on the ordinary principles of common law. The statutory examination must be strictly dealt with as the statute sets forth or the relative Act of Sederunt. Now, I do not quite understand the ground on which the respondent means to put his argument as to this oath, whether as an oath emitted under the statute or under a reference. I rather think he means to say it is an oath under reference, and that he is now prepared to supply the defect as to the constitution of the reference by a minute. If it be an oath under a reference, the statute does not apply, the only oath to which it applies, being on the examination of the debtor as to the state of his affairs, and so it is explained by Bell (Commentaries, II. 594). It is impossible to read the statute, without seeing that the only examination there provided for is one where there is process before the Sheriff, and that such examination must be on the merits.

There are a great many preliminary matters not provided for by this statute, as where a sufficient number of creditors have not been cited, &c. Now, any such objection might competently be stated, and therefore I take it, that others which go to a declinature of the Judge are preliminary and prejudicial to all other proceeding whatever. It is only after all objections are finally and fairly at rest that sec. 5 says, that on the day appointed, "the debtor shall

June 8. 1852. appear in public court, in presence of the Sheriff, for examination as to his affairs, and the Sheriff shall have power to put him on oath,"
^{Hamilton v.}
his Creditors. &c. That being premised, I hold two things to be clear, 1st, That those objections which go to the destroying of the process are preliminary, and must be disposed of before the examination is proceeded with; 2d, That the examination is on the merits, and the Sheriff has no power to put the party on oath, *ex proprio motu*. Now, this is said to be a reference to oath on the question of jurisdiction. If there had been a reference to oath, the proceedings would have been quite competent; but I see no such reference, and without a reference the Sheriff had no power to put the party on oath in this matter; and if there was no reference to oath at the time the examination was taken, I do not think the defect can be mended now by putting in a minute. On the whole I think this was a course which the Sheriff had no power to adopt, and which this Court ought not to entertain.

LORD CUNINGHAME. I have formed a different opinion in this case. This question is raised on the statute 6 and 7 William IV. c. 56, affording a remedy before the Sheriff to a forlorn and miserable class of parties, and therefore it is entitled to the same liberal construction that is appointed for our leading bankrupt statute, that "the Act shall be construed in the manner most beneficial for promoting the ends thereby intended." To what law can such a considerate rule of interpretation be applied, if not to an act giving the Judge Ordinary power to relieve the poorest and most indigent members of the community from personal diligence.

According to that and any other view I can take of the case, it appears to me that the examination of the bankrupt here as to his present residence and employment, on which the jurisdiction of the Sheriff depended, was not incompetent, but most correct and expedient for all parties, seeing it was summary and cheap, and no other mode of expunction was proposed by any of the litigants. This, I think, was following out what the new law intended. The statute, after providing for the citation of witnesses, appoints (by sec. 5,) the examination of the bankrupt, with power to put him *on oath*. Does that clause, as worded, exclude that simple and easy mode of expunction as to the fact of jurisdiction? Are there any words to confine the examination to the *merits*, when a preliminary difference as to facts respecting the bankrupt's residence require expunction? I cannot so read the Act. The examination may be used to ascertain every fact necessary for the disposal of the

case; and the rule is doubly clear when it is attended to, that the examination here was *not objected to*, but acquiesced in by every party concerned. June 8. 1852.
Hamilton v.
his Creditors.

The LORD PRESIDENT. The conclusion to which I have arrived is, that there was no incompetency before the Sheriff. It appears to me that the proper time was taken for stating the objection. It was the first opportunity the party had for stating it. It was relevant and competent; and that objection having been stated in due time, the question arises, whether it has been inquired into in a competent manner. It was an objection that required to be explicated, the fact being denied. Was it competent to inquire into that fact by oath of the petitioner for *cessio*? Now, whether we regard this as a part of the statutory inquiry with regard to which the debtor is bound to answer, or as on a separate objection, I think that in either way the proceeding is competent. The last is the important view, and is the one to which I am to speak. Upon the point whether it required a reference to the oath of the party, I hold that such reference was necessary; and what takes place? The objection is stated, and is denied; and then comperead the debtor, &c. Now after that examination, assuming that it required the reference, I hold it was not competent for either party to say that they threw aside that proceeding as not involving a reference to oath. If this was a part of the statutory examination, he could not have refused to be sworn; but otherwise he might have so refused. In either view of the matter I think this proceeding was a perfectly competent mode of expiscating the matter. The nature of this oath will be the next thing for us to consider.

Pattison, for the claimer, now argued that the petitioner's ordinary domicile must be held to be his lodgings at the Water of Leith. *Hossack v. his Creditors*, 16th December 1841, 4 D., 628.

Logan, for the respondent, cited Erskine, 1, 2, 16, and maintained that the petitioner's lodgings could not be regarded as his ordinary domicile, but a domicile acquired by forty days' residence, which renders him amenable to the jurisdiction of the Sheriff, but could not entitle him to sue his creditors under this statute.

The LORD PRESIDENT. It appears to me that for the purposes of this Act this party had his ordinary domicile within the Sheriffdom of Edinburgh. The statute creates a new rule, and in giving Sheriffs jurisdiction in this matter, it has given a great

June 8. 1852. boon to the country. It does not appear to me that the fact of his living in Lanarkshire can, in the circumstances, raise up a question ^{Hamilton v.} _{his Creditors.} that the petitioner's domicile was still in Lanarkshire. Therefore, looking to the state of the facts here, his residence must be held to be either at Baberton or at the Water of Leith; but at any rate, there is here enough to constitute his domicile within the Sheriffdom of Edinburgh.

The other Judges concurred.

The following interlocutor was pronounced:—"Remit to the Sheriff, with instructions to recal the interlocutor reclaimed against, to repel the objection therein referred to, and to proceed with the process of *cessio* according to law; find the reclaimer entitled to the expenses incurred by him in preparing the said reclaiming note, and on the discussion which has followed the same," &c.

Lothians and Finlay, S.S.C., Reclainer's Agents.

William Wishart, S.S.C., Objector's Agent.

FIRST DIVISION.

No. 302. A. B. Petitioner, for the appointment of a factor *loco tutoris*.

Amendment of Petition.

June 9. 1852.

^{A. B. Peti-}
_{tioner for}
Factor.

The petitioner having omitted to give the usual information to the Court in this petition regarding the general nature or extent of the pupil's estate, an amendment on the petition in this respect was ordered by the Court, in pursuance of a previous intimation made from the Bench, that in all applications for the appointment of factors *loco tutoris*, and curators *bonis*, and factors *loco absentis*, the general nature and extent of the estate should be set forth for the information of the Court, and of its officer, the accountant of Court.

FIRST DIVISION.

No. 303.

Petition, JOHN GELLATLY.

Poors' Roll—Certificate.—Where an applicant for the benefit of the poors' roll could not obtain a certificate in consequence of there being no minister of the parish, a remit was made to the Sheriff to take the applicant's declaration.

June 9. 1852.

^{This petition was presented by an applicant for the benefit of}
Pet. Gellatly. the poors' roll. By sec. 2 of the Act of Sederunt, (21st Decem-

ber 1842), it is ordained, "that no person shall be entitled to June 9. 1852. the benefit of the poor's roll, unless he shall produce a certificate ^() Pet. Gellatly. under the hands of the minister and two elders of the parish, where such poor person resides, setting forth his or her circumstances according to a formula" annexed to the Act. This petition set forth that there is at present no minister of the parish of Liff, where the petitioner resides, and it has been ascertained that the vacancy will not be filled up in time to enable the petitioner to adopt the necessary steps for his admission to the poor's roll before the rising of the Court for the summer recess; that delay until the vacancy is filled up would be attended with damage and inconvenience to the petitioner; and therefore praying for a remit to the Sheriff, to take the applicant's declaration—a course which had been adopted in the case of A. B., 30th June 1836, 14 S. p. 1040, where a certificate could not be procured in consequence of there being no elders in a parish.

Wilson appeared in support of the petition.

The COURT remitted to the Sheriff or his substitute, in terms of the prayer of the petition.

George C. Adams, S.S.C., Petitioner's Agent.

SECOND DIVISION.

MACFARLANE v. HIS CREDITORS.

No. 304.

SINGLE BILLS.

Process—Reclaiming Note—Printing—Cessio.

This was a reclaiming note against the judgment of the Sheriff ^{June 9. 1852.} of Perthshire in a process of cessio, refusing the cessio in *hoc statu*. ^() Macfarlane v. The reclaiming note was in manuscript, there being no appendix. his Creditors.

Monro for the objecting creditors. The reclaiming note and proof should be printed.

Scott was for the reclainer.

LORD JUSTICE-CLERK. It is not necessary to print a reclaiming note against a Sheriff's judgment in a cessio in the Inferior Court; but the note must be boxed. The Court must do the best they can with the process in the absence of an appendix. I have never, however, seen a manuscript reclaiming note in such a case before.

James Bayne, S.S.C. Reclainer's Agent.

Dundas and Wilson, C.S. Respondents' Agents.

HIGH COURT OF JUSTICIARY.

Before THE LORD JUSTICE-GENERAL, THE LORD JUSTICE-CLERK, LORDS COCKBURN, WOOD, IVORY, COWAN, and ANDERSON.

No. 305. HER MAJESTY'S ADVOCATE *v.* SARAH FRASER and JAMES FRASER.

Petition for the Prisoners.

Petition for Her Majesty's Advocate.

Certification from Circuit—Continuation of Diet—Peremptory Diet.—During a trial on Circuit an objection was taken to the admissibility of a production in evidence, but the Court, with the view of certifying the point to the High Court, should the pannels be convicted, reserved consideration of the objection, and meantime allowed the trial to proceed. The pannels were found guilty, whereupon the Court certified to the High Court, and continued the diet in general terms without fixing any particular day for the diet being then called:—*Held* that criminal diets are peremptory, therefore *held* that the criminal process had fallen, and the warrant of incarceration discharged, and the pannels ordained to be set at liberty.

June 9. 1852. This case was certified from the last Spring Circuit at Inverness, and now came before the Court under the following circumstances. The Frasers (mother and son), were indicted and tried at the Circuit for murder by poisoning. During the trial, the competency of proving against the prisoners an article contained in the list of productions was objected to, and the Court (Lords Cockburn and Ivory) having a doubt on the subject, it was arranged between the Court and the counsel on both sides, that the evidence should be received in the meantime, but that the point should be reserved for the opinion of the High Court, on the understanding that if the prisoners should be convicted, sentence should not be moved for unless this Court should decide that the evidence was properly received. The Jury found the prisoners guilty. The record then bears as follows:—

“The Advocate-Depute having moved for sentence.

“Before proceeding on the verdict above recorded, the Lords Cockburn and Ivory, agreeably to the understanding come to by the Court and the counsel for the parties when the objection to the admissibility of the article marked No. 12 in the inventory of productions was disposed of, certify the case to the High Court of Justiciary as to the validity of that objection, and as to the consequent competency of pronouncing any sentence upon the

verdict, continue the diet against the pannels, and ordain them to June 9. 1852.
be carried from the bar to the prison of Inverness, from thence to
be transmitted under a sure guard until they are brought to and ^{H. M. Adv.} ~~cate v. Frasers.~~
incarcerated in the prison of Edinburgh, therein to remain until
liberated or removed therefrom in due course of law; and for these
purposes grant warrant to all proper officers of the Court.

"J. IVORY, P."

To the competency of this proceeding objection was taken on behalf of the pannels, who, on the 25th May last, presented a petition to this Court in which they set forth that they "are advised that the case having been certified to the High Court of Justiciary in general terms, without any day having been fixed for proceeding with the case, and the diet against the petitioners having been continued indefinitely and *sine die*, the certification of the case and the continuation of the diet are altogether inoperative.

"That in these circumstances the petitioners humbly submit to your Lordships that the diet of the libel against them has fallen and can never be revived for the purpose of pronouncing sentence, or for any other purpose whatever. They further submit that there is no warrant or authority upon which they can ever be put to the bar of the High Court of Justiciary in reference to the said libel, or any proceeding which may have followed upon it on the original diet; the same not having been duly continued to a certain day, according to the established law of the land, and the uniform practice of the Court. In short, they submit that the diet against them can never again be called, and that they are legally entitled to a warrant liberating them from prison." They therefore prayed the Court "to discharge the warrant, in virtue of which the petitioners are now detained in prison, and to grant warrant for their immediate liberation; and farther, to find and declare that the petitioners are for ever free from the charge stated against them in the indictment at the instance of Her Majesty's Advocate, before referred to, and upon which they have tholed an assize."

Upon this petition, the Lord Justice-Clerk pronounced a deliverance, appointing parties to be heard on the matter of it, on Tuesday, June 1st, at 2 o'clock.

A petition was, on the 26th May 1852, also presented by the Lord Advocate to this Court, setting forth, *inter alia*, that "under the above deliverance the said Sarah Anderson or Fraser, and James Fraser, were incarcerated in the prison of Inverness, and

June 9. 1852. are now in the course of being transmitted to the prison of Edinburgh for incarceration, and it becomes necessary to make the H. M. Advocate & Frasers present application to your Lordships to fix a day for disposing of the above certification ;" and the petition prayed accordingly.

The Lord Justice-Clerk appointed parties to be heard on this petition, along with the other petition for the pannels, on the day and at the hour formerly named.

The petitions were then accordingly called for debate.

G. Young, (with whom W. H. Murray and Logan) for the pannels. The diet in all criminal processes is a peremptory diet. 2 Hume, 263. The Court before which the trial was must fix a day, else the process is gone. That Court may continue the original diet, but cannot make a new one; 2 Hume, 275. There is no such thing as an indefinite continuation of the diet. There is a step to be taken after the verdict, and that is in the process. You must call the diet and keep it up by regular continuation and adjournment. The Crown may complain that the accident happened when there can be no after prosecution, but criminal process is peremptory and strict, and it does not signify as to the time of the accident; case of *George Columbine*, Perth Circuit, 17th May 1734. High Court, 10th Feb. 1735, 2 Hume, 27; *Alexander Livingstone*, at Stirling, 23d September 1749; *Nicol Brown*, High Court, 29th January 1755; *John Macafee*, Inverary, 13th September, and High Court, 26th November 1782; *John Ferguson* and *Archibald Sharp*, Stirling, 13th September 1838; *Drysdale* and *Cairns*, 1848, Arkley's Reports, 450. (Lord Justice-Clerk. There is another case, that of *Mary Macfarlane*. Glasgow Circuit, 1843,) *Mallony*, January 1840, 2 Swinton, 485, for the opinion of Lord Justice-General Boyle. This is not a matter of discretion, but is decided by a fixed and peremptory rule. The prisoners are entitled to judgment that the process here has fallen in terms of the prayer of their petition.

The *Solicitor-General* and the *Lord Advocate* for the Crown. The pannels here stand convicted of the crime charged. We don't dispute that the prosecutor must fix a diet, that the case is different after the verdict of guilty has been recorded; that is a totally altered situation of the case. The prisoner no longer stands on his citation, but is *in manibus curiae* a prisoner convicted of a crime, all enquiry into which is at an end; see Sir George Mackenzie on Crimes. This is a separable proceeding, complete in itself. The case of *Ferguson* and *Sharp* shews that a specific

continuation is not necessary, and therefore, where the libel is followed by a verdict of not guilty, the process does not fall. ^{June 9, 1852.} ^{H. M. Advo-}
 After verdict, there is no one can stand between the Court and ^{cate v. Frasers.} the prisoner; the prisoner is left alone with the Court. The passage from Hume, 2 vol., p. 275, could only have been intended to apply to a continuation of a trial in the proper sense of the term. The ancient practice is mentioned in Mackenzie, 31 tit., 2d part of book. The act of conviction is a completed proceeding, as being in itself extractable. Observe the analogy of cases of pregnancy, 2 Hume, 471. The Circuit Court is the High Court acting by a small quorum. Can then the Judges in Circuit determine the sittings of the High Court? The case ought to be disposed of as prayed for by the Crown.

Logan, for the pannels, in reply, cited 2 Hume 111 and 605. Hume speaks as an accurate witness. We are to look to the practice of the Court, as disclosed by its own records. In every instance there is a continuation of the diet for a day certain. In respect of the practice alone, the pannels are entitled to judgment.

The argument having been concluded, the case was continued till this day when it was advised.

The Court by a majority, (Lords Cockburn, Ivory and Cowan dissenting), were of opinion, that the objection taken for the prisoners must be sustained, and the prayer of their petition granted. The diet in a criminal process is peremptory, and here from the facts before the Court the instance and process had fallen. They therefore pronounced the following interlocutors :—

On the petition for the pannels.

Edinburgh, 9th June 1852.—The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, having resumed consideration of this petition, in respect that no day certain was fixed by the Circuit Court as the diet for proceeding with the case before the High Court: Find that the instance has fallen, and therefore discharge the warrant under which the petitioners are now incarcerated, and ordain them to be set at liberty. *Quoad ultra, refuse in hoc statu the desire of the petition.*

DUN. M'NEILL, I.P.D.

On the petition for the Lord Advocate.

Edinburgh, 9th June 1852.—The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, having resumed consideration of this petition, in respect of the judgment

June 9. 1852. this day pronounced on the petition for the prisoners; Refuse
 the desire of this petition.
 H. M. Advocate v. Frasers.

DUN. M'NEILL, I.P.D.

James Tyler, W.S., Crown Agent.

Lachlan Mackintosh, S.S.C., Agent for the Panels.

FIRST DIVISION.

No. 306.

DONALDSON OR MILNE v. DONALDSON.

Judicial Admission—Qualification—Construction.—In an action for payment of the balance on a bill for L.200, the defender admitted that he had received the sum claimed, but pleaded a counter claim by way of compensation:—*Held* that the qualification must be taken as part of the defender's statement; and there being no other proof of the debt sued for, that the defender's judicial admission amounted to a denial of the debt.

June 10. 1852. This action was originally raised in the Sheriff-Court of Kin-
 cardineshire, and was brought for payment of L.100 alleged to be
 Donaldson,
 &c. v. Donald-
 son. the balance due on an advance of L.200 made by the pursuer and her deceased husband to the defender James Donaldson. It was admitted by the defender that he had “received from the deceased William Milne, the pursuer's husband, L.200, on or about the 26th May 1845, and that the defender repaid L.100 thereof on the 7th June thereafter, as set forth in the libel, but denied that the balance, being L.100, is due and resting-owing by the defender, the same, or at least the greater part thereof, having been due to the defender on account of, or at all events being now subject to the counter claim after mentioned.” This counter claim was founded on a bill for L.50, dated 21st December 1831, granted by the pursuer's deceased husband, William Milne, and the defender, to Robert Rust, now deceased. The defender's statement was, that Milne borrowed the sum of L.50 from Rust, to whom Milne, and the defender, as his cautioner, granted their joint acceptance; that the defender retired the bill in consequence of Milne's inability to do so, and that this sum of L.50, with the legal interest thereof from the 20th November 1835,—when the bill was retired,—was resting-owing to the defender by Milne at the time when the defender received from him the sum of L.200. This bill for L.50 was lodged in process by the defender. There was also produced in process an acknowledgment by James Donaldson, the defender, to Mrs Donaldson, the pursuer, in the following terms:

—“MARY,—I am due you the sum of two hundred pounds sterling, June 10. 1852. which money I shall pay when called for, &c. (Signed) JAMES DONALDSON,” On the back of this acknowledgment was the following marking,—“7th June 1845.—One hundred pounds paid to account.” There were also letters produced from the defender containing the same admission, but with the same qualification as in the record.

The pursuer did not allege that the bill was paid out of the funds of her late husband, the principal debtor, but she averred that the £.50 wherewith the bill was paid were given for that purpose by her father, either to her or her late husband.

The question therefore arose, whether the pursuer had established a claim against the defender, or must admit this counter claim?

The Sheriff-Substitute found that the promissory-note being unstamped, was improbatative, and “that the only evidence of the pursuer’s claim arises from the defender’s admissions, which, in the circumstance, must be taken under the qualification annexed to them, viz., the defender’s claim of compensation.” To this interlocutor the Sheriff adhered, and the pursuer advocated.

The Lord Ordinary (Wood) adhered to the Sheriff’s interlocutors, and in a note appended to his interlocutor, he referred to the decision in the case of *Campbell v. Macartney*, decided by him on 27th June 1843, but not reported, (but a report of which will be found subjoined to this case,) and also to the English case of *Rundall and others v. Blackburn*, 5 Taunton’s Reports, 245, referred to in *Campbell v. Macartney*; and his Lordship proceeded to state, “that in conformity to the doctrine therein explained, the result is, that in the case of a qualified admission, a qualification which, in an oath on reference might be excluded as extrinsic, is not excluded, but is to be taken along with, or as a part of the admission, if the opposite party allows his claim to stand exclusively upon the admission. One reason of the distinction seems to be, that in the case of a reference to an oath, no contrary or rebutting proof is allowed to the opposite party, whereas in the case of qualified admission, the qualification may be rebutted by contrary proof. . . . Then looking to the circumstances of the present case, the Lord Ordinary has been unable to see any ground for rejecting the qualification which the respondent has added to his admission of the claim insisted on against him. The claim is confessedly not instructed otherwise than by the respondent’s admission, and the Lord Ordinary does not find in

June 10, 1852. the facts admitted or proved anything to rebut the qualification
with which it is made."

Donaldson,
&c. v. Donald-
son. The advocator (pursuer) reclaimed.

P. Fraser and Penney, for the reclaimer, cited *Ferguson v. Young*, M. 1488, Thomson on Bills, p. 355, and argued that it cannot be called a qualification of the admission to set up a separate independent claim. This is something collateral altogether, which must be supported by proof. It is not intrinsic. Philips on Evidence, 9th ed. 1843, vol. i. p. 344; *Anderson v. Rentoul*, 1st June 1827, 5 S. and D. 744; *Murray v. Elliott*, 13th June 1847, 15 S. 1121; *Pitcairn v. Fraser*, 7th July 1836, 14 S. 1101; *Millar v. Oliphant*, 21st January 1845, 7 D. 283; Taylor on Evidence, vol. i. p. 478. Therefore the doctrine of the Lord Ordinary may be sound, but it is not applicable.

Monro, and the *Lord Advocate* for the respondent (defender). Where anything relevant in law in his answer to a demand of the pursuer is stated by the defender in his judicial admission, that must be taken as true. A relevant counter claim should be allowed to be proved by the same evidence which is the sole evidence of the claim itself. Where, therefore, the party has no way of proving his case but by appeal to the conscience of his adversary, the whole must be taken together. There is a difference between an oath on reference and a judicial admission. In the former case, the qualification must be intrinsic. In the other case, it is only relevancy that can be looked to; *Gray v. Monro*, 10th Dec. 1829, F. C. 191.

THE LORD PRESIDENT. In this case, the opinion which I have formed is in accordance with that of the Lord Ordinary. It appears to me that the pursuer, apart from the evidence deduced from the judicial admission of the defender, has not established her claim. From the very first the defender puts forward his right to an accounting, and the same claim runs through the whole correspondence. The document of debt produced in process by the pursuer cannot be looked at at all. It is improbatative, because unstamped, and that defect cannot now be remedied. Then we come to the evidence of the admission of the party on the record, and what is the nature of this admission? Is it an admission that there was an advance by way of loan? On the contrary, the statement made is of a different kind. Nor is it very likely to have been a loan, for within a fortnight of the date of the transaction, £100 is repaid. I think that we must take the admis-

sion, with the qualification adjoined to it. That qualification is, I June 10. 1852. conceive, substantially part of the statement. It is a plea of compensation, and is part of the quality of the admission. I do not ^{Donaldson,} Donald- go into the question at present, whether or not this would be a ^{son.} relevant statement in an oath of reference, for we are dealing with the judicial admission of the party ; and I think that the result of his admission is this, that it is a good answer to the demand. This case is the same as if the party here had said, I admit that I got the L.200, but then the state of our accounts is this ; and so having made out an account in figures in terms of this admission, the qualification would be on the one side of the account, and the admission on the other. But there is another part of the case into which it was competent for the pursuer to go. It was competent for him to say that it is evident from the whole circumstances of the case that you have no case ; and then the question arises—does that really appear ?

It does not appear to me, from the circumstances of this case, that there is any ground for rejecting the statement and claim of the defender ; for the moment that demand was made on him, he puts forward this counter claim. He is in possession of the document of debt, and which is admitted to have been the proper debt of the party whom the pursuer represents. I do not think that the principle of law that it is to be presumed that it was paid by the proper debtor is here at all applicable. But it is said that in some way the defender got possession of that bill—that it was paid out of the pursuer's own funds. I do not understand the reason of his getting possession of it as stated. The bill was in the repositories of the late James Donaldson, the father of both parties, and in the possession of the defender until produced in process, the defender being the sole executor of his father. If the pursuer retired it with her own funds what was the use of shewing it to her father, who was no party to the bill ? Does not the presumption hold, that it came into the hands of the defender because he was the party who really did retire it ? I am of opinion that the interlocutor of the Lord Ordinary ought to be sustained.

LORD CUNINGHAME. I come to the same conclusion as your Lordship and the Lord Ordinary. The case has been treated as if there were nothing to support the respondent's plea in defence, except his qualification in his admission of the original debt, which, though constituted by a document void and null, was admitted to have been advanced, but compensated by a prior debt due by the

June 10. 1852. pursuer to the defender. Now, in general, there can be no doubt
~~~~~ that if any party's judicial statement is founded on, it must be  
Donaldson,  
&c. &c. Donaldson taken with all its qualifications. It may be different when there  
son. is a reference to *oath*, and a qualification held *extrinsic* in law  
occurs in the deposition of a party. The present is a very dif-  
ferent case. The defender pleads compensation, and supports that  
plea by production of what I consider a liquid ground of debt. It  
is well known that such a plea has long been admissible by way  
of *exception* in our practice, by the Act 1592, c. 143; a just and  
positive statute most creditable to the wisdom and sound views of  
the ancient Scottish legislature, as it was centuries before such a  
law was recognised in England. The pursuer has admitted that  
the debt vouched by the bill was *his* bill in its origin. The bill  
produced by the defender was subject to no prescription. Hence  
its validity was unquestionable by way of exception in the present  
action. The only way in which the pursuer has met the counter  
claim, was by alleging that she had retired the counter-bill with  
money received from her own (the pursuer's) father; while the de-  
fender says that *he* paid the pursuer the money, and got the bill de-  
livered up to him by the pursuer, which he has kept ever since. The  
defender's statement is vouched by his *possession* of the bill; the  
pursuer's is neither proved nor presumable in itself. It can only  
be proved, therefore, by the *writ* or *oath* of the defender, which  
has not been offered in the present question.

LORD IVORY. I am much of the same opinion, although not  
altogether on the same grounds. On the face of the record, it  
appears that the bill was retired out of the hands of the creditor,  
by the hands of the pursuer. It is not said that it was retired by  
the defender, and therefore there is some room for hesitation,  
whether we are entitled to presume in law without further evidence  
that the bill having been retired by the proper debtor—if the docu-  
ment had remained with that debtor—that it was settled out of her  
own funds; but the document is not left in her hands, but in the  
hands of the defender, and the only explanation that could be given  
of that, would be, that the defender being but cautioner, it had been  
handed over to him in order to satisfy him that the debtor had  
been paid. But that is not the statement on record; for it is said  
that it was handed back to the father of both the parties to satisfy  
him that the debt was paid. Now he was not a party to the bill,  
and there is no reasonable ground why it should have been handed  
to him at all. The judgment of the Court and the principle of law  
is against dealing with the judicial admission of a party, except as

an entire whole. The statement of the defender is not an admission of the debt. It is a denial of it; and it would be very hard indeed, that by being compelled to come into Court, that which was a disputed question before, should all at once become a settled question. I think that in dealing with an admission in that way the principle of extrinsic qualification applies. Upon the whole, I am satisfied that the judgment of the Lord Ordinary must be adhered to.

THE COURT "having heard the counsel for the parties, who renounce further probation, hold the trustees of the deceased James Donaldson, sometime farmer at Glithno, as respondents in his room, conform to minute . . . . refuse the prayer of the said reclaiming note and adhere to the interlocutor of the Lord Ordinary reclaimed against: Find the respondents entitled to expenses."

*Thomas Dunn, S.S.C., Reclaimer's Agent.*

*George Monro, S.S.C., Respondent's Agent.*

### FIRST DIVISION.\*

(*The following is the case referred to in Lord Wood's Note in Donaldson v. Donaldson, ante, p. 811.*)

MACARTNEY v. CAMPBELLS.

No. 307.

*Accounting—Qualified Admission—Counter Entries—Extinction of Debt.*  
—Circumstances in which entries in an account were held to be qualified by counter entries, and the debt extinguished.

This was an advocation from the Sheriff of Ayrshire, in which (besides other claims in a second conjoined action which need not be noticed,) the pursuer Macartney, concluded for a balance alleged to be due him by Campbell, of L.140, 12s. sterling, arising on an account libelled, in which the defender was debited with sundry large furnishings of wool, the price of some cattle, &c. amounting to L.446, 3s., and credit was given for purchases at a roup of the defender's effects, and for cash received, amounting together to L.305, 11s., leaving the said balance still due.

Campbell, in his defences, denied the accuracy of the account libelled, and produced with his defences the following state of accounts, showing a balance due to him of L.51 : 16 : 6, which he alleged to represent the true state of the claims, *hinc inde.*

\* The Court consisted of Lord President Boyle, Lords Mackenzie, Fullerton, and Jeffrey.

June 28, 1843. STATE of ACCOUNTS between JAMES M'CARTNEY and WILLIAM  
 Macartney v.  
 Campbell.

|       | <i>Dr.</i>                                                                | <i>J. M'CARTNEY.</i> | <i>CONTRA.</i>                | <i>Cr.</i>        |
|-------|---------------------------------------------------------------------------|----------------------|-------------------------------|-------------------|
| 1821. | To lent cash, . . .                                                       | L.20 0 0             | 1821. By 18 packs of wool, at |                   |
|       | ,, Cash given you at Kirkconnell, . . .                                   | 36 0 0               | L.6 per pack, . . L.108 0 0   |                   |
| 1822. | ,, do. do. at M'Naught, 66 14 0                                           |                      | 1822. , , 7½ packs of wool at |                   |
|       | ,, paid to James Campbell by your order, 20 0 0                           |                      | L.4 per do., . . 30 0 0       |                   |
|       | ,, cash given you at your mother's funeral, . . .                         | 8 0 0                | 1823. , , 6½ do. do. at L.3,  |                   |
| 1823. | ,, do. do. at Largmore, 10 0 0                                            |                      | 10s. per do., . . 22 15 0     |                   |
|       | ,, do. do. at Claffin, . . 2 0 0                                          |                      | ,, a quay's grass, . . 1 16 0 |                   |
|       | ,, do. do. to John Coats, your servant, . . .                             | 2 0 0                | ,, 4 cattle wintered,         |                   |
|       | ,, a load of meal, . . .                                                  | 2 4 6                | which, by agree-              |                   |
| 1824. | 1824. keeping a cow seven months, . . .                                   | 1 6 0                | ment, were to be              |                   |
|       | ,, 3 bolls of meal, . . .                                                 | 3 12 0               | 10s. each, . . . 2 0 0        |                   |
| 1825. | 1825. a plough bought at my roup, . . .                                   | 2 1 0                | 1825. , , a cow, . . . 7 7 0  |                   |
|       | ,, a boll and half of meal, . . .                                         | 1 5 0                |                               | L.171 18 0        |
|       | ,, do. do. do., . . .                                                     | 1 5 0                | Balance due to William        |                   |
|       | ,, cash lent you, . . .                                                   | 2 0 0                | Campbell, . . . 51 16 6       |                   |
|       | ,, a cow belonging to me, and sold by you without my authority—say, . . . | 7 7 0                |                               |                   |
|       | ,, three sheep do. do., . . .                                             | 3 0 0                |                               |                   |
|       | ,, for the product of 3 cows since Whit-                                  |                      |                               |                   |
|       | ,, sunday last, . . .                                                     | 20 0 0               |                               |                   |
|       | ,, for crop of Largmore for last year, taken up by you, . . .             | 12 0 0               |                               |                   |
|       | ,, grass of two score of goats since Whit-sunday 1825, . . .              | 3 0 0                |                               |                   |
|       |                                                                           | <u>L.223 14 6</u>    |                               | <u>L.223 14 6</u> |

In the meantime the defender, Campbell, died, and was represented by his widow and children, against whom the process, which had fallen asleep, was wakened and transferred.

The pursuer led no proof, but rested his claim on the admission in the account produced by the defender, and maintained that the defender was bound to have proved the sums therein taken credit for, which he had not done. The defender maintained that the whole account must be taken together. The Sheriff-Substitute adopted the pursuer's view of the account and decreed against Campbell for the sums therein debited to him, and the Sheriff adhered. In his note the Sheriff remarked, "with regard to the claim for wool, the Sheriff does not think it

one which involves the doctrine of *qualified admission* on the part June 23. 1848.  
of the defenders. The delivery of the *article* being admitted, it is incumbent on the defenders to instruct payment, either by written Macartney v. receipt, or by the oath or admission of the pursuer." The de- Campbell's.  
fender brought an advocation.

The Lord Ordinary (Wood) advocated the cause, and recalled the interlocutors complained of, and, *inter alia*, " finds that the respondent having failed to adduce any sufficient proof in support of the charge side of the said state of accounts libelled on, consisting principally of the price of wool alleged to have been sold and delivered by the respondent to Campbell, he ultimately ( . . . . ) rested his claim in said action against the complainers upon a counter-state of accounts, which was given in by Campbell, in which Campbell debits or charges himself with L.171. 18s. sterling, which the respondent agreed to hold as the charge against the complainers, and which sum consisted, to the extent of L.160, 15s. sterling, of the price of wool admitted by Campbell to have been sold and delivered to him by the respondent: Finds, that although the respondent, in the state libelled on, admitted "cash, &c., at sundry times," as received by him from Campbell, to the extent of L.125, 11s. sterling, he, in his observations on Campbell's state of accounts ( . . . . . ) admitted the discharge side of that state to the extent only of L.37 : 1 : 6 sterling; but finds that the respondent cannot found on the said state as an admission to theforesaid extent, of the sale and delivery of wool by him, and of the other items on the charge side thereof, without, at the same time, taking along with it the counter entries in that state: Finds that these counter entries must be taken into view, and that being greater in amount than the said sum of L.171, 18s. sterling, forming the charge against the complainers, the latter must be held to be thereby extinguished. And, therefore, finds that nothing is due to the respondent under the conclusions of the said first mentioned action."

In his note, his Lordship observed, " If a case is to be allowed to stand exclusively upon the admission of the defender, the pursuer cannot take one side of an account given in by the defender without taking the other, although it may be competent to him, while he takes the admission, to rebut the qualifications by evidence. But if he offers none, and makes no reference to oath, (which is the case here,) so that the case is left on the admission of the defender alone, then the admission must be received with all the adjected qualifications, and the pursuer cannot, by rejecting

June 23. 1843. them, supersede the necessity of leading farther proof on his part."

*Macartney v. Campbell.* But while this has appeared to the Lord Ordinary to be the import of the cases upon the point which were cited by the complainers, he may be mistaken in his reading of them, and he may state, that had he not considered these cases to have decided it against the plea of the respondent, he might have entertained some doubt whether any substantial distinction could be drawn in favour of the party making admissions, between judicial admissions coupled with qualifications, in such a case as the present, and admissions with qualifications in an oath, upon a reference where the claim was prescribed. And dealing with the present case, as not ruled by authority in the way he has held it to be, he would rather have been inclined to have allowed the complainers credit, —in addition to the entries admitted by the respondent,—only for the sums entered on the credit side of Campbell's account, as cash given by him to the respondent, which sums were paid, when, according to the account as stated, the articles admitted by Campbell on the charge side were due, and when, so far as appears, these articles formed the only debt due by him."

His Lordship referred to the following authorities, *Anderson v. Rintoul*, 1st June 1827; *Forbes v. Milne*, 18th Nov. 1827; *Gall v. Fordyce*, 11th June 1828; *Gray v. Monro*, 10th December 1829; *Grierson v. Thomson*, 14th January 1830; *Buist v. Lyon*, 13th December 1838; *Campbell v. Arnott*, 26th February 1835.

Macartney reclaimed.

*Maitland* was for the reclaimer, and *Monro* for the respondent. Besides the above authorities, the following cases were referred to in the argument on the reclaiming note before the Court. *Lockerby v. Stirling*, 25th June 1835; for an elaborate interlocutor by Lord Moncreiff; *Noble v. Scott*, 23d February 1843. *Rundall v. Blackburn*, 5 Taunton's Reports 245; *Thomson v. Lambe*, 7 Vesey, 587.

It was stated in the Inner House by the defender, that he had a claim against the pursuers for the expenses of an action of reduction, in which the latter had been unsuccessful; and on 2d December 1843, the Court before answer, ordained the amount of expenses in that process of reduction, to be audited; and on the 19th January 1844, the following interlocutor was pronounced:—

"The Lords having resumed consideration of this cause, with the Auditor's report of the expenses in the reduction in 1829, whereby the said expenses are taxed at the sum of £59 : 4 : 10, and having

heard the counsel for the parties, approve of the Auditors' said June 28. 1852. report, and in respect that the pursuer James M'Cartney has got <sup>Macartney v.</sup> credit for the said expenses in accounting with the defenders, <sup>Campbell.</sup> assoilzie the defenders from the conclusions of the first action, raised by the said pursuer, and decern. Before answer as to expenses of process, appoint the counsel for the parties to be farther heard thereon."

*William Menzies, Advocators' Agent.*

*T. and R. Landale, S.S.C., Respondent's Agents.*

## SECOND DIVISION.

LEWIS v. ANSTRUTHER.

No. 308.

*Alimentary provision—Arrestment.*—Circumstances in which held that an annuity contained in a bond by the present possessor of an entailed estate, granted to the next heir as a condition of his consenting to disentail, could not be arrested, it being declared alimentary.

This was an action of forthcoming, brought by Lewis against Anstruther, younger of Carmichael, and Sir Wyndham Carmichael, Jun., Anstruther and other parties, arrestees. <sup>Lewis v. Anstruther.</sup>

The summons set forth that the pursuer was holder of a promissory note for £850, blank endorsed by the principal defender and his father, which he had protested, and, in virtue of the warrant on which, he had arrested in the hands of Sir Wyndham, and Henry Gordon Dickson, W.S., and Henry Gordon Dickson, Jun., W.S., (1,) the sum of £300, being one half-year's payment of an annuity of £600, provided to the principal defender by his father, payable in equal sums half-yearly, and of which the first half-yearly payment was due on 15th November 1850; and (2,) the sum of £37, 10s., being a half-year's interest of the sum of £1500 due to the defender in virtue of a bond and disposition in security in his favour by his father, dated November 1850. In defence it was alleged that the defender had put his name to the bill solely for the accommodation of his father, who received whatever value the pursuer gave for it; that the pursuer had various transactions with the defender's father, in the course of which he had received full payment for the said bill; that the pursuer had granted to his father a formal and final discharge of said bill without the consent or sanction of the defender, and that the annuity said to be arrested was declared by the deed constituting it to be an alimentary provision not subject to diligence.

June 10. 1852. It appeared that the defender had become an obligant in other two bills along with his father, which, including the one in question, amounted to £2300. On these and on another bill for £1500, in which the father was the sole obligant, proceedings had been taken by Lewis against Sir Wyndham. Of the sums contained in these bills the pursuer granted to Sir Wyndham a discharge, on condition of his paying over the sum of £1600 and granting a bond and disposition in security for the balance, by which discharge he "exonerated, acquitted, and simpliciter discharged Sir Wyndham of each and all of the said four bills or promissory notes, amounting together to £3820," &c. Of the same date with this discharge Lewis granted a letter of obligation to Sir Wyndham, bearing, that whereas he had granted a discharge of the bills in which the principal defender was a co-obligant, "and whereas the said discharge is limited and confined to the said Sir W. C. D. Anstruther, and noways extend to the said W. C. J. Anstruther, against whom, notwithstanding of the discharge in favour of the said Sir W. C. Anstruther, I have hereby reserved all my claims full and entire; and whereas it is necessary for me to retain possession of the said two bills and of the said promissory note in order to effectuate any claims thereanent against the said W. C. J. Anstruther," he undertook, on receiving payment of the bond, to deliver to Sir Wyndham the bills, to enable him to operate relief against his son.

It further appeared, that on condition of the defender, who was next heir of entail to his father in the lands of Carmichael, consenting to the disentailing of the lands, Sir Wyndham agreed to grant him a free yearly annuity of £600, "declaring, as it is hereby specially provided and declared, that the said annuity of £600 sterling is an alimentary provision in favour of the said W. C. J. Anstruther, and that the same shall not be assignable by him, neither shall the same be liable for his debts or deeds, or subjected to the legal diligence of his creditors for payment of the debts already contracted, or that may hereafter be contracted by him." By bond and disposition in security, dated Nov. 1850, he also granted to his said son the sum of £1500 sterling, and of this sum the first term's interest fell due at November 1850.

In these circumstances it was pleaded by the defender, (1,) that the discharge by Lewis to his father operated as a relief to him; and (2,) that the annuity arrested being alimentary, could not be arrested. These constitute his fourth and sixth pleas in defence,—the only ones insisted on in the Inner-House.

The Lord Ordinary (Robertson,) "Finds that the deed of dis-

charge by the pursuer in favour of Sir Wyndham . . . . does not June 10. 1852. operate as a discharge in favour of the defender of the bills libelled <sup>on,</sup> and that the sum of £1600 therein acknowledged to have been <sup>Lewis v.</sup> Anstruther. paid in cash, was thereby effectually applied to the promissory note of £1520 due by the said Sir Wyndham Anstruther to the pursuer, with interest and expenses, and that no part thereof can be ascribed to the three bills of which the defender was drawer or acceptor, or any one of them ; and to this effect repels the defences and decerns ; Finds that notwithstanding the declaration in the bond of annuity libelled on, that the amount of £600, for which the same is granted, may so far as it is in excess of a proper and suitable aliment, be competently modified in this process, to the effect of giving decree of forthcoming to the extent of the sum due beyond the said reasonable and proper aliment ; and in the whole circumstances of the case, Finds that to the extent of £200 per annum the annuity due under the said bond may be attached by arrestment, and made forthcoming for the benefit of the pursuer, and that so far as used, the arrestments to this extent are available, and in so far repels the defences and decerns ; Finds that the interest due in the bond for £1500 in favour of the defender is attachable by arrestment, and may be made forthcoming by the pursuer, and decerns accordingly," &c. In his note the Lord Ordinary referred in support of the competency of restricting the aliment, to *Webster v. Shaw*, 7th July 1826, 4 S. 809 ; *Wright v. Harley*, 2d June 1847, 9 D. 1151.

The defenders reclaimed.

*Boyle* and the *Solicitor-General*. In regard to the annuity, it is to be observed that it is an estate in the defender, only created by the bond from Sir Wyndham. Lewis does and must found upon it a part of his title, yet he repudiates the condition on which it was provided, viz., that it shall be alimentary. This is not the case of a man converting his own estate into an annuity declared to be alimentary.

*Donaldson and Penney*. It is clear that a security granted by an indorser or co-obligant in a bill can never operate as an extinction of that bill against the acceptor, especially when as here, a right to proceed against him is expressly reserved. No part of the £1600 paid to Lewis by Sir Wyndham was applicable to any of the bills to which the defender was a party, because the discharge stipulates that besides that payment, Sir Wyndham is to grant a bond for "the farther sum of £2984, 17s., consisting of the several items specified in a state subscribed by me as

June 10. 1852, relative hereto;" and this state contains an item—" Balance of bills, with interest and expenses incurred in England, £2400," shewing a clear reference, both by its amount and the manner of mentioning it, amongst others, to the bill due by the defendant. Besides Lewis delivers up the bill for £1500, and retains the others. In regard to the other plea that the annuity is alimentary, it is to be observed that for this fund Anstruther gave up his right of succession, &c., which was a commodity applicable to the payment of creditors, and he gives it up for an annuity attempted to be placed beyond the diligence of his creditors. He is not entitled to do that. Besides, it is not true that any fund declared alimentary cannot be reached. It is not protected from the diligence of creditors, so far as it exceeds the bounds of a proper aliment; Stair, III., i., 37. *Blackwood v. Boyd*, 14th June 1667, M. 10,309; *Lord Buchan*, 11th July 1835, 13 S. 1112, admitted, by implication, the same rule, because there the question was, whether the aliment was or was not excessive. The aliment is here excessive.

LORD JUSTICE-CLERK. I am disposed to sustain both the defences; but it is not necessary to enter much on the discussion of the first. It does not follow because a right was reserved in the discharge, that therefore it should be effectual in point of law. And looking to the nature of the transaction, namely, a promissory-note from the father and the son, at the time the son had nothing but enough for his maintenance and education, as well as the manner in which the creditor transacts with the father, it is quite clear the debt really was a debt of the father's, and that the creditor who received the note from the father knew that to be the truth. The Court will not shut its eyes so far as not to look at the truth and reality of the transaction. Now, holding that, I think Lewis has obtained full satisfaction of all his claims against the father, the proper and principal debtor; and that the proceeding by which he takes security for the sum from the father, and at the same tries to preserve a power to proceed against the son, is a proof that this is (to use an expression we over-heard at the bar) a most Jewish transaction.

2. I apprehend the annuity secured to the son is clearly alimentary. This is the first case occurring in regard to the efficacy of these deeds of consent under the new Entail Act, and is, in that point of view, of great importance. This is a case in which a gentleman, largely embarrassed with debt, proposes to avail him-

self of the power of disentailing his estate, if he can obtain the June 10. 1852. consent of the heirs, whose consent is required by the statute. His eldest son is twenty-five. He has no independence of his own ; and he is asked to surrender his right of succession in large estates (which right, had he survived his father, was indefeasible) in return for a consideration to be given him. Now there are various conditions on which he might have renounced this right,— (1,) For the payment of a sum of money ; (2,) For an annuity ; or, (3,) For a combination of these, as is done here, where he receives a bond for a sum of money and an annuity. We deal now only with the annuity ; and it is stipulated that he is to give up his estate and to receive this in lieu of it. Now, very naturally he makes stipulations not for a great amount of annuity, not for such as, if calculated by the terms of life insurance, he might have got, but for an annuity declared to be alimentary ; and he makes his getting such an annuity the condition of his assent. In the recent entail statute, clauses have been very properly inserted, in the view of provisions of this sort being made, for the purpose of protecting the interests of creditors of such heirs. These have been carefully worded, and were the subject of much discussion at the time when the act was passed. They are two in number ; and were for the purpose of enabling creditors in different situations to come forward and object to the consent the heir proposes to give, so that the Court, if necessary, may provide for their rights and interests. The process of disentailing is made public by advertisement. Lewis does not appear, and the result is, that out of the *entailed* estate an estate is created in the son, which would never otherwise have existed. Can the creditor now come forward and insist on holding, that the whole of the provision securing an annuity to the son, is to be disregarded, and that the fund is attachable by creditors ? I do not consider here the question of modification. The first question is, is the provision alimentary ? There is nothing stated here against the proper onerosity of this deed. I never saw a transaction out of which an alimentary fund arose, which is more clearly an onerous transaction than the present one. If so then, is there any ground for restricting it ? I cannot admit that any of the cases cited have any application to the present case at all. Webster is a case where a party was going to try a question whether a fund was alimentary or not ; and thus arose the question whether you could recal an arrestment used ; and both Lord Glenlee and Lord Alloway (both great authorities in such a question) said, this is not a case in

June 10. 1852. which we can consider whether this fund is alimentary or not.

*Lewis v.  
Anstruther.* It is impossible to restrict an annuity bargained for under condition of being alimentary; and I hold that this fund is clearly alimentary, and cannot be restricted. I don't proceed on a consideration of its amount. I need not at present consider whether or not, in a case where an *extravagant* alimentary annuity was provided, the annuity might be touched. I go here on this, that the fund is declared alimentary under circumstances precluding the creditors from touching it.

**LORD MEDWYN.** I entirely concur. In regard to the bills, I have no doubt it was a debt of the father. It is impossible to read the transaction without seeing that. I hold this to be an alimentary bond, and not restrictable in consequence of the manner of its creation. It is not necessary to consider whether an alimentary provision would be restrictable if excessive, for, under the present case, it is certainly not excessive, considering the situation of the parties.

**LORD COCKBURN.** This fund was plainly an alimentary fund; and the sum allowed is not above a reasonable amount.

**LORD MURRAY.** In the circumstances, £600 a-year is not excessive.

The COURT pronounced the following interlocutor:—"Alter the interlocutor reclaimed against: Sustain the fourth defence so far as founded on the circumstances and character of the transaction entered into between the pursuer and Sir Wyndham Anstruther: Sustain the sixth defence; and therefore asoilzie the defenders: Find the pursuer liable in expenses."

*James F. Wilkie, S.S.C., Reclaimer's Agent.*

*Hugh Ross, W.S., Respondent's Agent.*

## HOUSE OF LORDS.

### No. 309. FERGUSSON, *Appellant*; and SKIRVING and OTHERS, *Respondents*.

*Presbytery Courts—Authentication of Minutes—Stat. 1686, c. 5—Cancellation.*—In a reduction at the instance of a schoolmaster to set aside a sentence of deposition by a presbytery, one of the grounds of reduction was, that the minutes of the presbytery were not duly authenticated, although it appeared that the mode of proceeding adopted was warranted by the practice of the Church Courts. Circumstances in which *Held*,

affirming the interlocutor of the Court of Session, that even if the statute 1686, c. 3, applied to the Courts of Presbyteries, (which was doubted), there had been a due compliance with it, and the minutes were sufficiently authenticated :—*Held* also that the appellant could not, in the circumstances, object to the right of the Presbytery to cancel certain of the proceedings complained of.

An action of reduction was raised at the instance of the <sup>May 28. 1852.</sup> ~~appellant~~ against the respondents, for the purpose of setting aside <sup>Fergusson v.</sup> a sentence of the presbytery of Dumfries, deposing him from his office of schoolmaster in the parish of Kirkpatrick-Durham. Several grounds of reduction were set forth in the summons, but it is only necessary to state the following, namely, 1st, That the minutes and deliverances of the presbytery were not duly authenticated by the subscription of the moderator, and the clerk of the presbytery ; 2d, that the appellant was refused access to the principal libel, and the depositions of the witnesses, or to any of the other proceedings in process, in violation of the statute 1686, c. 18 ; and, 3d, that the presbytery held as cancelled the whole proceedings in the case subsequent to their deliverance of the 14th October 1846, and up to the date of their meeting on the 2d March 1847.

The minutes, complained of under the first head of reasons, were the minute of a meeting of presbytery of 10th August 1846, which contained the debate on the relevancy of the libel, the minute of a meeting of 5th April 1847, containing a resolution of the presbytery, cancelling all the proceedings after the 14th October 1846, and the minute of 23d June 1847, containing the deliverance of the presbytery, finding the charges against the appellant proved, and containing the sentence of deposition.

The original minutes were not authenticated by any signature, but they were afterwards written out *in extenso* by the clerk ; and at the next meeting of the presbytery, the extended minute, after being read and approved of, was signed by the moderator at such meeting, but who was not the moderator when the resolution which the minute recorded was passed. In the course of the cause the Lord Ordinary, by an interlocutor of December 1848, remitted to the Principal Clerk of the General Assembly of the Church of Scotland, and to the Procurator for the Church, to report what was the practice of the General Assembly and other Church Judicatories, in regard to the form and mode of authentication of such interlocutors and deliverances as were brought into

May 28. 1852. question by the present case. A report was afterwards made in  
the terms of this remit, which shewed that the proceedings which  
had taken place with respect to the authentication of the records,  
was according to the forms of procedure of the Church, there being  
no case found in practice in which the scroll or original minutes  
had been signed.

Fergusson v.  
Skirving.

The appellant, however, contended, that the minutes were not authenticated in the terms of the statute 1686, c. 3, and that the practice of the Church Judicatures being at variance with that statute, could not avail the respondents. The statute in question enacts—"That from and after the 1st of November next, all interlocutors pronounced by the Lords of Council and Session, and all other Judges within the kingdom, shall be signed by the President of the Court or the Judge-pronouncer thereof: And his Majesty, with advice foressaid, prohibits and discharges the Clerks, upon their peril, to extract any acts or decrets, unless the interlocutors, which are the warrants thereof, be signed as said is: Declaring hereby the extracts which shall be given out otherwise to be void and null."

The facts on which reduction on the 2d and 3d heads were based, appeared to be these. On the 14th October 1846, the presbytery refused a petition by the pursuer for access to the proceedings then in the hands of their clerk, and they afterwards refused to grant a commission for the examination of witnesses on his part, of certain parties said to be resident in England, and elsewhere. In consequence of this, the appellant brought a suspension and interdict against the presbytery, and contended that their so refusing access to the proof was in violation of the statute 1686, c. 18, which enacts, "in all processes presently depending, or to be intended before the Lords of Privy Council, Lords of Session, and all other judges within this kingdom, the witnesses who are made use of and adduced therein, shall be examined in presence of the parties, or their advocates, they being present at the diets of examination, and that there be publication of the testimonies of the witnesses in the clerk's hands allowed to the parties before advising, to the effect parties may have copies thereof if they think fit." The presbytery, on the recommendation of the Court of Session, consented to cancel the proceedings subsequent to such refusal, and to pay the expenses of the appellant; upon which the Court of Session recalled the interdict, reserving to the appellant his right to insist on a reduction of the whole or

any part of the proceedings. The appellant, when called on by the presbytery, refused to say whether he wished the proceedings cancelled or not, but left them to proceed at their own risk, upon which the presbytery cancelled the proceedings subsequent to their refusal of access to proof, and resumed the case *de novo*. The presbytery ultimately, on 7th June 1847, finally disposed of the case, by finding certain of the charges proven, and deposing the appellant. This was the sentence which appellant sought, in his action of reduction, to reduce.

The Lord Ordinary reported the case to the Inner House, and the majority of their Lordships, by an interlocutor of 26th June 1850, repelled the reasons of reduction. The present appeal therefrom was now argued by

*Bovill*, for the appellant, who contended that the proceedings before the presbytery were not properly authenticated, and also that they had no power to cancel the evidence which had been taken, nor to subject the appellant to a second trial, after annulling the proceedings taken on the first trial. He cited 43 Geo. III. c. 54; *Smith v. Macaulay*, 9 Court of Session Cases, N. S. 190; *Dickson's case*, Morr. Dict. 7464; 2 Swinton, 443; 2 Hume's Notes, 477; Hill's Practice in Church Courts, 27, and Assembly 1817, Sept. 7; *Campbell, Synod of Merse and Teviotdale*.

*Rolt*, Q.C., and *Anderson*, Q.C., for respondents, contended that the act 1686, c. 3 does not apply to presbyteries, and, next, that its provisions have been sufficiently complied with; and as to the other objections that the proceedings were regularly cancelled, and that after the opportunity given to the appellant, and his refusal to say what he wished done, it was not for him afterwards to complain that all the evidence had been cancelled. They cited *Inglis v. Great Northern Railway Company*, *ante*, p. 749.

*Bovill* in reply contended that the act 1686, c. 18, was similarly worded to the act 1686, c. 3, and that as, when the present case first came before the Court of Session, their Lordships held that the Act 1686, c. 18, was applicable to presbyteries as well as to other courts; 9 Shaw, N. S. 691 (which had not been appealed against), the Act 1686, c. 3, must equally be held to apply to presbyteries.

**LORD CHANCELLOR.** My Lords, in this case the appellant has not the merits, and if he succeeds in his appeal, it must be on a legal technical point, and therefore your Lordships will no doubt be most anxious, if possible, to dismiss this appeal. The first point is,

May 28. 1852. that certain minutes containing the presbytery's findings were not signed in the terms of the statute 1686, c. 3. Now, my Lords, in point of fact, that statute has never been held to apply to the proceedings of presbyteries; and in *Dickson's case*, which has been cited on behalf of the appellant, one of the learned Judges says so. He says that that act has not been understood to relate to Ecclesiastical Courts. The Act itself, my Lords, says, that "all interlocutors pronounced by the Lords of Council and Session, and all other Judges within the kingdom, shall be signed by the President of the Court, or the Judge-pronouncer thereof." It is singular that the Act does not declare that judgments shall be void if they are not so signed, but it goes only to declare void the extracts which shall be given out, if the judgments are not so signed. There is, my Lords, I think, a good deal in the argument that the Act is directory only in the first part of it, and imperative in the second part. Our experience tells us that interlocutors, properly so called, are not signed at the time they are pronounced; indeed, it would be impossible for the course of justice to proceed, if their not being so signed were an irregularity, and the Act does not say it is such. I should, as I have already intimated, doubt that the statute 1686, c. 3, ever applied to Courts of Presbytery; but it is said, that the statute of the same Parliament, c. 18, contains, in this respect, the same words as those of c. 3, and that the statute, c. 18 has, in the proceedings between these same parties, been lately held to apply to presbyteries. But, my Lords, the words of the two statutes are not the same, for at the end of the statute, c. 18, it is declared that that statute is to abrogate, "any law or Act of Parliament, custom or usage to the contrary notwithstanding." Your Lordships, however, are not called on to decide that point, because we must take the construction which this, an ancient Act, has received by the non-challenge of the acts of the presbytery, and by there never having been any attempt to upset the deposition of a minister for the want of that very form now complained of, and the want of which, we know in practice, has always prevailed. And in confirmation of this construction of the Act, it is to be observed that "interlocutor" is a technical word, which, at the time the Act passed, could not have applied to the proceedings of presbyteries. There is, my Lords, moreover, still a question whether the minutes have not been signed within the meaning of the Act, for the Act does not require the interlocutors to be signed at the time they are pronounced, nor that the Moderator of the meeting by which they were pronounced is to sign.

Ferguson v.  
Skirving.

Take the case of an interlocutor pronounced by the Lord Ordinary. I dare say the practice is for a minute of it to be made at the time, from which afterwards the formal interlocutor is drawn up, and that, which is a case expressly within the words of the Act, is sufficient. It is clear that the learned Judges in the Court below considered themselves bound to refer to the practice and usage of the Church Courts, and a remit in this case was made to the Clerk of the General Assembly and the Procurator for the Church, who afterwards made an elaborate report, finding the practice to be such as was followed in this case; and I will only say, that as regards the practice, it gives this effect to the statute, that it shews what is its true construction. I called for the books of the presbytery in this case, and, my Lords, I was quite surprised when I examined them, for I had expected to have found these minutes to have consisted of mere scratches and scrawls, but never saw anything more regularly kept than these minutes, which with great care are transcribed afterwards into the book which forms the record of the proceedings. My advice to your Lordships is, that you will consider that there has been in this case a due compliance with the Act, and that, consequently, this first objection cannot prevail. It is not necessary to trouble your Lordships with the others. The most material is that to the cancellation by the presbytery of their minutes, subsequent to their refusing the appellant access to the proof taken. That was done by the presbytery, under the direction of the Court of Session, the interlocutor of which was acquiesced in by the present appellant. Substantially it is open to no objection, because the appellant was asked whether he wished the minutes to be cancelled or not, and he persisted in giving no answer to the question. I therefore think that this and all other objections fall to the ground, and that the interlocutor complained of ought to be affirmed.

Appeal dismissed with costs.

*Charles Spence, S.S.C, Edinburgh ; and Wm. Rogers, Westminster,* } Agents for the Appellant.

*David Welsh, W.S., Edinburgh ; and Grahame, Weems, and Grahame, West-* } Agents for the Respondents.  
minster,

May 28. 1852.  
Fergusson v.  
Skirving.

## HOUSE OF LORDS.

No. 310.

**THE DUKE OF ATHOLL, *Appellant*, and TORRIE AND OTHERS, *Respondents*.**

*Action of Declarator—Public Way—Title to sue.*—In a declarator of a public right of way, the summons described one of the pursuers as an advocate residing in Aberdeen, another as a writer to the signet residing in Edinburgh, and the third as a merchant residing in Perth, and stated that the road had been for forty years and upwards used by the public, and that the pursuers have been used to proceed along it:—*Held* by this House, affirming the interlocutor of the Court of Session, that the pursuers shewed on the summons sufficient title to raise the action.

*Note.*—It would seem that an action of declarator to establish a public road may be brought by any one of the public.

June 8. 1852. An action of declarator was brought in this case to have it declared that the respondents and others have a right to use a public road between Blair-Atholl in Perthshire, and Braemar in the county of Aberdeen, and which in its course passes through Glen Tilt, the property of the appellant. The summons, after describing the respondents as being, one, an advocate residing in Aberdeen, another, a writer to the signet residing in Edinburgh, and the third, a merchant residing in Perth, stated, that from time immemorial, there has been, through the district of country lying between the upper part of the valley of the Dee, in Aberdeenshire, and the valley of the Garry in Perthshire, a public road, communicating between the village of Castletown of Braemar, and other places in the former valley, and the village of Blair-Atholl, and other places in the latter, and forming the only direct thoroughfare between them. The summons then particularly described the route, and set forth the following averments:—“That the said road has been, from time immemorial, at least for forty years and upwards, used and travelled on by the public on foot or on horseback, and has been frequented as a drove road by drovers, and their sheep and cattle.” Further, “That it forms the regular and only direct road from Aberdeen to Blair-Atholl, and from Blair-Atholl to the valleys of the Avon and the Spey.”

The summons then stated that the respondents had been used to proceed along the said road, and that, if they were deprived of the use of it, when they had occasion to travel to or from the valley of the Dee, they would require to make a circuit of many miles. The summons then alleged an obstruction by the appellee.

lant, and concluded that it ought and should be found and declared, by decree of the Lords of our Council and Session, that the foresaid old road communicating between the village of Castle-Torrie, &c. town of Braemar and other places in the valley of the Dee, and the village of Blair-Atholl, and other places in the valley of the Garry, in so far as the same passes through the property of the defender, as aforesaid, is a public road, and that the pursuers and all others are entitled to the free and lawful use and enjoyment thereof, as of any other public road.

In his defences the appellant denied that the road in question was a public road, and averred that it was made for the convenience of certain farms which are described, "and for access to Forest Lodge, a hunting seat of the noble defender and his predecessors;" and, as a preliminary defence, he pleaded that "the pursuers have not set forth, and do not possess, a sufficient title and interest to raise and insist in the present action."

When this preliminary objection came before the Lord Ordinary, his Lordship, by an interlocutor on the 14th July 1848, superseded the consideration thereof until it should be seen what were the precise extent of the respondents' averments when the record came to be adjusted. Accordingly, a record was afterwards made up by condescendence and answers, in which the following material facts were averred by the respondents, and though denied by the appellant, were, for the present purpose, assumed by the Court to be true.

1. That previous to the road being metalled (about the middle of last century) it had been used from a very ancient period as the natural pass between the districts of country situated to the south and the north;

2. That, at the expense of the public, operations were commenced about the year 1759 for converting this pass into a metalled road, and that it was, along with other roads in the district, placed under the control and management of the commissioners of supply of the county of Perth, of whom the Duke of Atholl, for the time being, was one;

3. That the commissioners had frequent meetings on the subject of the roads under their management, and that this road was described in the minutes of these meetings as "leading from Blair-Atholl northward through Glen Tilt to Braemar," and it was kept in repair by statute labour or service.

That in pursuance of an Act of Parliament of 1811, for the conversion of statute labour, the commissioners of supply, the

June 8. 1852. Duke of Atholl being the chairman, classed the road (under the  
~~~~~  
D. of Atholl •.
Torrie, &c.) 12th section of the Act,) among the "roads of the greatest public
utility and resort in the county." For the maintenance of these
roads the services of the district were converted into a money
rate. The respondent, Charles Law, was assessed for and paid
statute labour service money under the said Act. That the ap-
pellant had recently obstructed travellers in the use of the road,
and, in particular, that he interrupted and stopped the respondent,
Robert Cox, on the 11th September 1848, when he was passing
from the south to the north; and that the appellant likewise in-
terrupted and stopped the respondent, Alexander Torrie, on the
16th September 1848, when he was passing along the road from
the north to the south.

The Lord Ordinary (Ivory,) on 15th June 1849, pronounced
an interlocutor repelling the preliminary defence, and sustaining
the title of the respondents to insist in the action. Against this
interlocutor the appellant presented a reclaiming note to the First
Division of the Court of Session, on considering which, their Lord-
ships adhered to the Lord Ordinary's interlocutor. From these
interlocutors the present appeal was now brought.

The Solicitor-General of England and Rolt, Q.C., for the
appellant. The respondents, as mere members of the public, had
no title to pursue this action. There was no authority for any
such action by an individual. In all the cases the pursuer had
some interest beyond that of being a member of the public. *Har-
vey v. Rogers*, 7 Shaw, 287; *Forbes v. Forbes*, 7 Shaw, 441; *An-
derson v. Earl of Morton*, 8 D. 1085; *Ewin v. Glasgow Com-
missioners of Police*, 1 Macl. and Rob. 847; and *Finlay v. New-
bigging*, referred to in 1 Macl. and Rob. 861. There is no case
bearing directly in point, but the case of *Tait v. the Earl of
Lauderdale*, 5 Shaw, 330, is an authority; but it is not every one
who can bring such an action, for servants who were not house-
holders were there held to have no title to sue. If, therefore, it
is not every one who can maintain actions for the purpose of keep-
ing open roads, the respondents are bound to shew that they are
of that class who can maintain such actions. It is admitted there
are some cases tending to shew that a person may bring an action
of declarator on behalf of the public, but those cases cannot to that
extent be supported, or some limit to the locality must be fixed,
else it might be open to the whole world, and every member of it
might bring an action.

The appellant's counsel being requested by the Lord Chan-

cellor to state on paper how they proposed the restriction should be made, handed in afterwards the following statement.—“*1st*, ^{June 8. 1852.} *D. of Atholl v. That the authorities have not hitherto determined the extent Torrie, &c.* of the locality, or the precise limits within which ownership or residence, &c. will entitle; but they have negatived the right as existing in the subject of the realm, independent of the locality; *2d*, If locality is now for the first time to be defined, it must be limited to the parishes and towns through which the road in question passes, and the parishes and towns situated and adjoining to either terminus of the said road.”

The following cases were also referred to, *Cassilis v. the Town of Wigton*, Morr. Dict. 16122; *Aitchison v. the Magistrates of Dunbar*, 14 D. 421; *Trinity House of Leith v. Magistrates of Edinburgh*, 7 S. and D. 374; *Burgesses of Lauder v. the Magistrates*, 1 Shaw, 17; *Sir W. Forbes v. Gibson*, 1 Shaw, 30, and *Oswald v. Laurie*, 5 Murray, 6.

Bethell, Q.C., and *Anderson*, Q.C., for the respondents. It is shewn by *Stair*, 2, 7, 9, and *Ersk.* 2, 2, 5, that in public highways, all the public have an interest, and in Scotland where there is not as in England, the remedy by indictment, it is open to any one of the public to maintain the present action. A right to a public way is not confined to parties in the immediate neighbourhood, but all who are in the habit of using the way may sue. In the present case, not only is there the statement of the respondents having occasion to use the road, but there is an individual interest, though stated in common with the public, for it is averred that Mr Law has shared in the expense of the repair of the road. The case of *Campbell v. Lang*, 13 D. 1179, shews that the owner of property may have an action of declarator, that there is no public way through his property, which, if pursued without collusion or fraud, would bind the public. The following cases were also cited by them; *Porteous v. Allen*, Morr. Dict. 14,512; *Campbell v. Campbell*, 5 Brown's Sup. 599; *Guild v. Scott*, 21st Dec. 1809, Fac. Coll.; *Macfarlane v. Magistrates of Edinburgh*, 4 W. and S. 76; *Stair*, 43-47; *Barber v. Grierson*, 5 Shaw and D. 603; *Earl of Hopetoun v. the Officers of State*, Morrison, 13,527; *Dyce v. Hay*, 11 D. 1266; *Mackintosh v. Trustees of 1st District of W. Stirlingshire Turnpike Roads*, 12 D. 85; *Cuthbertson v. Young*, 13 D. 1308.

The Solicitor-General of England replied.

THE LORD CHANCELLOR. This case may after all turn out not to be of any great importance in point of law. The merits

June 3. 1852. of the case, whether Glen Tilt was, or was not a highway, is not,
D. of Atholl v. in the present stage of the matter, before the house. The simple
Torrie, &c. point at issue now is this, whether the respondents, in their capacity of pursuers in the Court below, had the right to sue in the character in which they had presented themselves to the Court of Session. Much contention arose in the course of the arguments as to what is the real effect of the averments made by the pursuers in their summons of declarator; and it was forcibly insisted, on the one side, that it is necessary to prove the user of the road by the pursuers, in order to enable these parties to maintain their right of action; and then, that the interlocutor of the Lord Ordinary, confirmed by the Lords of the First Division of the Court of Session, is in effect a decision of that particular question against the noble Duke, the appellant on the present occasion. This induced considerable discussion at your Lordships' bar, although it now turned out that it was admitted on both sides—that was, one side did not doubt and the other admitted—that that question was not concluded by the judgment; but that the pursuers having by their own declarator averred that they had used the road through Glen Tilt, they would have to establish that fact in the course of the proceedings in the Court below. Thus, then, your Lordships are relieved from much difficulty. Now it may be that the Judges of the Court below may determine that it is not necessary in such an action of declarator, that there should be any user of the road by persons suing on behalf of themselves and the public. I believe, my Lords, that that question is not concluded by the present judgment, but that it is still open, and if so, and any party shall be aggrieved by the decision on that point, he will have the right to come to this House upon it. Therefore, looking at the averments on the summons as true, the question is, whether they shew such a title as give a right to sue. Now the summons describes Alexander Torrie as "an advocate residing in Aberdeen," Robert Cox as "a writer to the signet residing in Edinburgh," and Charles Law "as a merchant residing in Perth." Let your Lordships, for instance, take the name of the last gentleman. That gentleman resides in the very county through which this particular road passes, and it is furthermore averred that he has himself paid "conversion statute" labour money under the Act of Parliament for regulating and converting the "statute services" in that county. Supposing, now, for the sake of argument, that there had been no law against their right to maintain the action—it would appear that a right was set up,

and the statement of the condescendence would exclude any question, for in the condescendence it is positively stated that the pur- June 3. 1852.
suers had each and all used the road, and it goes on to add that they could not pass from one terminus to the other without going through Glen Tilt, except by taking a long circuitous route of many additional miles in respect of distance. Assuming, then, these facts to be proved, there would then be a very different case from that which had been the subject of contention at your Lordships' bar, viz., could any one of Her Majesty's subjects sustain an action of declarator without having used this road? If, then, the averments be sustained, the case would come so much within all the authorities which had been cited, that I apprehend there will be very little question at all. But the whole of the difficulty in the matter has arisen in consequence of the difference which exists between the law of England and that of Scotland in respect of questions of this nature. Now, in England no difficulty can arise like that which has presented itself in the present case, for this reason, in England there is a remedy by indictment. Any person can proceed by indictment to try a right of way on behalf of the public generally. There is no such power or mode of establishing a right of way by the law of Scotland, and therefore the question is, whether the mode pursued in the present case is or is not lawful. If that mode is not in accordance with the law of Scotland, there is no other mode in Scotland, as I believe, of trying the question. Now, assuming, for the sake of the present argument, that the right of the public generally to the road is established, it would seem that every one of the public would be entitled to vindicate that right; the question is, whether he may by the law of Scotland do so by an action of declarator. Why should he not? There might, no doubt, be inconvenience in doing so, but that inconvenience would arise out of the defect in the law itself, in not having a remedy by indictment, as in England. That defect, however, cannot take away any right. It has not been denied, on the part of the noble appellant, that a great many persons have this right; but then it has been endeavoured to limit it to certain classes. Now, it would be somewhat singular if the law of Scotland had placed any limit on this right. During the arguments, when this point was so strongly urged, I asked the learned counsel for the noble appellant to state in writing how it was proposed the right should be limited. This has been furnished, and to that paper I will presently call your Lordships' attention; but in the first instance, how stand the authorities? On the side of a right on

D. of Atholl v.
Torrie, &c.

June 3. 1852. the part of the public, every case is in favour of certain classes of
the public to institute a suit of this kind. It had been said the
^{D. of Atholl &c.} cases only shew a right to a certain limit, but if there is to be a
limit of the right, where is to be the limit? It is said you may
take a person at either of the termini, but are you to exclude the
suburbs of a town; they are often very extensive, and where are
you to stop if you take in the suburbs? But then the counsel for
the appellant says, no case can be shewn in which an individual,
simply as such, on behalf of the public, has been held entitled to
maintain this action. The answer to that is, is there any authority
that he cannot so sue? The reply is no—as far as they go, the
authorities tend, case by case, to prove the right in the public to
vindicate a public right, and that that right had been maintained.
In truth, the whole of the cases which have been cited are against
the appellant—it lies on him to shew that the right has been limited,
and he has failed to do so. That the exercise of that right may pro-
bably be attended with inconvenience, I am quite prepared to
admit, but it can scarcely be denominated as a practical one, for
inconvenience had not come to pass in the practice; and, what
was more, I am disposed to believe that it never would, inasmuch as
that men would not go to try actions of declarator of this nature
who were not naturally connected with the particular locality.
Now, there could be but little doubt that the application of the
law would be confined to such persons who, according to the ad-
missions at your Lordships' bar, were clearly entitled to maintain
an action. Now, inconvenient as it no doubt would be for persons
who had no connection with the particular locality, to bring actions
of this kind, the danger is as great, or even greater, on the other
side, as was shewn by one of the cases cited in the course of the
argument. It is clear from the cases of *Forbes v. Forbes*, and *Camp-
bell v. Lang*, that the owner of the property may have a declarator
against there being any public way through his property. Suppose,
then, that the present appellant should bring his action of declarator,
with the view of obtaining a decision against the right of the
public to use this road in question, against whom would he bring
it? Why, against those who were likely to be most troublesome to
him. I should expect that there were no persons against whom
he would have been more likely to have gone as defenders in that
action than the present respondents. To this, although the mode
might be liable to be abused, practically no very serious incon-
venience could arise. An action might have been brought, and
the matter might have gone to the jury, but the person who had in-

stituted an improper action would have been liable in very considerable damage. I do not, my Lords, expect the general question, whether any one of the public may vindicate a public right by an action of declarator, will arise, but I think there will be little difficulty in your Lordships disposing of that point when it shall come before you. In the case of *Tait v. the Earl of Lauderdale*, there was a discussion as to whether servants were rightly excluded. Now, that was a case where a road, having been closed by a decree of the justices, a reduction of the decree had been brought by nineteen persons, of whom ten were described as being "servants" in Lauder and its neighbourhood. Servants who were not householders were in that case held not to have any title. I do not see how that case bears on the point at present under consideration. All it does is to show that a particular class of servants do not constitute members of the public; that is, that the public is of a more limited class. As to the question of public right, the question at this moment stands just where it stood before. Now, *Tait's* case in one sense has an important bearing on the general question. Several of the pursuers there are described as being merchants in Lauder, and it is impossible to read the opinions of the learned Judges without arriving at the conclusion that the right of action was acknowledged, not merely because the pursuers were merchants in Lauder, but that as they were merchants they were a portion of the public, and, as such, had a right to sue. All the cases that had been cited were against the appellant and in favour of the respondents. When the learned counsel for the appellant was asked the question, they said that the right must be either patrimonial or local, and they appeared, too, to have been very much inclined to contend that the right is one of servitude. Now, it is no such thing. A servitude is one thing, but dedication to the public is another. It has nothing in the world to do with a dominant tenement or a servient tenement; but the question is, in truth, whether the road has been dedicated to the use of the public? If it has been dedicated to the public, why should the public not have the right to sue? That this is a patrimonial question cannot for one moment be allowed. That it is merely local is equally untenable, inasmuch as it is utterly impossible to fix the limit. I asked the learned counsel for the appellant how he proposed to fix the limit, and I have received from him this paper. [His Lordship here read the statement which appears *ante*, page 833.] It is not correct to say, as is here stated, that the

June 3. 1852.
D. of Atholl v.
Torrie, &c.

June 8. 1852. authorities have negatived the right as existing, for the cases have to a certain extent affirmed the right, certainly they have not D. of Atholl v. Torrie, &c. negatived it. It is only necessary to hear the propositions contended for at the bar of your Lordships' House, to see that the question of limit is not a matter capable of being settled by rule. And why, indeed, should such a rule be established? Why should there be a limit of any kind? If it were found that the inhabitants of a particular town or district had a right, why, or how, should any limit be placed on the exercise of the right, because some of them might be beyond some imaginary circle? It seems to me quite clear that the attempt on the part of the appellant to limit the right to sue on local grounds has failed. I do not apprehend that an affirmation of the interlocutor of the Court below will in any respect prejudice the appellant in establishing, if he can, his right of excluding Her Majesty's subjects from Glen Tilt. I therefore move, my Lords, that this appeal be dismissed.

Appeal dismissed with costs.

James Ferguson, W.S., Edinburgh ; Spottiswoode & Robertson, Solicitors, Westminster, } Agents for the Appellant.

William Duncan, S.S.C., Edinburgh ; Dodds & Greig, Solicitors, Westminster, } Agents for the Respondents.

COURT OF SESSION.

FIRST DIVISION.

Petition, JOHN BROWN.

No. 311. *Trust Estate—Office of Trustee—Competition—Expense.*—Circumstances in which the expenses of a competition for the office of a trustee on a sequestrated estate refused to be allowed as a charge against the estate:—*Observed*, that the successful party will be entitled only to the proper expenses of his appointment, and not to any of the expenses incurred in the competition with the other party.

June 11. 1852. This case was reported verbally by Lord Anderson. In an application for the appointment of a factor, two parties competed Pet. Brown. for the office. Considerable discussion ensued. The Court at last appointed one of them; and now the factor applies for his discharge; but as in his accounts a charge is made against the estate, of the expense of both applications, his Lordship did not feel himself justified in passing the accounts without the authority of the Court.

The facts were these : The estate in question belonged to the late William Brown. An application was made for the appointment of a factor in 1845, and a Mr Douglas was appointed at that time. Alexander Hamilton, (the partner of Douglas in business,) was cautioner for Douglas in that application. Douglas became insane in 1848, and his factorial powers fell. It thus became necessary to apply for the appointment of a new factor, and on 26th October 1848, an application was made to the Lord Ordinary on the Bills, by John Brown, (brother of the deceased) with the consent of Robert Brown, his uncle, for the appointment, *ad interim*, of Alexander Hamilton. This *interim* appointment was made, to continue till the fifth sederunt day of the ensuing session, being the 20th November, when it expired. On 29th November, John Brown, having recalled his mandate under which the *interim* appointment was made, presented an application for the appointment of Provost Brown of Kilmarnock. Upon the 2d December an application was presented in the name of John Brown, with the concurrence of Robert Brown, being the same application that was originally presented in the Bill Chamber, but that being after the mandate by John Brown had been recalled, it was withdrawn. Another application was then presented in name of Robert Brown for the appointment of Alexander Hamilton ; and in this way the competition arose between Hamilton and Provost Brown. The Court preferred Provost Brown to the office.

His Lordship intimated his opinion to be, that this was a case in which he could not allow the expenses of both of these applications to be charged against the estate.

Macfarlane was for the successful party.

Deas, for the unsuccessful party, referred to the case of *Fraser*, 25th November 1851.

The LORD PRESIDENT. An application was presented to the Bill Chamber, which was a competent one, and an *interim* appointment made. I can see no objection to this proceeding. The fifth sederunt day comes, and no application is made for the continuance of the appointment, nor till the 2d of December. In the meantime, John Brown had come to be of opinion that Hamilton was not a proper person to be continued in that office, and so withdrew his mandate. In that state of matters he applied for the appointment of another person, viz., Provost Brown. That application appears to have been unexceptionable, and the Court appointed Brown to the office. But although John Brown, who

June 11. 1852. was the nearest relative of the deceased, had applied on 20th
Pet. Brown. November for the appointment of the Provost, an application is
made by Robert Brown, on the 2d December for the appointment
of Hamilton, thus setting up a person in opposition to the applica-
tion for the appointment of Provost Brown, and raising a com-
petition between these parties. I can only look to this, that when
a person is proposed in proper form, another person is set up in
opposition to him, and so expenses are incurred. I do not think
that the estate should be subject to such expenses.

LORD CUNINGHAME. In concurring with your Lordship in
the present case, which I do entirely, I by no means wish to inti-
mate that there are not cases in which the expenses of an unsuc-
cessful party should not be charged on the estate in applications
for factorial nomination. They may have been necessary and
useful to the estate, especially if the party seeking costs were first
in the field, and if he gave useful information and suggestions to
the Court. But the onus of proving the usefulness of such
procedure necessarily lies on the unsuccessful claimants. In
the present instance, I am perfectly satisfied on the grounds
stated by your Lordship, that the application of Robert Brown
was unnecessary, and that the estate derived no benefit what-
ever from it. If Robert Brown had any interest or occasion
to take a part in the nomination of factor on the estate, he might
have done so by entering a compearance under John Brown's ap-
plication, which was sufficient for the nomination of any proper
factor, and for the protection of the estate.

LORD IVORY. I do not know that the Court has before it all
the circumstances which are necessary to enable it to pronounce
a decision on this question. If there had been asked here the
expenses of the interim appointment, I would have had no ob-
jection: for that appointment was made in the usual way, and was
quite competent. Under the second application, a competition
ensued, Robert Brown the uncle, applying for the appointment of
the person who had filled the office of interim factor. I think
that the proper and natural expenses of that application ought to
be allowed. But I am of opinion that Hamilton cannot get any
expenses at all. It is Robert Brown who is now asking them. It
is expressly provided that the expense of competition shall be
thrown on the parties who incurred it; and shall not be thrown
on the estate. It is the duty of the Court to see that estates are
not torn to pieces by parties, who are seeking nothing but lucrum
out of their offices. The expense of the mere formal application

is proper, but the expense of competition is out of the question, June 11. 1852. and whenever there is the appearance of competition, the Court ^{should} set its face against both competitors, and appoint a person Pet. Brown. of their own authority.

Charge disallowed.

William Wotherspoon, S.S.C., Agent for Robert Brown.

John Leishman, W.S., Agent for John Brown.

SECOND DIVISION.

MACFARLANE v. HIS CREDITORS.

No. 312.

Cessio—Circumstances in which refused.

(See *ante*, p. 805.)

The Sheriff's grounds of judgment in this case, besides the fact June 11. 1852. that the pursuer had kept no accounts, and that his allegation that Macfarlane v. he was now carrying on cattle-dealing merely as a servant to his Creditors. nephew, was not reconcileable with the circumstances as proved or admitted, were farther, that the pursuer had carried off or sold his crop and stocking in the last year of his lease, in fraud of his landlord's (the Duke of Montrose), hypothec, and had also refused his consent to a proposal, in a process of sequestration at his landlord's instance, to let the winter foggage of the farm, though he himself had abandoned it, by which the let was delayed, and an inferior price obtained.

Scott and Logan, for the claimer. The pursuer was an illiterate man, and unable to keep books, which was quite common in his business. There was no ground in the proof for holding that the claimer was now dealing in cattle on his own account. He had raised an action against his landlord for a large amount of patrimonial damage; and when he carried off his effects did not consider he owed his landlord anything. Besides, he had applied the whole proceeds of these effects in payment of his debts; and a fraud is not relevant as a ground for refusing *cessio*, unless it had either increased the debts or diminished the assets of the pursuer.

Munro and the *Solicitor-General*, for the Duke of Montrose and the objecting creditors.

The *LORD JUSTICE-CLERK* was for affirming the Sheriff's judgment, and he did not think it necessary to look to anything else than the fraudulent carrying off the effects of the claimer, by which his landlord was deprived of a large and preferable claim.

June 11. 1852. It was not necessary that a fraud, in order to form a ground for refusing *cessio*, should either have diminished the general fund or increased the debts. It was sufficient if a creditor was thereby deprived of a preference, as in this case, for a just debt.

The other Judges concurred.

James Bayne, S.S.C., Reclaimer's Agent.

Dundas and Wilson, C.S., Respondents' Agents.

FIRST DIVISION.

No. 313.

KERR AND OTHERS v. MARQUIS OF AILSA.

11 and 12 Vict. c. 36, sec. 6—*Entailed Lands—Application to sell—Affidavit—Justices of Peace.*—An affidavit is good although taken before a Scotch Justice of the Peace resident in England.

(Sequel of case reported *ante*, p. 193.)

June 12. 1852. In accordance with the instructions of the Court, a case was prepared by Mr Archibald T. Boyle, advocate, for the opinion of English counsel, upon the point, whether an affidavit taken by a Scotch Justice of the Peace, resident in England, is a good affidavit by the law of England.

The case detailed the procedure that had already taken place before the Court of Session, and stated the arguments of both parties upon the point submitted for consideration;—it being maintained on the one hand, that as the Scotch Justices' authority does not extend to England, the oath was not regularly sworn, and does not carry with it the sanction expressed in the Act, because a prosecution on a charge of perjury would be incompetent in England; while on the other hand, as set forth in the case, it was maintained that the statute does not recite *before whom* the affidavit thereby required is to be emitted, and therefore that it may be emitted before any functionary who is by law entitled to administer an oath, and that a Justice of the Peace is confessedly such a functionary. That moreover, a person duly vested with the office of a Justice of the Peace may legally officiate in such a manner, wherever he may be; for the emission of an affidavit is not, properly speaking, a judicial proceeding, but a mere voluntary act of the party deponing; *Turnbull*, 1st March 1828, 6 S. and D. 676.

In these circumstances, the opinion of counsel was requested on the following point:—“Whether according to the law of England,

and having reference to the terms of the said 6th section of the June 12. 1852. Act of Parliament, and particularly to that part of it which de- ^{Kert, &c. v.} clares that 'any person who shall wilfully make such affidavit ^{Marquis of} falsely, shall be deemed to be guilty of perjury, and be punished ^{Ailsa.} accordingly,' the affidavit produced would or would not be objec-
tionable, and could or could not be made the ground of a prose-
cution for perjury, on the charge of the oath having been made
falsely, seeing that it was administered by a Scotch Justice of the
Peace, resident at the time in England?"

The case was submitted to Sir Fitzroy Kelly, and Mr Rolt, who returned the following opinion:—

1. We are of opinion that according to the law and practice of England, a Justice of the Peace for any English county, hav-
ing jurisdiction to administer oaths for any specific purpose, might for that purpose administer an oath, not only out of his county, but out of England, and that the affidavit or deposition sworn before him out of his county or out of England, would be receiv-
able in every Court, and for every purpose in or for which it could have been received, if it had been sworn before him within his own county. For an act so merely ministerial, his jurisdiction would not be affected by his being out of the locality in which his judicial duties as a magistrate are alone to be discharged. We offer no opinion upon the question (which might possibly be raised), whether if the affidavit had been sworn before a Justice of the Peace in his own county in Scotland, it would have been receivable in the Court of Session, in support of the petition; but we may observe, that by the law and practice of all the superior Courts in England, an affidavit to found proceedings therein, must always be sworn in such Courts, and the oath administered by the Court or its officers.

Assuming however, that an affidavit sworn before a Justice of the Peace, is receivable in the Court of Session, and that the circum-
stance of its being sworn out of the Justice's jurisdiction, would have no other effect in Scotland, than it would have in England, we are of opinion that an indictment for perjury might be maintained upon the affidavit in question, if false, in London or Middlesex, where it was sworn. But independently of the provi-
sions of the statute, the falsely swearing such an affidavit is a misdemeanour, and punishable accordingly.

This case and opinion having been laid before the Court.

LORD IVORY. My doubt, and that of Lord Fullerton, rested

June 12. 1852. on the question of English law entirely. That being removed, the objection falls.

Kerr, &c. v.
Marquis of
Ailsa.

The Solicitor-General (with whom *Duff*) for the suspender, Kerr and others. As to the matter of expenses, there was certainly a deviation here from the order of proceeding, and the expenses ought therefore to fall upon the party, who, by thus deviating from the usual course of procedure, gave rise to these objections. *Dunlop v. Crawfurd*, 26th May 1849, and 25th Jan. 1850.

Dean of Faculty (with whom *Mure*) for the Marquis of Ailsa, petitioner. We have succeeded in every point, and therefore are entitled to expenses from the party whose objections occasioned these proceedings.

LORD IVORY. The question is, would these parties have been safe to have taken this purchase without taking the opinion of the Court on these points ; and I remember that the Court, when the case came before us last Session, condemned the practice of trying experiments on the statute. These objections were not stated rashly or unreasonably ; they were admitted to be of a formidable nature, and are part of the expenses of the title which the seller bound himself to give.

LORD CUNINGHAME. I rather incline to the same opinion. The statement of these objections was necessary to give a fair title to the purchasers. The difficulties here arose out of a course of proceeding on the part of the heirs of entail, excusable, certainly, but still a little out of the ordinary course ; and although we have now found that they were not such objections as were fatal to the proceedings, I think that the purchaser's expenses ought to be defrayed by the seller.

The **LORD PRESIDENT** concurred.

The **COURT** therefore repelled the remaining objection to the validity of the affidavit, and found the objectors entitled to expenses.

John Patten, W.S., Objectors' Agent.

Hunter, Blair, and Cowan, W.S., Petitioner's Agents.

FIRST DIVISION.

No. 314. Suspension and Interdict—DAVID CRAWFORD v. JOHN SMITH Jun., and OTHERS.

Process—Caption—Suspension—Expenses.—An agent borrowed along with a process a promissory note, which formed the ground of action,

and refused to return the note, on the ground that the indorsation was ^{June 1st 1853.} a forgery. The cause in the Outer House was not enrolled. Caption being threatened, he raised a suspension. The bill was thereafter lodged with the Clerk of Court, who was directed to allow the Procurator Fiscal to have access to it; but no criminal proceedings were taken in consequence:—*Held* that the agent brought the suspension at his own peril, and was therefore liable in expenses.

Crawford v.
Smith, &c.

This was a suspension of a threatened process caption, and was reported by Lord Cowan in February last. An action was brought against Mary and Jane Smith for payment of the balance due upon a promissory note. Defences were lodged; but with these defences the promissory-note, which had been produced in process and had been borrowed up with the summons, was not returned to the Clerk; and repeated demands by the respondents' agent not having been complied with, the process caption now under suspension was applied for. The process caption was resisted, on the ground that the indorsation of the bill was forged. The complainant did not allege that the signatures of his clients, Mary Smith and Jane Smith, were not genuine. His averment was, that the subscription of the payee, by whom the promissory-note was blank endorsed, was a forgery, and defences were lodged on the ground of this forgery vitiating the respondents' title to insist for payment of the note, and also on the ground of the note being *ex facie* vitiated in its date. The complainer maintained that he was entitled on the part of his clients, although their signatures were not alleged to be forged, to keep up the promissory-note, and to refuse implement of his obligation to return all the documents which he borrowed from the clerk to the process, because of the payee and indorser's signature being, as he says, a forgery. Although a considerable time had elapsed since the defences were lodged without the promissory-note, and since the process caption was marked by the respondent, no information has been given to the public prosecutor, nor any steps, with the view of criminal procedure, taken. In this situation the Lord Ordinary was prepared to refuse the suspension, and allow caption to go out; but at the hearing before him, it was suggested, that as the matter was urgent, and the question of an unusual and peculiar kind, the more desirable course would be to report the matter to the Inner-House for immediate decision.

Wood and Inglis appeared for suspender.
Penney for the respondents.

June 12. 1852. The case was continued, and the bill was deposited in the hands of the Clerk of Court, who was directed to allow the Procurator Fiscal access to the document; but no proceedings followed thereupon.

*Crawford v.
Smith, &c.*

On the case being again called to-day,

Wood and the *Solicitor-General* for the suspender. The question now to be determined is one of expenses; and that turns on the point whether or not the suspender was justified in bringing the note of suspension. The cause in the Outer-House was not enrolled, so there was no clerk with whom the bill could have been deposited with safety. All that the suspender asked was, that the bill be preserved from being tampered with, till examined by the Fiscal; and he all along offered to lodge it with the clerk for that purpose. His clients were entitled to give information, and the suspender was entitled to be protected during the investigation, and suspension of the process caption was necessary for that purpose. No proceedings against the respondent have been taken by the public prosecutor; but that is not conclusive, unless it be shewn that the charge of forgery was made calumniously, or without probable cause, or at least recklessly. The suspender is therefore entitled to expenses.

Penney for the respondents. The question whether the suspender was entitled to bring this suspension and interdict may be put thus: whether an agent in this Court is entitled, on the grounds set forth here, to contravene one of the rules of the Court? The agent here acted on his own risk; and therefore we ought not to be liable in his expenses.

The LORD PRESIDENT. If I had any doubt or difficulty about this case, I would have liked to have heard the opinion of the other Judges first, not having myself had the advantage of hearing the case when it was formerly before the Court; but I have no doubt on this question of expenses. It appears to me that the party who brought this suspension did so at his own peril. He refused to go on with the case. Now the bill may be good, or it may be a forgery, yea or nay. But if the party thought it was a forgery he had the means of going at once to the Procurator Fiscal, who would have accompanied him to the clerk of Court who would have put all right; nor do I think that the interest of the complainor's clients was endangered by the risk of its appearing again. Now his charge of forgery is very specific. Is the party to be subject to the expense and annoyance of all this without any re-

dress at all? It is plain from the correspondence, that the agent ^{June 12. 1852.} has preserved his recourse against his client, who gave the instructions under which he acted.

Crawford v.
Smith, &c.

LORD CUNINGHAME. The question here is this: the party who lodged this production said, I must have back my production, and at the end of two months, he said, I will apply for caption. It was a most fair and reasonable course. I do not in the least find fault with Mr Crawford, because he acted by the instructions of his client, but I think that he ought to have taken the course either to have gone to the Procurator Fiscal, or returned the bill; but instead of that he allows two months to elapse before doing any thing. I think we must allow expenses here.

LORD IVORY. I concur. The party here has chosen to follow the instructions of his client instead of the regulations of this Court, and must bear the consequences of doing so.

The COURT remitted to the Lord Ordinary to refuse the note of suspension, with expenses.

David Crawford, S.S.C., Suspender's Agent.

Campbell and Smith, S.S.C., Respondents' Agents.

FIRST DIVISION.

Appeal, JOHN ANDERSON, in Halliday's Sequestration.

No. 315.

Bankrupt Estate—Election of Trustee—Claim to Vote.—In the election of a trustee on a bankrupt estate, the mother-in-law of the bankrupt claimed to vote on a promissory note, payable at sight, and which had been presented by her three days before the bankruptcy, and noted for non-payment. The affidavit contained no statement of the circumstances under which it was granted, or of the manner in which the debt arose:—*Held* that the document was not such as would entitle to a vote.

This was an appeal against a decision of the Sheriff-Substitute ^{June 12. 1852.} of Lanarkshire, in a competition for the election of a trustee on ^{Appeal} the sequestered estate of William Halliday, wine and grain merchant in Glasgow. The Sheriff's note explains the ground of his decision: “At the meeting for the election, the votes for Mr Guild amounted in value to the sum of L.350, 5s.; those for Mr Anderson to the sum of L.490, 15s., giving the latter an apparent majority of L.140, 10s. At the scrutiny, it was admitted that Mr Guild had a majority of good votes if the vote of Mrs Janet Halliday or March, claiming for L.225, was bad; and, on the

June 12. 1852. other hand, that Mr Anderson's majority could not be cut down if that vote was good. The Sheriff-Substitute is of opinion that Appeal, Anderson, &c. the vote cannot be maintained. Mrs March, the claimant, is the bankrupt's mother-in-law, and the claim is founded on a promissory-note granted by the bankrupt to her, dated August 16th 1850. The affidavit merely swears to the debt as vouched by the note, but contains no statement of the circumstances under which it was granted, or of the manner in which the debt arose. If granted of the date it bears, it must have remained unoperated upon, in the claimant's possession, till within three days of the bankruptcy, when it appears to have been noted for non-payment. Now it is settled by a series of cases, that I O U's and other acknowledgments of debt granted by a bankrupt to conjunct and confident persons, short'y prior to sequestration, are not *per se* vouchers sufficient to sustain a vote. The only distinctions between these cases and the present is, that it is a promissory-note which is held by the mother-in-law, and that it bears to be dated about eighteen months prior to the bankruptcy; but notwithstanding these specialties, the principle upon which the decision in these cases went seems equally applicable here. The principle seems to be, that a conjunct and confident creditor, who holds the bankrupt's acknowledgment of debt, must produce, along with such document, before he can be allowed to vote, some corroborative voucher, such as a detailed account, excerpts from books or other writings; or failing these, must explain in his oath the nature and history of the transactions between him and the bankrupt, which led to the granting of the acknowledgment founded on. Lord Fullerton's remarks in the case of *Cullen*, July 6. 1842; Lord Mackenzie's in *Laidlaw*, January 27. 1844; and Lord Moncreiff's and the Lord Justice-Clerk's in *Dyce*, May 28. 1847, all strongly enforce this doctrine. See also *Gascoyne*, December 16. 1847. The rule, however, would be one of easy evasion, if instead of a holograph I O U, all that was necessary was to put the acknowledgment on stamp paper, and in the shape of a bill or promissory-note. This might be a very good document of debt as between the granter and grantee, but in a sequestration, the interests of third parties require to be protected, and a necessity of explanation is therefore imposed on a mother-in-law, admittedly not in trade, who by voting on her son-in-law's acknowledgment, might virtually secure the management of the sequestered estate."

Deas was for the appellant.

T. Mackenzie for the respondent.

June 12. 1852.

The LORD PRESIDENT. I think that with such a document as the one in question the party ought to have explained the nature of the debt, and although it may be sustained as a good voucher, at an after stage of the proceedings, I am not for sustaining this document as entitling the party to a vote.

LORD CUNINGHAME. I agree. Every case of this kind is one of circumstances, and depends on its own specialties, and in this case they are such as cannot be got over. I apprehend we must take this bill as having come into existence at the time when it was first heard of. I do not think that this is a case in which the documents prove their own date at all.

LORD IVORY. I come to the same conclusion. This case does not fall within the letter of the authorities stated in the Sheriff's note, but it falls substantially within their spirit. The present question occurs in a case of competition,—always an unfavourable case for dealing with a question of this nature. This vote turns that competition. This vote, the trustee who is to carry the election by virtue of it, will be the party upon whom will devolve the duty of instituting an inquiry regarding it. Now, if there be any suspicion attaching to it, it appears to me that we should not commit it to any one who is bound to attend to his own interest in supporting it. The document is presented to us in a very unsatisfactory state, and it is for the Court to take care that it shall be subjected to a proper course of inquiry; and if so, it should be under the auspices of a trustee whose appointment is not dependent on maintaining this as a good document of debt.

The COURT "refuse the note, and find the appellant liable in expenses."

John Walls, S.S.C., Appellant's Agent.
John Leishman, W.S., Respondent's Agent.

SECOND DIVISION.

THOM v. HENRY and OTHERS.

No. 316.

Husband and Wife—Contract of Marriage—Clause, Construction—Divorce, effect of.—A. by contract of marriage, on the occasion of the marriage of his daughter C. to D., conveyed an estate "to himself in life-rent, and after his death to C. and D. in conjunct fee and life-rent; and to the longest liver of them two in life-rent, but for the said D. his life-rent

only." D. obtained decree of divorce against C., and thereafter A. died : —*Held* that D. was entitled to the liferent of the *whole* estate from the death of A.

June 12. 1852. Mr Henry of Corse, by antenuptial contract of marriage, on the occasion of the marriage of his daughter Margaret Sidny Henry, to the pursuer Alexander Thom, in contemplation of the said marriage, and in consideration of the annuity after mentioned to be paid by the said Alexander Thom to the said Margaret Sidny Henry, and of the sums of money after mentioned provided by him to his said intended spouse and the children of the marriage, and the discharge after expressed by the said Margaret Sidny Henry, "conveyed the estate of Corse to and in favour of himself, the said John Henry, in liferent, during all the days of his lifetime, and after his death to the said Margaret Sidny Henry and Alexander Thom, in conjunct fee and liferent, and to the longest liver of them two in liferent, but for the said Alexander Thom, his liferent use only." The fee was destined first to the heirs male of the marriage, then to the heirs female, whom failing, to the granter himself, and his nearest and lawful heirs and assignees whomsoever. The conveyance was not gratuitous, for the discharge granted by Mrs Henry to her father in respect of it, was of a provision of £6000 due to her under her parents' contract of marriage. The pursuer raised an action of divorce against the present defender, in which he obtained decree in November 1849. Infestment was taken on the marriage contract in terms of the conveyance in June 1847. Mr Henry died in June 1850, and the present action has been raised by the pursuer to have his right declared to the liferent use and enjoyment of the estate of Corse from that date, with corresponding conclusions of removing.

It was not denied on the part of the defender that the pursuer is immediately entitled to the liferent of one-half of the estate, and eventually on her death to the whole ; but it was contended that as Mr Henry died after the divorce, the pursuer has no right to more than the liferent of one-half ; the liferent of the other half belonging to the defender in her own right, and the dissolution of the marriage interrupting the *jus mariti*. The defender put her case upon the effect of the conveyance, as giving her a separate liferent to the extent of one-half, which *stanto matrimonio* might have been carried by the husband's *jus mariti*, but which after divorce remains with her in her own right.

The Lord Ordinary (Rutherford) "repels the defence for Mrs June 12. 852 Henry, and decerns against her in terms of the conclusions of the declarator and removing : Finds her liable in expenses to the pur- ^{Thom v.} Henry, &c. suer."

The defender reclaimed.

A. R. Clark and *Moncreiff* for the claimer. The husband has merely a right of liferent to one-half. According to Ersk. i. 6, § 46 and 47, the wife by her divorce forfeits her tocher and *donationis propter nuptias*, which accordingly she does not here claim. But how does her right stand to the estate? By *Elgin*, 26th January 1827, 5 S. 243, it was held that in consequence of divorce the *jus mariti* necessarily fell, and the husband could take nothing by virtue of it. Now in this case the husband necessarily retains one-half the liferent; but that which, during marriage, gave him right to the whole, namely, the *jus mariti*, no longer exists. The wife therefore gets a liferent of the other half. It is said, on the authority of Stair, i. iv., 20, and Professor More's Notes, p. 27, § 37, that the effect of divorce is the same as the effect of death. But that passage refers only to rights conferred by the marriage, not rights coming by succession. *Innerwick*, March 1589, M. 329; *Justice v. Murray*, 13th Jan. 1761, M. 334; *Anderson v. Walsh*, 8th Feb. 1734, M. 333; Scott, Elchies, Fiar, No. 8; *Boyd*, 25th July 1749; *Forrester v. M'Gregor*, 1 Shaw and M'L., 441, 13th April 1835.

W. G. Dickson, with whom the *Dean of Faculty*. The pursuer's case rests on the marriage-contract, and in virtue of it the husband and wife are entitled to a conjunct fee and liferent. The liferent refers to the whole, and in consequence of the divorce the pursuer is in the same position as if the marriage were dissolved by the death of the wife. The position is clear that in case of divorce on the ground of adultery, the offending spouse forfeits not merely the legal but conventional rights. Stair, *ut supra*; Bankton, I. v. 134; *Manderstoun*, 21st March 1637, M. 1741. It is a fallacy to say that in a conveyance such as this there is a separate estate to the extent of one-half in each spouse. On the contrary, the husband during his own life, by virtue of the grant, takes the liferent of the whole, the right of the wife merging in his right, not *jure mariti*, which could not give to the husband the wife's heritable estate, but by the proper legal effect of the conveyance.

LORD JUSTICE-CLERK. It is necessary to dispose of this case

June 12, 1852. according to the deed. I can understand a deed so framed as to secure rights to the wife even in the event of divorce. But this is a marriage-contract and runs, "in contemplation of said marriage and in consideration of a provision by husband," &c.

*Thom v.
Henry, &c.*

Now it is true the phrase, "in conjunct fee and liferent," when only one of the parties to the marriage is intended to have the liferent exclusively after the death of the other, is an awkward and embarrassing phrase. But one must look at the real meaning of the deed, and that is unquestionably, that the whole is given to these two in conjunct fee and liferent, which is practically a conveyance of the liferent of the property to the husband, with fee in the wife subsequently to the husband. The notion of a separate and divisible estate is inconsistent with the making it a conjunct right at all. It is given to the husband as the *dignior persona*; he does not take in consequence of his *jus mariti*, but in terms of the deed itself. How then can the wife claim one-half when the right is declared to be conjunct? She is just placed in the position as if she were dead. Even if his wife she could not have claimed one-half. Is it possible her adultery should make her better off than if she had continued his innocent wife?

LORD MEDWYN. I think the interlocutor is right. Both Stair and Bankton say that the innocent party is to obtain all rights under the contract as if the other party were dead. Now the liferent is here given in contemplation of marriage, and of marriage subsisting, and it would be very singular if the wife were by her divorce made to have a better right than she would have had during the subsistence of the marriage.

LORDS COCKBURN and MURRAY concurred.

H. G. Dickson, W.S., Agent for Pursuers.

Lockhart, Merton, Whitehead, and Greig, W.S., Agents for Defender.

FIRST DIVISION.

VALLANCE and Co. v. BEALS, BUSH, and MUNKITTRICK.

No. 317. *Principal and Agent—Bankruptcy—Recouree of Creditors—Liability of Agent.*—A firm in New York transacted with a firm in Glasgow, who acted not as principals but as agents. The principals afterwards became insolvent. They had previously granted a bill to the New York firm, who agreed to a composition and granted a discharge:—*Held that whatever may have been the knowledge or belief of the New York firm at*

the outset of those transactions, as to the character and position therein of the agents as agents merely, they had accepted the principals as their proper debtors, and could not go against the agents for the balance of the debt.

This case was reported by the Lord Ordinary (Wood) in terms ^{June 15. 1852.} of 13 and 14 Vict. c. 36, § 32. There were here conjoined processes of advocation in which proof had been led at great length. ^{Vallance v. Beals, &c.} The action was originally raised in the Sheriff Court of Glasgow at the instance of Vallance & Co., who are merchants in New York, against the defenders, who are agents in Glasgow for Anderson, M'Gregor, & Co., merchants in Kilmarnock; and the latter firm having become bankrupt, this action was brought for the purpose of having the defenders held personally liable to the pursuers for the balance due on certain mercantile transactions that had taken place between them. The facts which the Court held to be established, were these:—1st, That the goods referred to in the summons, and in the account pursued for, were the property of Messrs Anderson, M'Gregor, & Co. of Kilmarnock, and not of the defenders; 2d, That in the transactions referred to in the summons and account relative to said goods, the defenders were the agents of the said Anderson, M'Gregor, & Co., and were not principals; 3d, That whatever may have been the state of the knowledge or belief of the pursuers in the outset of these transactions regarding the true position and character therein of the defenders, as agents merely, the pursuers and their agents in Glasgow, William Wardlaw & Co. were aware of the true position and character of the defenders, as agents merely in these transactions, before the termination thereof; 4th, That in the knowledge of the fact that the defenders were merely the agents of Anderson, M'Gregor, & Co., and that the latter were the principals, the pursuers transacted directly with Anderson, M'Gregor, & Co. for an adjustment and settlement of the accounts, and accepted of their bill for the balance, and granted them an acknowledgment therefor without the defenders being parties to that arrangement, and without any intimation to the defenders that they were to be held liable for the balance on the account.

Anderson, M'Gregor, & Co. became insolvent, and offered a composition, which the pursuers accepted. They now claimed the balance of this account from the defenders, and pleaded that they had dealt with the defenders as the only parties acknowledged in the transaction; and they, having thus become primarily liable to the pursuers as principals in any question

June 15, 1852. between them, the circumstance of the pursuers having afterwards taken a bill from Anderson, M'Gregor, & Co. could only be regarded as an additional security, and therefore cannot relieve the defenders as principal obligants—a discharge, in that case, not being inferred by implication.

*Vallance v.
Beals, &c.*

The Sheriff-substitute held that the pursuers must have been aware throughout these transactions that they were dealing, not with Vallance & Co. themselves, but through them with Anderson, M'Gregor & Co., and therefore assailed the defenders.

The Sheriff-depute (Alison) reversed this judgment, holding that the credit originally relied on was that of the agents, and that the pursuers had not lost their recourse against them, merely because they were led *subsequently* to understand that they were really not the principals in the transaction, but acted merely as agents.

Logan and the Lord Advocate now appeared for the pursuers.
T. Mackenzie and the Solicitor-General for the defenders.

The COURT were unanimous in finding that in the circumstances above narrated (and which were detailed in their interlocutor) "the pursuers must be held to have taken the said Anderson, M'Gregor, & Co. as their proper debtors, and that they have now no good claim against the defenders; therefore assailed the defenders from the conclusions of the action raised against them by the pursuers, and decern; find the defenders entitled to their expenses both in this Court and in the Inferior Court," &c.

J. W. Mackenzie, W.S., Pursuers' Agent.
Scott, Rymer and Scott, W.S., Defenders' Agents.

OUTER-HOUSE.

BEFORE LORD ANDERSON.

No. 318.

NIDDRIE v. DEAN and SMITH.

Process—Judicature Act—Opening up closed record where no allegation of res noviter.

June 15, 1852. In this case the pursuer, alleging himself to be only fourteen years of age, sought to recover damages from the defenders for serious bodily injuries which he sustained while employed as a

*Niddrie v.
Dean, &c.*

labourer in their service, as contractors for the formation of the Aberdeen Railway.

The grounds of action chiefly relied on in the summons were, ^{June 15: 1852.} ^{Niddrie o.} Dean, &c. (1,) That the pursuer had been put to drive a waggon for the transport of earth from one part of the line to another, in circumstances requiring the strength and experience of a full grown man for the safe and proper execution of the work ; and, (2,) That on an emergency occurring in the course of the work to which he was so put, he was urged by the commands of other parties in the employment of the defenders, and for whom they were responsible, to do a certain thing which he had not strength to perform, and being unable to get out of the way of an approaching loaded waggon, had fallen under it and sustained the injuries for which reparation was craved.

The record was closed in the Inferior Court on summons and defences, and under an advocation of the 4th section of the Judicature Act, the record was held to be the record in this Court.

The defenders contended that, in the record, no relevant ground of action was stated.

The pursuer moved the Lord Ordinary to allow the record to be opened up, and an addition to be made, that at the time the pursuer met with the injuries, the waggon had no "breaks," and it was not sufficiently under the control of the drivers. Parties were ordered to be heard on the competency of this proposal.

Shand, in support of the motion. The record is no doubt closed, but in many cases the Court, at stages even more advanced, have allowed the record to be opened up, and the parties to make additional statements. *Watson v. Edwards*, 13th Dec. 1834, xiii. S. 196; *Maben v. Perkins and Millar*, 3d June 1837, ix. S. i. 515; *Home v. Purves*, (referred to in *Maben*) 7th June 1834, xiv. S. 898; *Hay v. Suther and Hay*, 12th Dec. 1845, (not reported on this point, but the Court, long after the record was closed, ordered the pursuer in the Inner-House to lodge a specific condescendence of his grounds of action,) *Boswell v. Ogilvy*, 6th Dec. 1848, xi. D. 185.

Monro, contra. The motion is incompetent under the Judicature Act. This is an amendment of the libel after the record is closed, which is quite inadmissible. The case of *U. v. B.*, 6th March 1845, is directly in point. No *res noviter* is alleged.

LORD ANDERSON. The libel here is both the libel or initial writ, and the record, but that does not appear to help the pursuer's

June 15. 1852. motion. No doubt the Court have in various cases cited by the pursuer, ordered records to be opened up, where that appeared indispensable for the justice of the case. In all, or at least in almost all of these cases, the order to make the statements more specific was made against the party whose statements were too vague, and not on his own motion, as in the present case with which I have to deal. Sitting in the Outer-House I would not readily make such an order in any case, seeing the stringent rules in the Judicature Act on the subject of closed records, as to additions of *facts* (not of *pleas*) after closing, but in this instance, I do not think the permission is required for the justice of the case.

Motion refused, with three guineas by way of expenses.

William Hunt, W.S., Pursuer's Agent.

Stein and Campbell, W.S., Agents for Defendants.

FIRST DIVISION.

No. 319.

MACLAINE v. MACLAINE.

Reduction—Registration—Sasine—Presentment—Date.—The date in the Minute book of the presentment of a sasine, and not the date on which the sasine is actually recorded, is the proper date of the deed.

June 16. 1852. This was an action of reduction-improbation, and declarator, at the instance of Donald Maclaine, Esq. of Lochbuy, against himself and others. In 1776 Archibald Maclaine of Lochbuy executed an entail, under which Captain Murdoch Maclaine, the pursuer's grandfather, was called to the succession. That deed contained effectual prohibitions, *inter alia*, against contracting debts, and a resolute clause, declaring "that the contravener and the descendants of his body" should, *ipso facto*, forfeit the succession. The deed was registered on 18th January 1785, but the prohibition against the contraction of debt was not repeated in any of the charters or infestments in favour of the grandfather or father of the pursuer. In 1785 the succession opened to Captain Murdoch Maclaine, and the first of the writings now challenged is a crown-charter of resignation in his favour proceeding on the procuratory contained in the deed of 1776. On the charter of 1785 Captain Murdoch Maclaine was infest on 15th October 1785, and his infestment was recorded in the General Register of Sasines in December following. The relative entry in the Minute-book of the General Register of Sasines is as follows:—"10th Dec. 1785—tween 11 and 12—Sa. Murdoch Maclaine of Loch-

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buy, Esq. of the barony of Moy, dated 15th Oct.," &c. In the book of the record, to which the minute-book is an index, the sasine is fully engrossed, but the date prefixed is "the 16th day of December 1785 years, between the hours of eleven and twelve before noon," which is beyond the sixty days from the date of the sasine, within which it must be recorded. Captain Murdoch MacLaine was succeeded by the pursuer's father, who died in 1844. During his possession he contracted debts to various creditors. An action of adjudication was brought at the instance of one of them; and in 1846 it was decided that the investitures of the estate were insufficient to protect it against the contraction of debt, and decree of adjudication was accordingly pronounced. After the death of the pursuer's father, the whole estates, real and personal, were sequestrated for behoof of his creditors; and by a subsequent act and warrant, the lands and barony were declared to be transferred to, and vested in Archibald Borthwick, who had been appointed trustee, and who is also one of the defenders in the present action of reduction. The various deeds sought to be reduced, and the several pleas of parties, need not be specified, as the case turned on the question whether the sasine of 15th October 1785 was duly recorded. Two objections were taken to it. The pursuer contended, 1st, That the 16th December, and not the 10th December, must be held to be the date of registration, and consequently, that the sasine was not duly registered; and, 2d, That it is not regularly booked, inasmuch as an essential part, viz., that which set forth the month and the day of the month, and the year of the King's reign, is not written in the body of the register, but appears in the form of a marginal note, not subscribed or authenticated.

In support of the first objection, the pursuer founded on the provision in the Act 1617, that extracts from the register shall "mak as great faith as the principallis except in case of improbation." With regard to the second, no averment was made of the record having been unduly tampered with.

The defender pleaded, *inter alia*, that the pursuer had no title to pursue.

The Lord Ordinary (Wood) sustained the pursuer's title, but held that the sasine was duly and sufficiently recorded within sixty days from its date, and therefore assuizied the defender. In a note appended to his interlocutor, his Lordship remarked, that "the whole system of registration of sasines is matter of statutory enactment, and it is one which has been progressively developed

June 16. 1852. by acts passed from time to time to improve and perfect it."

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And after commenting on the various statutes regulating registration, he states, "No doubt the entry in the minute-book is not, *per se*, sufficient to complete the registration. There must, in addition to that, be a subsequent engrossment of the whole instrument in the record itself. The *two together* are necessary to complete the act of registration; for although a practice had prevailed, and was even in a certain degree sanctioned by the statute 1686, c. 19, of not fully recording the instrument, it was prohibited, and the full entry of the instrument enjoined by the Act 1696, c. 18. But still that did not affect the date on which the preference was to depend, consequently, although *de facto* the instrument was *not actually recorded till beyond* the sixty days of its date, no objection could thence arise to the registration, if it had been *presented within* the sixty days. Therefore, if the prefix of a date in the record-book to the instrument, as there engrossed, had been required, it could not, consistently with the object in view, have been the date of the *operation of engrossing*, but must have been the date on which the sasine *had been presented* to the keeper, so that in prefixing a date, it could only be *one taken or transcribed from the MINUTE-BOOK*, and not the date of the fact of recording. And accordingly, when the keepers do (although not required by the statute) prefix a date in the register to the record of the instrument, (which, in the case of *Adam*, 19th June 1810, F. C. was characterized by President Blair as an unnecessary and bad practice,) it is not the date of the *res gesta* of engrossing the instrument, but the date on which it was presented to the keeper, and which was then 'expressed' in the minute-book in terms of the statute. Thus, in the present instance, the 16th December 1785, the date prefixed to the *booking* of the sasine, expressly bears to be the date on which the same was *presented by* John Greig, writer in Edinburgh. Such being generally the nature of the statutory regulations for the registration of sasines, the Lord Ordinary is of opinion that the date in the minute-book must be held to be the ruling date." In the register, the sasine in question is preceded by a renunciation, dated 9th December, and followed by a sasine, dated 10th December, all which "shews very clearly that the 16th December prefixed to the sasine in favour of Murdoch MacLaine of Lochbuy, was a mere clerical error." . . . "The Lord Ordinary thinks that the part of the instrument written on the margin must be held to be duly recorded as well as all the rest." . . . And certain other ob-

jections, such as "that Maclaine is written in the minute-book June 16, 1852. 'Maclean,' . . . appear to require no remark."

Maclaine claimed.

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Macclaine.*

Shand for the claimer, referred to the cases of *Macqueen v. Nairne*, 23d January 1824; *Speirs v. Dennistoun*, 16th November 1824, 3 S., p. 285; *Adam v. Duthie*, 19th June 1810, F. C.; *Drummond v. Ramsay*, 24th June 1809, F. C.; Bell's *Commentaries*, I. 679.

Walker for the trustee.

Hector and the *Dean of Faculty* for the other defenders.

The COURT were of opinion that it would be dangerous to depart from the doctrine laid down by the Lord Ordinary; and they pronounced the following interlocutor:—"The Lords having considered the reclaiming note, . . . and having fully heard the counsel for the claimer, refuse the prayer of the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary, reclaimed against; Find the defender Archibald Borthwick entitled to additional expenses," &c.

Shand and Farquhar, W.S., Reclaimers Agent.

Hunter, Blair, and Cowan, W.S., } Defender's Agents.
David Douglas, W.S., }

FIRST DIVISION.

Petition, R. S. C. AITCHISON ALEXANDER.

No. 320.

11 and 12 Vict. c. 36—*Disentail—Consenting Heirs—Alienage—Disqualification*.—In a petition for disentail, the third substitute heir under the entail being married to an American subject who was an alien, and her children having been born in America, the next heir was called as one of the three parties whose consent was required. A curator having been appointed on behalf of the children, lodged a minute to the effect that they had no interest to oppose the petition, and an attestation of their alienage by their parents was produced in process:—*Held* that no further proceedings were necessary to protect their interest, and that the application might be granted.

This was a petition for disentail of the estate of Airdrie, and June 16, 1852. was reported to the Court by the Lord Ordinary (Cowan) under the following circumstances, as set forth in his Lordship's note:—Petition, Alexander. All the procedure is reported to have been correctly carried through, subject to an observation by the reporter, on a matter to

June 16. 1852. which he has properly directed the attention of the Lord Ordinary and the Court. It is, that the consents from the three heirs-substitute next entitled to succeed, are regular only on the supposition that another party nearer in blood is excluded from the succession by alienage. The reporter thus states the matter:—"It appears that the third substitute heir who is called, would not, in ordinary circumstances, have been one of the parties whose consent was required, because her elder sister, Mrs Lucy Alexander or Waller, who is called as the second substitute heir, is stated to have issue, and one of her children would, according to the destination in the entail, have been one of the three nearest substitute heirs. But it is stated that the husband of Mrs Waller is an American subject, and an alien, and that her issue by him having been born furth of the kingdom, are incapable of succeeding to the said entailed estates. Mary Alexander, the sister of the petitioner, is therefore called as the heir of entail next entitled to succeed after Mrs Waller." As the fact of alienage was not supported by any evidence in process, the Lord Ordinary has required such evidence to be produced; and an attestation by Mr Waller, the husband of the petitioner's sister, and by Mrs Waller herself, has in consequence been obtained; and that these are in the handwriting of the parties respectively, has been certified to the satisfaction of the Lord Ordinary. Presuming this evidence of the fact to be satisfactory, the question is, whether the birth in America of Mrs Waller's child excludes that child from the succession? and as this point does not appear to have been decided in Scotland,—although determined in England, *Doe v. Jones*, 4 Termly Reports, p. 300, the Lord Ordinary has deemed it right to submit the matter in this form to the Court for their decision. The statute 4 Geo. II. cap. 41, sect. 1, explains the prior statute of Queen Anne, relating to the children of natural born subjects of Great Britain, in terms which apply only to children whose *fathers* were natural born subjects; and to the same effect is the statute 13 Geo. III., c. 21."

A curator *ad litem* had been duly appointed to Mary Alexander, in terms of § 31 of the statute. A curator had also been appointed to the children of Mrs Waller, who lodged a minute to the effect that they had no interest to oppose the application.

G. Patton for the petitioner, argued that the requirements of the statute had been sufficiently complied with, *Dundas*, November 13. 1839.

The LORD PRESIDENT. We are in the position of hearing par-

ties who are not before us, further than by a curator, who, however, has had an opportunity of making the necessary enquiries, and we are called in a very summary way to hold that they have no interest to oppose the petition. As at present advised, I think that the view taken by the petitioner is properly the correct view of the case. We have done all in our power to protect these parties, by appointing a curator, and we can do no more.

LORD CUNINGHAME. I am of the same opinion. We must presume that the curator appointed took every means to satisfy himself that there was no object in opposing the petition; and that being the case, the application is in proper form, and may be granted.

LORD IVORY. I do not say that I differ. It is difficult to see what other course can be taken than that proposed to be taken. At the same time this is a very peculiar case, and what we are now to do, is to disfranchise, without any conclusions being taken against them, and without their being called into Court, parties whose interest may hereafter become of great importance with regard to the question now raised. Looking to this entail, on the face of which we see there are other heirs and nearer heirs than those whose consents are given, I have some doubt whether we are entitled to engraft in this incidental and somewhat irregular manner, another process forfeiting the rights of parties not substantially called to the case. It would have been more satisfactory had an action of declarator been raised, by which the disqualification of these parties would have been judicially fixed. At present this disqualification is not so fixed, and I doubt whether a mere curator *ad litem* can, by any minute, bar these parties from stating any plea which they may be advised to urge. On the other hand, we have no distinct or precise proof of the fact on which we are to dispose of this case at all. We have no proof of the facts which are to affect the interest of these children; and I doubt whether the case we are to deal with in this shape is such as to entitle us, without positive evidence of the fact, to oust these parties from the case.

I express these doubts with diffidence; and I do not wish to be understood as differing absolutely from the opinion already pronounced.

Petition granted.

Walker and Melville, W.S., Agents.

SECOND DIVISION.

No. 321.

WATT v. DUFF.

Lease—Death of Tenant before Expiry—His Heir absent—New Tenant—Surplus Rent.—B., the tenant of a small farm, having died three years before the expiry of his lease, and no heir appearing to take it up, A., the landlord, relet the farm on a new lease for twenty-one years, at a higher rent than that which he drew from B. After the expiry of the three years which B.'s lease had to run, C. his heir, who had been abroad, appeared, and claimed from the landlord the surplus rent for the three years, which he had drawn from the new tenant:—*Held* that the claim could not be sustained.

June 17. 1852. The defender, by a lease dated 7th March 1832, let to the late Watt v. Duff. John Watt, a small farm called the Hill of Gerby, for a term which expired at Whitsunday 1851. The rent payable for the possession under this, which was an improving lease, was L.4, 10s. from Whitsunday 1841; and the tenant had a claim for meliorations to the extent of two years' rent of the possession. Watt died on the 28th May 1848. His widow continued for a few months in possession; but, in September, a new lease was granted by the defender to a person of the name of Grant, for nineteen years, from Whitsunday 1848, at a rent of L.15, 10s., Grant settling with the widow for meliorations and grass seeds, &c.

The pursuer, who is the son of Watt, was then abroad. Nobody appeared to take any charge of his interest. He did not return to this country, nor intimate any claim to the landlord, in connection with the lease, till May 1851. Thereafter he brought the present action, concluding for payment of L.46, 10s., being the rents drawn by the defender under the new lease for the three years preceding Whitsunday 1851, under deduction of L.13, 10s., the rent payable by Watt under the original lease, and for the amount of meliorations due to the tenant.

The defender averred that the pursuer's mother continued in possession till Martinmas 1848; that she then sold off the whole stock and cropping of the farm, and deserted the possession; and that there were claims against the tenant and his representatives for non-implementation of his obligations. He further averred that no such rent as L.15, 10s. could have been obtained for a lease of two or three years only. These facts were denied by the pursuer.

The defender pleaded, that not being bound to allow the possession in question to lie waste, he was bound to relet it, and

the pursuer not having appeared, or made any claim until the ex-^{June 18. 1852.}piry of the lease with his father, he can qualify no loss from the ^{Watt v. Duff.}defender not having allowed the possession to lie waste.

By a minute, dated 3d February 1852, the defender offered to the pursuer the sum of L.8, 15s., for meliorations, being the amount which had been already *paid* to the widow, and within five shillings of the sum which could be claimed for meliorations under the original lease to Watt.

The Lord Ordinary (Rutherford) decreed against the defender for the L.8, 15s. offered for meliorations, and, *quoad ultra*, assailed him from the conclusions of the action.

In his note the Lord Ordinary says, "if the landlord had done nothing, he would not only have lost the rent under Watt's lease, but a claim of damage would have arisen in respect of the deserted possession, and the pursuer, if he had represented his father, would have been responsible for rents and damages. The Lord Ordinary does not see that the landlord was under any necessity for managing for behoof of the absent heir, and necessarily at his own immediate expense and risk. By taking the matter in his own hands, he may have incurred responsibility if the heir could show damage; but, by the course adopted, the heir was saved from liability in damages. If the landlord got an increase of rent upon a new lease for nineteen years, that advantage was not obtained to the detriment of the heir."

The pursuer reclaimed; and at advising,

THE LORD JUSTICE-CLERK. The claim of the pursuer appears to me to be well founded. 1. As to the meliorations. Any sum paid to the widow was paid without any title or warrant; and the defender seems to be aware that the amount must be paid to the pursuer. 2. As to the surplus rents, the pursuer is entitled to the same. Even in a lease with a clause for forfeiture on account of non-residence, it has been held, (*Stirling*, June 29. 1813,) that proper time must be allowed for the heir's return, if abroad when the succession to the lease opens to him. In this case there was the ordinary obligation on the tenant to crop and work the farm properly. The course which the landlord took was a very natural one, and certainly the best for the good management of the farm; and the best, therefore, for the interests of the landlord. But on the other hand, no fault is found or averred against the pursuer. The delay before he appears, is not shown to have arisen from neglect of his interests and his rights in knowledge of his father's death, nor is it averred to be such. But whether or not, the land-

June 17. 1852. lord has thus drawn surplus rent, by so letting the farm advantageously for himself, during the years when the old lease had not expired, nor been forfeited or brought to an end, and when the son's *title* and *right* subsisted. Hence it follows, that he cannot put into his own pocket that surplus rent. Nothing is averred to raise this sort of case, viz., that the surplus rent was the result of any outlay by the landlord. His act of letting the farm, no doubt, produced it. But that act of letting at once on a long lease (taking his chance of the heir challenging and coming home,) was highly for his own interest. I cannot find any ground on which the landlord can keep that surplus rent, the pursuer not being in fact or in law to blame in any respect.

LORD MEDWYN. I think I should arrive at a more satisfactory conclusion, if the facts averred by the defender, but denied and unascertained, were admitted to proof; and, as I understand, probation has not been renounced here. When the widow abandoned the possession, and no one appeared to claim for the heir, I cannot conceive that the landlord was bound to leave the farm waste, neither do I think he was obliged to apply for judicial authority to entitle him to put a new tenant in. I admit, that the heir being abroad, some little time should be allowed for him to hear of the death of his father, and make his claim; but when, as it is alleged, he was only at Gibraltar, and never appeared till after three years, and made no claim till then, I must infer that he never meant to claim, or undertake the responsibility of representing his father, and the risk of farming; at all events, that he must have led the landlord to suppose he left him to dispose of the farm as he pleased. The landlord appears to have acted with the most perfect *bona fides*; and I may add, that in the circumstances of the case, I do not think that any blame attached to the landlord, if it did not occur to him that there might be an heir to the lease, and so did not himself inquire if there was one. And I cannot think that the heir now appearing can be entitled to the excrecent high rent got upon a nineteen years' lease from another tenant, which must be much higher than he could have made of the possession, when the utmost he could have reaped was the profit for three years, after paying L.4, 10s. of rent, if he had in due time attended to his own interest, by letting the landlord or his factor know that he was coming home to enter into possession.

LORD COCKBURN. The defender in this case saw the farm abandoned. It was lying waste, in so far as any tenant was

concerned. What was the landlord to do in this situation ? June 17. 1852.
He was certainly not bound to act as a manager for the heir
—who, though entitled, was not obliged to take possession. Watt v. Duff.
I think that he was most clearly entitled to consider the farm
as abandoned, and to proceed as if the lease was at an end.
In point of fact it *was* at an end, by the dereliction of the party
entitled to take it up. It is not said that the landlord had
done anything wrong in granting the new tack. It is admitted
that he was entitled to do so. And it is also admitted that the
heir-tenant was wrong, if he meant to take up the remnant of the
original lease, in not doing so. Why then is the party who was
entirely right, to pay the party who was entirely wrong? The
answer is, that the landlord was *benefited* by the new lease, and
that during the remaining years of the old lease, this benefit be-
longed to the heir. I cannot think this sound—indeed, I can
scarcely comprehend it. I cannot conceive how the heir, who had
practically brought the first lease to a conclusion, by deserting
the premises, should, after this, be entitled to found on that lease
at all; nor can I conceive what connection he had with a rise of
rent, which was not got on account of the three last years of the
lease. The landlord would unquestionably have been entitled to
have kept the three first years of the new lease, at, or even below
the old rent, and the heir would have had nothing to say. I can
conceive no ground on which the heir can first, by his conduct,
compel the landlord to go into a new arrangement, and can then
claim to be recompensed for his own wrong. According to this,
a man may take leases of several farms, or dwelling-houses, and
then, after compelling the landlords, by his desertion of them all,
to relet them, may make a good thing of it, by calling them to
account for whatever surplus rents new tenants may have given.
And this might be a good trade. I think the pursuer's demand
ought not to be entertained.

LORD MURRAY. I admit that the landlord was not obliged to
leave the farm abandoned and deserted, looking for his remedy
against his tenant resident abroad; but was entitled to take mat-
ters into his own hands, and act as he did, *bona fide*. He was not
obliged to be at any expense or risk, and he did not incur any re-
sponsibility by what he did. But the lease was not legally put an
end to or transferred; and during the period of that lease the
landlord drew an increase of rent. There my difficulty arises.
The increased rent was produced, as far as appears, without any
apparent outlay. The landlord entered by a necessary and *bona*

June 17. 1852. *fide* arrangement perfectly justifiable. He ought to be protected against loss; but has he any right to draw a higher rent while the old lease subsisted? The question comes to be—to whom ought that increased rent to belong? The law of Scotland holds that a lease subsists until it is legally terminated. In the case of *Stirling*, there was even an irritancy if the tenant should not be resident and cultivate the lands; the tenant remained in America. It was then held that the lease subsisted although the tenant was in America. Even in these circumstances, the tenant was allowed time to consider whether he would take up the farm. There was no such clause in this lease, and it subsisted for all the years for which it had been granted; therefore the right of the heir (*in titulo* of the lease) to the increased rent remained good as tenant of a lease not legally put an end to, and the landlord has no right to that increased rent by the law of Scotland. While, therefore, the landlord was justified in taking the course which he adopted, without the intervention of judicial authority; yet the circumstance did not give him any right to the lease, or to profit by what he not improperly did, in the circumstances of the case. He ought not to be subjected to any loss; but he has no legal or equitable title to be a gainer.

The Judges of the Second Division being equally divided, the case was ordered to be debated before three Judges of the First Division.

Moncreiff and *Buchanan* were for the claimer.

Ross was for the respondent.

Some difficulty being expressed by the Court, from the state of the record, in which statements were made by the defender, as to his knowledge of the heir's existence, &c., which were not admitted or proved, parties agreed to renounce probation, and allow judgment to be pronounced on the facts as admitted.

LORD PRESIDENT. In the circumstance, I don't think it was incumbent on the landlord to have made application to the Judge Ordinary for judicial management. He took possession of the property by letting it fairly. Now, in regard to this claim of the heir, 1st, he was either ignorant of his father's death, till after expiry of the lease, and if so, it is plain he never could have made anything of the lease, consequently he has suffered no loss. Or, if he knew of his father's death, why did he not come to take

possession of the lands? In that case he is not entitled, having kept himself free from all risk to come forward now, and claim the benefit. Supposing the landlord had laboured the land himself, the tenant could never have demanded an accounting. But letting them for a rent, the tenant not being in a position to benefit by the land, is he any more bound to account for the surplus rent? If the landlord has obtained a profit, it is not at the expense of the tenant, and his *bona fides* is not impeached.

June 17. 1852.
Watt v. Duff.

LORD CUNINGHAME. I concur. I proceed generally on the view, that looking to the situation of parties, when John Watt died, and to the then abandonment of the small pendicle held by him, it is difficult to see what course any landlord could have followed than that which the pursuer did. It was suggested that he might have applied to the Sheriff to name a *manager* of the farm, for behoof of all contingently interested. But I do not know of any precedent for such an application, under such circumstances as the present. And I rather think that that sort of interference must have been attended with expense and hazard to all interested, which they were not bound to undertake. In a separate view, the heir's claim seems altogether untenable in law. The small possession held by John Watt was to him and his *heirs* only for twenty-one years. It is a settled point of law that such a right does not pass to *assignees* and *sub-tenants*. The pursuer, therefore, being in a foreign country, was unable to occupy and cultivate the farm, but claims the rent offered by a new tenant for an extended term of years; he is thus plainly seeking the benefit of assignation, from which the original contract expressly excludes him. He is in no view entitled to the profit of a personal occupant, when he was engaged in other employment in Portugal. Lastly, I can find no indication of any *mala fides* in the defender in resuming this deserted pendicle.

LORD IVORY. I agree. I think the tenant here has no claim for the lucrum made by the landlord. It is not a lucrum necessarily connected with the fruit of the subject, but the result of a speculation into which the landlord entered. The three last years of a lease are the least favourable generally for the tenant. He has generally to leave the subject in good order, and they are the years in which he generally makes least. When a subject is abandoned by a tenant, the landlord is under no legal obligation to look after the interest of the tenant's representatives. And if he finds no one taking care of it, I cannot say he is not entitled to enter on possession. The speculation in which the landlord has

June 17. 1852. entered might have turned out for loss. The tenant would not
 Watt v. Duff have been held liable, and therefore there being a gain, I do not
 think he is entitled to demand it.

The COURT adhered.

John Cullen, W.S., Pursuer's Agent.

Tods and Romanes, W.S., Defender's Agents.

HOUSE OF LORDS.

No. 322. DR HUGH MACPHERSON and ANOTHER, *Appellants*; and
 ANN MACPHERSON, *Respondent*.

Executors—Accounts—Right of the beneficiary to the first year's proceeds—Will.—Where a testator directs personal property to be laid out in the purchase of land, to be entailed upon certain heirs, without any direction that the interest is to accumulate in the meantime, the first beneficiary under the entail is entitled to the first year's profits, although during the first year, the personality has not been invested in the purchase of land. Notwithstanding the lapse of time, an executor, in order to discharge himself of sums found due from him, on account of the testator's estate, must give some evidence to prove his discharge.

June 10. 1852. James Macpherson of Belleville, in the county of Inverness,
 Macpherson, &c. v. Macpherson. died in February 1796, having, by bond and disposition of tailzie, settled his lands in Scotland upon a series of heirs, and disposed of his personal estate in England, by a will executed at London, on 7th June 1793. By this will, after reciting the settlement of his lands in Scotland, by the above mentioned bond, and leaving various annuities, he gave the following directions, viz., "I request and direct the executors of my will hereafter mentioned, to consolidate into one fund the whole of my fortune, and moveables; which fund they are to lay out in purchasing lands in Scotland, to be entailed upon the series of heirs specified in the bond, and deed of entail already mentioned, according to the strict form of the laws of Scotland; the principal of the annuities specified on the first page of this will, as they respectively fall, shall be applied to the purchase of lands in Scotland, to be entailed as already directed." The testator by his will then appointed the late Sir John Macpherson, baronet, (whom the appellants represented), Colonel Allan Macpherson, Colonel Duncan Macpherson, John Mackenzie, and the late James Macpherson junior, to be his executors. All the executors accepted the office, and duly proved the will in the Prerogative Court of

Canterbury. James Macpherson junior, who was also the eldest son of the testator, and the first heir of entail in the succession to the landed estate, was in India at the time of his father's death, &c. r. Macpherson. but soon after his return, which was in October 1797, he was conjoined with the other executors in the office of executor. During the interval between the testator's death and the return of James Macpherson junior from India, the other executors intrusted generally with the whole of the executry, and realized a considerable portion of the trust funds. On the 17th February 1798, certain accounts were made up and docqueted by James Macpherson junior, and the other executors, of their intromissions with the executry funds, for which a release and deed of indemnity were given by James Macpherson junior; and James Macpherson junior was allowed by them to draw the annual dividends and profits of the trust estate, commencing from the date of the testator's death.

James Macpherson junior died in April 1833, without children, and was succeeded in the estates by the respondent, who was the next heir under the entail, and who afterwards, in 1835, raised an action of accounting against the representatives of the executors of James Macpherson senior, and amongst others, the appellants, who represent the late Sir John Macpherson, one of these executors, for the purpose of obtaining an accounting, in regard to the estate intrusted with by the executors.

A record having been made up, the Lord Ordinary in the cause, on 12th January 1841, pronounced an interlocutor on the state of the accounts, which was adhered to by the Court, (the effect of which will be found stated in the Lord Chancellor's judgment,) and a remit was made to Mr Ralph Erskine Scott, accountant in Edinburgh. Afterwards, a case was prepared under the Lord Ordinary's direction, for the opinion of English counsel, in which case the following questions *inter alia* were submitted :—

“ Whether under the terms of the will of James Macpherson the elder, regulating the succession to his English property, the right of the first beneficiary under it to the annual profits of the trust-estate, would by the law of England be held, or was in the year 1796, when the testator died, held to take effect from the date of the testator's death, and if not, from what other term would such right commence? or, whether executors by the law of England, now have, or at the time of the testator's death referred to, were held to have any discretionary power to pay the annual

June 10, 1852. proceeds of the trust-estate to the beneficiary, from the time of
 the testator's death?"

Macpherson,
&c. r. Mac-
pherson.

Mr Pemberton, the English counsel, before whom the case was laid, returned the following opinion:—"I think that the interest of the first beneficiary in this case would be held by the law of England to commence at the end of one year from the death of the testator. The law, however, upon this subject, is in a very unsettled state. The most recent authority on the subject is the case of *Taylor v. Clarke*, 1 Hare, 161. The law, whatever it may be, would be held to have been the same in 1796, as at the present time. The executors of the testator would not be held to have had any discretionary power as to paying or withholding the first year's income."

Lin. Inn, 8th July 1842.

THOS. PEMBERTON."

The Lord Ordinary thereupon pronounced an interlocutor in conformity with the opinion of Mr Pemberton, but which reserved to the parties to be further heard on the import and effect of the two above quoted answers, in the learned counsel's opinion. The case was then laid before Mr Scott, the accountant, by whom, after some time, a report was returned to the Lord Ordinary.

Objections were stated by the appellants to this report in two particulars, 1st, As regarded a sum of L.305 : 2 : 8, of alleged expenses, for which it was said that Sir John ought to have obtained credit; and, 2^d, as regarded a sum of L.258 : 6 : 8, received by Sir John, and which it was said he had paid over to James Macpherson junior, and ought to have obtained credit for in like manner. As to the 1st, viz., the sum of L.305 : 2 : 8, for law expenses, the only evidence was the letter of Mr Loundes, who was the law agent of Sir John, to Mr James Macpherson, one of the executors, dated 18th August 1810, and in which he speaks of "a claim upon the estate for costs and expenses not yet made out, but which cannot be less than L.305 : 2 : 8." As to the second sum, viz., the L.258 : 6 : 8, it was found by the accountant that that sum was the amount of a dividend, received on 14th March 1812 by Sir John, on a debt due to the trustee. This item was stated in the answer of the executors of James Macpherson junior, to the condescension of the respondent, (the pursuer in the Court below) to have been intromitted with and accounted for by Sir John Macpherson.

The Lord Ordinary, on 20th March 1849, repelled the objections to the accountant's report; and as to these two sums of L.305 : 2 : 8, and L.258 : 6 : 8, approved of the accountant's report. A reclaim-

ing note against this interlocutor, so far as it repelled the objections June 10. 1852. to the accountant's report, was presented by the appellants to the Lords of the Second Division. Their Lordships, upon advise &c. v. Macpherson, Macpherson, ing the reclaiming note, refused the desire thereof. The parties pherson. were then heard upon the reserved question as to the first year's proceeds, and several interlocutors were successively pronounced, on 30th November, and 5th and 14th December 1849, finding, in conformity with the opinion of Mr Pemberton, that the respondent was not barred from the demand for the first year's proceeds, and that the executors were not entitled to pay to the late James Macpherson junior, the first year's annual proceeds of the executry estate. Against these interlocutors the present appeal is taken.

*Stuart, Q.C., and Anderson, Q.C., for the appellants; and
The Solicitor-General of England, and Rolt, Q.C., for the respondent.*

The authorities referred to for the appellants, were, *Hewitt v. Morris*, 1 Turner and Ross, 241; *Angerstein v. Martin*, 1 Turner and Ross, 232; *Howat's Trustees v. Howat*, 16 Shaw, 622; *Campbell's Trustees v. Campbell*, 14 Shaw, 770.

The cases cited for the respondent were, *Fordyce v. Bridges*, 2 Phillips, 497; *Duke of Leeds v. Earl Amherst*, 2 Phillips, 171; *Lord Stair v. Lord Stair's Trustees*, 1 Wils. and S. 72; *Taylor v. Clark*, 1 Hare, 161; *Sitwell v. Barnard*, 6 Ves. 520; *Stott v. Hollingworth*, 3 Mad. 161; *Gibson v. Bott*, 7 Ves. 89; *Dimes v. Scott*, Turn. and Ross, 232; *La Terriere v. Bulmer*, 2 Sim. 18; *Caldicott v. Caldicott*, 1 Young and Colt, 318; *Angerstein v. Martin*, as referred to by Vice-Chancellor Knight Bruce in *Caldicott v. Caldicott*.

THE LORD CHANCELLOR. In this case, my Lords, which has been argued at great length, there are three points; two of them arise out of the accounts which were taken between the parties, under the direction of the Court below, and the other is a point of law. I will first direct your Lordships' attention to the two points upon the accounts. Sir John Macpherson was one of the co-executors of the estate of James Macpherson, the testator, and James Macpherson junior, was another of the executors, and he had also a beneficial interest. The first item in dispute is a sum of L.305 : 2 : 8, claimed by Sir John Macpherson for costs incurred by him in the prosecution of his duty as an executor. I am clearly of opinion that the Court below came to a right decision with regard to that sum, and that the appeal on that point must be

June 10. 1852. dismissed. The other sum of L.258 : 6 : 8, was one which it was right to charge to the representatives of Sir John Macpherson, for a general account was directed to be taken, and in taking that account, receipts came out, which showed that Sir John had received the money. How did he discharge himself from that liability? It was said that the money was paid over to Mr James Macpherson, his co-executor. That might be so, but it is clear that that discharge cannot be sustained without some evidence to support it—slight evidence might be sufficient, but here there is not any evidence on which a Court can act, and therefore the finding of the cause below, with respect to this sum, was also right, and must be affirmed.

This, my Lords, brings me to the point of law, and a very important one it is. For a great number of years I had thought that the point was a concluded one, but since this question has been raised it is necessary to look shortly into the authorities which have been referred to. The whole question turns on the construction of a clause in the will of Mr Macpherson. After leaving various annuities and legacies the testator makes the following direction:—"I request and direct the executors of my will hereafter mentioned, to consolidate into one fund the whole of my fortune and moveables, which fund they are to lay out in purchasing lands in Scotland, to be entailed upon the series of heirs specified in the bond and deed of entail already mentioned, according to the strict form of the law of Scotland. The principal of the annuities specified in the first page of this will as they respectively fall, shall be applied to the purchase of lands in Scotland, to be entailed as already directed." It was plainly, therefore, the intention of the testator to place his personal property on the same ground with his real estate. Did he intend them to go together, or at any time to be severed? Did he intend that the interest should go to the consolidation of the fund? It cannot be contended that the will directs the interest to accumulate for investment; on the contrary, the intention of the testator was this, "I mean my personal property to be considered real, and to go as I have directed my Scottish estates;" can it be disputed that if the executors had, the next hour after the death of the testator, bought a proper estate out of the trust funds, the heir would not have been entitled to the rents and profits from that moment? My Lords, the true construction of this clause is, that capital only was to be invested. But if any doubt could be entertained, the direction of the will, as to the application of the annui-

ties as they fell in, rendered the testator's intention perfectly clear, June 10. 1852. for he expressly directs in the first part of the will "That out of the first and readiest of my money and effects, the above annuities &c v. Macpherson, Macpherson. be secured in the public funds; and that, as they respectively fail, the principal shall be added to the residue of my fortune, and be disposed of as after directed, by the executors of this my will, for the benefit of the heirs appointed by the above-mentioned bond or deed of entail." Are your Lordships then bound by authorities to decide this question against the appellants? I am of opinion that your Lordships are not, and that the decision of the Court below on this point is not founded on a correct view of the authorities. In *Scott v. Nollingsworth*, Sir John Leach miscarried, and that case is not law. The case of *Sitwell v. Barnard*, 6 Vesey, jun. was strongly relied on as supporting the view, which, it was contended, was taken of the law by the House of Lords in Lord Stair's case. In *Sitwell v. Barnard*, Lord Eldon put a violent construction on the rule, and strained rules of law in order to do justice in that particular case; but here the House is asked to strain a rule of law in order to do an injustice. Much misconception has prevailed with respect to the judgment in *Sitwell v. Barnard*, for it has been viewed as if Lord Eldon is there laying down a general rule of law, whereas he took great pains then and subsequently, to explain that he did not do so. The cases of *Angerstein v. Martin*, 1 Turner and Ross, 232, and *Hewitt v. Morris*, 1 Turner and Ross, 241, so far as they go, are clearly authorities in support of this view as to the opinion of Lord Eldon, for in each case his Lordship gave the tenant for life the fund on the death of the testator. In the case of *La Terriere v. Bulmer*, (2 Sin. 18,) decided by Sir Anthony Hart, and so much relied on by the respondent, the learned Judge only went two-thirds of the way, and stopped on the road; he did not give the interest on the uninvested part. In that case, Sir Anthony Hart actually professed to follow the authority of Lord Eldon in *Hewitt v. Morris*, so that this was not a decision which is to be taken as a rule laid down on some clear legal principle, but a decision in which the learned Judge miscarried. There is no subsequent authority to support the view taken by the Court below. Lord Langdale in the case of *Douglas v. Congreve*, 1 Keen, 410, held that the tenant for life was entitled to interest of residue, making interest as it stood at the time of the testator's death during the lapse, before the conversion of the residue. In giving judgment, Lord Langdale referred to the apparent conflict in the authorities, and

June 10. 1852. observed, "In a case where there is no direction to accumulate, and therefore no direction to add interest to capital, it appears to me more likely to have been the intention of the testator, that until the lapse of such convenient time as may be allowed to the executors to make the conversion directed by the will, the tenant for life should enjoy the interest actually accrued." It is clearly an opinion in favour of the rule I am now submitting. Lord Lyndhurst has expressed a similar opinion, and though it was given incidentally at the close of an argument, and therefore without the deliberation which would belong to regular authority, it was important as confirming this view of the law taken on the question. Indeed, I am quite unaware of any authority against this view of the rule of law. The difficulty in later cases is of a different nature; it is not, whether a tenant for life is entitled or not to the interest, but in what manner as between himself and persons who are entitled to the remainder. In the case now before the House there is no such difficulty. I therefore submit in so far as this point has been decided against the appellants, the decision of the Court below must be reversed; and that the representatives of Sir John Macpherson are not liable to the respondent for the proceeds of the estate in the first year after the death of Mr Macpherson, the testator.

LORD BROUHAM concurred.

Interlocutors reversed, so far as they find the appellants liable to pay the first year's proceeds,* and affirmed as to the rest without costs on either side.

Hore and Sons, 6 Lincolns Inn Fields, } Agents for the Appellants.
London,

G. W. Webster, Solicitor, Westminster, } Agents for Respondents.
Gibson-Craig, Dalziel, and Brodie, W.S.,
Edinburgh,

* It was afterwards stated by the Lord Chancellor and Lord Brougham, that they wished it to be understood that the House was of opinion that the law of Scotland and the law of England were precisely the same on this last point, and that the only reason why the Judges of the Court of Session came to a different conclusion, was, because they were misled as to what was the English law on the subject.

FIRST DIVISION.

CUMMING and OTHERS v. SMOLLETT and OTHERS.

No. 323.

Right of Way—Declarator—Title to sue.—An Act of Parliament was passed, empowering Road Trustees to erect a bridge over a ferry, on paying the proprietor the value of his right, or to contract with him to erect it, and assign him the tolls, with a power of redemption, on paying the value as at the date of redemption. The Road Trustees did not exercise their powers under the Act, and the proprietor of the ferry obtained the sanction of the Justices to build a bridge, and levy thereon the rates leviable at the ferry:—*Held* that the inhabitants of adjoining villages have no title to sue in an action against the proprietor, to have it declared that the passage across the bridge is free; and that the proprietor is not bound to hold count and reckoning with them for the excess of tolls levied by him beyond the amount expended in erecting the bridge.

This was an action of declarator at the instance of certain ^{June 18, 1852.} ~~residenters and feuars in the villages of Bonhill and Alexandria~~ ^{Cumming, &c.} in Dumbartonshire, against Alexander Smollett, Esq. of Bonhill, ^{v. Smollett, &c.} proprietor of a bridge across the river Leven between these two villages, and was brought to have it found and declared that the exactation of the toll-dues is illegal—that the defender has no right to levy dues except to the extent of reimbursing himself of the expense of erecting the bridge, to which the dues already drawn by him must be ascribed—and that he ought to hold count and reckoning with the pursuers, to whom and to the public the bridge should be declared free, all persons having a right to pass and re-pass the same without payment of any dues.

The defender, Smollett, by virtue of his titles, has a right of ferry across the river Leven at Bonhill, and in 1833 his predecessor, at the request of various inhabitants of the adjoining villages, applied for the sanction of the Justices of Peace and Commissioners of Supply to substitute a bridge for the ferry at his own expense, and to have the ford shut up. After various proceedings they authorised a bridge of twelve feet width to be built, and on its being completed they authorised the levy of fares for crossing the Leven by the bridge, in place of the boats as formerly, at the same rates as drawn at the ferry, but pronounced no judgment with respect to the shutting up of the ford. The substitution of the bridge for the ferry-boat was also approved of by the Statute Labour Trustees. In 1834 the Act 4th William

June 18, 1852. IV., c. 61, was passed, whereby the road leading to the ferry was placed under the management of Parliamentary trustees who were Cumming, &c. &c. authorised to levy tolls thereon; and, *inter alia*, to make a bridge of sufficient width, not being less than fifteen feet of clear roadway, across the Leven at or near the ferry of Bonhill; and it is provided that when they have resolved to do so, they shall be obliged to satisfy the proprietor of the ferry for the value thereof. The trustees are also authorised to contract with the proprietor of the ferry for the erection and keeping in repair of such bridge, on an assignation to the tolls leviable under the Act, which the proprietor of the bridge is to be authorised to levy "until the said trustees shall redeem the right so assigned as aforesaid, by making payment to the said proprietor or proprietors of the value of the bridge or bridges, and works erected by him or them, as at the date of such redemption, together with the value of the said ferry or ferries." After the bridge shall have been erected, and the toll-duties authorised to be levied, it is declared that it shall not be lawful for any person to use the ford or ferry; and the trustees are prohibited from levying tolls at the bridge after they shall have made payment of the value thereof to the proprietor, and shall not levy more than shall be necessary "to reimburse them of the monies expended by them in making payment to the proprietor of the said ferries, and of the lands adjoining thereto, of the value of the said ferries," &c. The defender's predecessor applied to the Justices of Peace and Commissioners of Supply, stating his desire to erect the bridge of the statutory width of fifteen feet, and this was approved of, and a Committee appointed to superintend the erection of the bridge as it now exists. The defender does not claim any right to exact any other or higher dues than those authorised by the Justices of Peace and Commissioners of Supply, being the same as those exigible for ferry-dues in crossing the river Leven according to use and wont.

The ground on which the action was laid, was, that as the bridge in question was, and could only have been erected subject to the provisions of the statute 4 William IV., c. 61, the defender is not entitled to levy any toll thereon without an assignation from the road trustees, at all events not beyond the amount expended by him in constructing the bridge, with interest, and the value of his right of entry. The proceedings of the Justices were illegal in respect they had no jurisdiction in the matter, and at all events their authority was superseded by the powers conferred by the 4 William IV., c. 61.

The defender Smollett denied the application of the Act, and June 18. 1852. pleaded that even if it were applicable, the circumstances in which ^{the} ^{Cumming, &c.} the exaction of tolls was by its enactments to cease have never *v. Smollett, &c.* existed, and under it the pursuers could have no title or right to call for the accounting they demand from the defender.

The Road Trustees and Commissioners of Supply were also called as parties to the action; and they pleaded that the summons is irrelevant, and improperly laid against them, in respect it does not allege that they have any right to, or interest in the subject-matter of the action, but rather the reverse. The Commissioners of Supply having acted in combination with the Justices of the Peace for the county as a statutory body, this action, if intended to affect them, or their joint acts and deliverances with respect to the bridge, ought to have called into the field the Justices of the Peace as well as the Commissioners of Supply.

The Lord Ordinary (Robertson) held that the dues exacted were authorised by lawful and competent authority, and that as the patrimonial right of the defender had not been purchased from him and paid for, the conclusions of the action could not be sustained.

In his note appended to the interlocutor, his Lordship stated that he had "assumed that the substitution of the bridge for the ferry-boat was a lawful act, and done by lawful authority. He thinks this can hardly be doubted under the terms of the Acts 1669, c. 16; 1686, c. 8; 5 Geo. I, c. 30; and other statutes referred to by Mr Tait in his Justice of Peace Law, p. 136. See also Hutchison's Justice of Peace, vol. 2, pages 506 to 507, and cases there cited, and *Magistrates of Montrose v. Scott of Rossie*, 7th February 1756, M., p. 4167."

The pursuers reclaimed.

Moncreiff and the *Lord Advocate* for the reclaimers referred to Gunning on the Law of Tolls, and the case of *Payne v. Partridge*, Shower's Reports, vol. i, p. 231.

Boyle, Dunlop, and the *Solicitor-General* were for the defender Smollett.

N. Campbell for the road trustees, &c.

LORD CUNINGHAME. Although there be no precedent in our books precisely similar with the present case, I am of opinion that the proceeding adopted, and the plea maintained by the pursuer are consistent with the soundest principles of law applicable to the case, and with every rule of public policy entitled to effect from the law.

June 18. 1852. It is obvious that the present question must be decided on such general principles of law as are applicable to the case, without aid from precedent. Few, if any, examples are to be found of private proprietors exchanging their right of ferry, by giving their neighbours and the public, at an incalculably greater expense, the improved accommodation of a substantial bridge instead of the uncomfortable and more tedious service of a ferry-boat, and still more extraordinary would it have been, if such a gift had been rejected. Without relying on decisions, therefore, it is necessary for a court of law to look narrowly to the grounds on which this great public accommodation is attempted to be challenged. The pleas of the pursuers appear to me on different grounds to be quite untenable.

I. In the *first* place, I am inclined to think that the defender's objections to the form of the present action are well founded. The regulation and superintendence of highways, bridges, and ferries were placed by the ancient Scots' Acts of 1669, cap. 16, 1670, cap. 9, and 1686, cap. 8, in the hands of the Sheriffs, Justices of Peace, and Commissioners of Supply; and by the last Act, five of the combined body formed a quorum. The pursuers have not called the Justices of Peace; nor have they brought a *reduction* of the resolutions of the meeting that approved of and sanctioned the proposal to build the bridge; or specified any tangible or intelligible ground on which they could urge relevant reasons of reduction, if such a process had been brought. The defender acted on the faith of every party, official and private, interested in the ferry, consenting to the bridge, as a *substitute* for a boat at the same ferry. These proceedings were eminently beneficial to every class of the community; they were, *ex facie*, within the scope and object of the powers of the magistrates and commissioners, and I am of opinion that the Court is not entitled, in any view of the case, to entertain a challenge of the proceedings under which the bridge was erected by the proprietor of the ferry, under the authority of the statutory guardians of this public passage, without a *reduction*.

The defender is entitled to insist that the authorities in the county may know on what specific grounds the pursuers' objections to the resolutions of the Justices and Commissioners of Supply in 1833 and 1834 are founded.

An answer to this plea was indicated at the debate, that the Act of 1834, placed the erection of the bridge within the power and administration of the road trustees. Unquestionably it did.

The trustees were entitled to build the bridge, and abolish the ^{June 18. 1852.} ferry on giving the proprietor *a compensation for its value*. But ^{Cumming, &c.} they were not disposed, or had no funds to take this course. ^{v. Smollett, &c.} Hence, they declined to execute the Act with regard to the bridge and ferry, in consequence of which, the superintendence and control was not devolved, but remained with the original conservators, appointed by the ancient Acts before quoted. I am of opinion, that their resolutions and orders, acted on for a series of years, far beyond the possessory period, and accompanied with a large expenditure on their faith, cannot be lightly challenged or set aside without a reduction.

II. Suppose, however, it were competent to enter into the pursuers' pleas in this process, I humbly conceive that they are altogether untenable on their merits.

What the Justices of Peace and Commissioners of Supply approved of, and sanctioned in 1834, came in reality and truth to this, that the neighbours and the public should, in all time coming, have a more commodious and safe passage across the river, *without any additional fare* than they or their predecessors had ever enjoyed. Was it within the powers of the local and statutory conservators of the ferry to sanction that arrangement? It humbly appears to me, that they would have been guilty of a plain dereliction of duty to the public, if they had not acceded to the application of the proprietor of the ferry.

It was argued that they had no power to do so, and that it was beyond their province. But that is a fallacy founded on a wrong assumption of the whole question at issue. The Justices and Commissioners of Supply were guardians of this ferry, for behoof of the public, and all interested. In that capacity, their only duty was to secure a safe and commodious passage across the river for Her Majesty's lieges, and their carriages and goods. The best recognized rules in the law of *servitude* are decisive of the question. While a right of ferry is a *property* in the owner, it is also a *servitude* in favour of the neighbours, and of the public, having occasion to use the ferry; E. b. II., tit. 9, sec. 12.

In law, and in the common understanding of the world, ferries are within the same category as roads. Dr Johnson properly defines a ferry to be "a passage across a river;" and if a slight change of route or usage may be decreed by Courts on roads, the same rule must apply to passages across a river, when a shorter and more safe line of passage is secured at the same rates to the public, to the satisfaction of the magistrates of the district. It

June 18. 1852. seems difficult, if not impossible, for any parties, either in a legal
or popular sense, to object to such a measure ; and, on the whole,
Cumming, &c. I should conceive it contrary to the best principles of law and
v. Smollett, &c. public police, to entertain any doubt on such a question.

LORD IVORY. I am substantially of the same opinion. The original grant of the title is not of a bridge at all. The pursuers have no right to it except so far as the late statute gives it to them; and the conclusions of the action have reference to the bridge alone. The shape of the action is such as to shew that these parties have been founding solely on this statute. Upon the matter of the action there is no doubt that the statute has never been called into action, at least with regard to the water of Leven. By the statute the road trustees are empowered either to purchase the bridge, or they are entitled, if it be inconvenient, to purchase the right of ferry, to contract with the proprietor of the ferry for the erection and keeping in repair of the bridge. Until the trustees have done one or other of these things, there is no bridge executed under the statute. It does not follow, because the bridge is illegal, that the parties are to be entitled to get hold of that bridge, and to exclude the true proprietor and appropriate it to themselves. I can understand that parties who had a right of ford and ferry might have an action against the proprietor of a bridge if it was prejudicial to the ford. But that is not the case here. Here is a party who makes the bridge, which, it is said, he had no warrant for doing under the statute. If I have made an illegal bridge I may be forced to pull it down again, but to demand that it shall stand, and that the pursuers shall have all the benefit of it as if the statute had been carried out, is a very difficult proposition to maintain.

I do not wish to pronounce any judgment as to the right of the Justices to substitute the bridge for the ferry. It is not necessary for the decision of this case that that point should be so disposed of. This is clear, that irrespective of every thing else, they have a right to regulate every thing in connection with the bridge itself, provided that in doing so they do not injure the private rights of ford or ferry ; *Inhabitants of Sneddon v. Magistrates of Paisley*, M., 7612.

The only title to pursue the action as it is raised, is, that the recent statute if it had been carried into effect, says that the bridge shall be toll free, &c. But this statute does not apply to the case, for the trustees have not done that which is necessary to bring them under the statute, and therefore the matter just stands as if that

statute had never been passed at all ; therefore they cannot have, June 18. 1852. on that footing, decree that the bridge is toll free ; and not having Cumming, &c. that title to pursue, this action falls to the ground. Smollet may v. Smollett, &c. be obliged to take the bridge down again ; but at any rate he is entitled until these parties be purchasers, or otherwise obtain the right to use it, to shut it against them.

The LORD PRESIDENT. The opinion which I entertain is in conformity with the conclusions to which your Lordships have arrived. The action is of a very peculiar kind. The objects which it is destined to attain, are the maintenance of the bridge and a free passage across it. It is not clear whether the action is laid on the statute or at common law. I concur in holding that so far as regards the statute, we cannot come to the conclusion that the bridge has been erected under any of the powers conferred by it. The trustees have not taken steps for carrying out the statute, and therefore the bridge is not one under the statute. Nor do I see any conclusions in the summons to have the statute followed out—no conclusion that the road trustees shall implement the terms on which they are authorised to take the bridge.

Then, what is the next view of the case ? The pursuer has erected this bridge where the ferry was before ; and the object of the pursuers is to have the ferry substituted for this bridge. And accordingly it was put to us, that the defender, having made the bridge at a place where there was a public road, must be held to have dedicated it to the public. I do not think that was a sound conclusion. Does it injure the ford at the ferry ? If so, let it be pulled down. But there is no conclusion to that effect.

Then, what right have the defenders to insist on passing free over the bridge ? That proceeds on two grounds,—1st, That the pursuer must be held to have dedicated the bridge to the public ; or, 2^d, That this bridge, being in the line of a public road, there can be no exaction of tolls upon it at all. Now, the first proposition I have already disposed of. The second goes too far ; for it comes to this, that if it be sound, there could be no exaction at the ferry either, for it is also in the line of a public road. The question is, is the defender bound to keep up the bridge at his own expense, and at same time to allow people to pass over it free of toll ? I do not know of any law for this. If he has done injury he may be obliged to pull it down, but I do not see how this action can be maintained to the extent of holding, that the pursuers are entitled to pass over the bridge free. I shall only say further, that it is clear that the proceedings of the defender in this case

June 18. 1852. were moved in by the public, with a view to their own convenience, and that he is not wishing to deprive them of a mode Cumming, &c. v. Smollett, &c. of transit which they might have found more convenient. There is no wish on his part to interfere with the convenience of the public. It is not necessary to decide whether the Commissioners of Supply and the Justices of the Peace have power, in every case, to transmute a ferry into a bridge; but, irrespective of this matter, it is impossible to maintain the conclusions of this action, and, therefore, I agree in holding that, in this action, the defendant must be assailed and the action dismissed.

The COURT "find, with reference to the summons and the averments on record in the present action, it is not necessary to determine in regard to the power of the Commissioners of Supply and Justices of the Peace, as conservators of highways, bridges, and ferries, to sanction the substitution of a bridge for a boat, in the event of such alteration being opposed or challenged in competent form, by parties having title and interest to do so; and with this explanation and limitation of the 6th and 16th findings of the interlocutor of the Lord Ordinary complained of, adhere to the said interlocutor; find the defendant, Mr Smollett, entitled to additional expenses, and remit to the Auditor to tax, and report to the Lord Ordinary; further, remit the cause back to the Lord Ordinary, with power to decern for the expenses, and, if necessary, to proceed farther in the cause as may be just."

Patrick Paul, S.S.C., Agent for Pursuers.

J. and J. M. Balfour, Agents for Pursuers.

John Blair, W.S. Agent for Commissioners of Supply, &c.

HOUSE OF LORDS.

No. 325. *SCOTT, Appellant, v. SANDEMAN, Respondent.*

Payment how to be imputed—Interest—Principal sum.—Certain disputes and differences were compromised by two deeds of agreement, one in the English and the other in the Scotch form, and thereafter a payment was made for behoof of a creditor, whose claim consisted of a principal sum, and of arrears of interest:—*Held by the House of Lords, reversing the judgment of the Court of Session, (returning to that of the Lord Ordinary) that such payment must be imputed in extinction of the principal sum, and that the creditor was not entitled to apply it first to the interest.*

Costs—Reclaiming Note.—Where the interlocutor of the Lord Ordinary was, on a reclaiming note, altered by the Inner House, whose judgment was in its turn reversed on appeal, and that of the Lord Ordinary returned

to, the House of Lords allowed the appellant the costs of the reclaiming note so erroneously brought.

This was an appeal against a decree of the First Division of the Court of Session, made in a process of multiple poinding for distribution among the creditors and family of John Crawford of part of Sandeman's estate, and for deciding their preferences thereon. The only question was in what character certain payments of money were to be considered to have been made, whether in extinction of a principal sum, or towards the interest upon it. The facts appeared to be these.

John Crawford, for some years prior to 1810 carried on business as a banker and merchant, in partnership with three of his sons, and died in the year 1813, leaving considerable property. Being perfectly solvent, he had executed certain deeds, making arrangements regarding his real and personal estate in favour of different branches of his family. It is alleged, but that fact is disputed, that he retired from the partnership in 1810 and died in 1813, leaving considerable real and personal property. The sons continued to carry on the business after John Crawford's retirement up to the year 1816, when they became insolvent, and their joint and separate properties were sequestrated under bankruptcy, and one Bennet was appointed trust assignee under the sequestration. At the time of the bankruptcy sundry separate debts due from the estate of John Crawford remained unpaid, among those debts the respondent's large debts, contracted during the partnership of John Crawford, also remained unsatisfied. By the will of John Crawford, his widow and two of his sons were appointed executrix and executors. The sons exclusively managed the affairs of their father's estate until their bankruptcy, and after the bankruptcy the widow exclusively intromitted in the affairs of the estate for some time.

Upon the bankruptcy of the sons, several creditors, whose debts were contracted after John Crawford had retired from the partnership, claimed to charge John Crawford's estate with their debts, upon the ground that he had not retired as alleged, or if he had, that no notice had been given of his retirement. The affairs of John Crawford very soon after this became involved in considerable and complicated litigation. Proceedings were taken in order to enforce the creditor's remedies against the real estate of John Crawford, which proceedings were opposed by the heir. Several complicated and difficult questions arose between the creditors and the family of John Crawford. The widow had advanced

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certain preferable claims under a bond and post-nuptial settlement, and the children of John Crawford, under deed executed by him, also claimed to be creditors upon his estate to the amount of L.50,000, and entitled to rank *pari passu*, with his general creditors. Serious questions likewise arose whether certain creditors whose debts were contracted during the original partnership, after John Crawford's alleged retirement, had so dealt with the new firm as to have discharged John Crawford's estate from liability to their debts. Many other of the debts which were claimed were also disputed upon various grounds.

Under those circumstances, a negotiation for a compromise was entered into in the year 1834, which terminated in the execution of two deeds. The one deed was called the English deed, and the other the Scotch deed. These deeds put an end to a vast deal of litigation, and procured a distribution of the funds of John Crawford, and of the partnership; but disputes arose in regard to the construction of those deeds, which led to the present appeal. The parties to the English deed were certain members of John Crawford's family, and legatees, M'Lachlan, the trust assignee of the creditors of John Crawford, and the creditors themselves, including the respondent, who claims to be a creditor upon the separate estate of John Crawford, and also a creditor of the firm in which John Crawford was a partner. The deed was executed by all those parties. The first clause of the English deed provides for putting an end to several suits then existing, and for facilitating the distribution of the funds realised of the separate estate of John Crawford, and also of the partnership estate. The second clause binds the creditors to accept certain payments in satisfaction of their claims. The fourth clause provides for the investigation of the debts which were claimed. The English deed and the Scotch deed formed part of the same arrangement, and they fell to be construed together. The Scotch deed was between the same parties as the English deed, and had reference to the same transaction; and, by the first clause, it was agreed that, out of the 4 per cent., (restricted interest accepted by M'Lachlan, and the creditors by the English deed,) M'Lachlan and the creditors, as soon as the first dividend should be received under the English deed, so far as such dividend should consist of interest, should pay 1½ per cent., to be applied, first, to pay to M'Lachlan, as trust assignee, L.700 for expenses; thirdly, that William Crawford and James Wilson, in the event of a sum contained in a chancery decree being recovered, L.2500 further expenses should

be paid to M'Lachlan. If less than the sum decreed should be re- June 8. 1862.
covered, proportionate reductions were to be made from the ^{the} L.2500. The sums of L.700 and L.2500, or the reduced sums, ^{Scott v.} Sandeman. were declared to be in full of all expenses of whatever kind or denomination, which had been, or should, or might be incurred by M'Lachlan, as trust assignee, or the creditors, relative to the estate of John Crawford. Mr Bennet, the trust assignee under the sequestration, with a view to the proceedings in that process, had made up an account of the claims upon the estate, attaching to each creditor's name the amount claimed by him. In 1831, prior to the deeds, a dividend of 5s. in the pound had been declared under the sequestration, which was calculated upon the sums for which each creditor was ranked in Bennet's scheme, which dividend had been paid to the creditors whose debts were not disputed, and set apart upon the debts which were disputed, the respondent's debt being among the disputed debts. In March 1835, a dividend of 14s. in the pound was declared, and applied in the same manner; and in December 1835, a farther dividend of 1s. was declared, and dealt with as the former dividends. These dividends made up 20s. in the pound upon the debts as stated in Bennett's scheme.

Immediately after the execution of the deeds, proceedings were taken to investigate the disputed claims. The proceedings that subsequently took place, and which occupied so long a time, do not distinctly appear, but they continued down to 20th July 1847, when the Lord Ordinary (Murray) after hearing the parties, found the respondent a creditor, as representative of a Mr Andrew M'Millan, for L.1037 : 8 : 0., being the amount stated in Bennet's scheme; and also finding *inter alia*, " 6*to*, That on the 10th June 1831, there was paid to the claimant the sum of L.259, 7s. as a dividend, at the rate of 5s. per pound, on theforesaid debt of L.1037, 8s.; and that on the 23d February 1835, there was consigned in the Royal Bank of Scotland, the sum of L.726, 3s. 7*½d.*, being a dividend at the rate of 14s. per pound, and on the 18th December 1835, a sum of L.51, 17s. 4*½d.*, being a dividend at the rate of 1s. per pound, both on the said debts, which sums so paid and consigned make up 20s. in the pound on the said debt of L.1037, 8s. 7*d.*; 7*to*, That in the circumstances of the case, and by the terms of the said 'first or English deed,' the sums paid and consigned as aforesaid must be held as having been so paid and consigned on account of the principal of the said debt of L.1037, 8s., and must now be imputed in extinction of the said principal sum. And in respect that of the said debt there remains

June 8. 1852. due a balance of L.133, 1s., finds the claimant entitled to be ranked therefor on the fund *in medio*, consigned in the Royal Bank of Scotland in the names of William Patrick and Walter Jollie; Authorises and ordains them, out of the said fund *in medio*, to make payment accordingly, and decerns; eighth, Finds the claimant further entitled to be ranked on the said fund *in medio*; first, for such interest as has accrued on the said two consigned sums of L.726, 3s. 7½d., and L.51, 17s. 4½d., from the 18th December 1835 to 1st January 1836; and second, for interest on the said balance of L.133, 1s., from 1st January 1836, till payment, both at the rate of 2½ per cent. Authorizes and ordains the said William Patrick and Walter Jollie, out of the said fund *in medio*, to make these payments accordingly, and decerns." And then the Lord Ordinary finds the respondent entitled to be ranked for certain sums, in name of the interest. In a note to the interlocutor, the Lord Ordinary found that those represented by the appellant had been anxious to procure an early division of the funds, that the creditors had been extremely dilatory, and that he could see no ground for holding that there had been any undue delay on the part of the family. The respondent reclaimed to the First Division of the Court of Session, who recalled and varied the Lord Ordinary's interlocutor, disallowing the rule of payment laid down by the Lord Ordinary, and holding that the creditor was entitled to apply the money paid, first to the interest due on the principal debt.

The present appeal was accordingly taken, and was argued on the 3d, 4th, and 8th April 1851, by *Bethel*, Q. C. and *A. S. Cook*, for the Appellant; and by *Sir F. Kelly*, Q. C., and *Inglis*, for the respondent.

The House took time to consider their judgment, which was this day moved by Lord Truro.

LORD TRURO (after stating at considerable length the facts and the pleadings, said) This appeal has been elaborately argued at the bar, and the interlocutor appealed against is objected to in every particular. And the first objection that is made to it relates to the construction put upon the deeds in relation to the application of payments, the interlocutor adjudging that the deeds do not purport to regulate or control such application, and that the payments made to the respondent were subject to the general rule upon that subject which applies to payments in ordinary transactions. Upon the part of the appellant, it is not denied that in ordinary transactions, payments made generally may be applied by the receiver in satisfaction of an arrear of interest, but it is insisted that the payments in question were not payments made

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in the ordinary course of transactions, nor subject to the rule applicable to them, but were made under special circumstances, and the application was distinctly provided for in the deed, and the ^{June 8. 1852.} ^{Scott v.} ^{Sandeman.} appellant mainly relies upon the express terms of the deed agreed to between the parties. None of the learned Judges below adverted critically or particularly to the precise terms of the deed, but expressed themselves generally, to the effect, that the deed contained nothing to interfere with the general rule, and that, therefore, the respondent might apply the payments as he had done according to that rule. I am compelled to say, I cannot concur in that conclusion, and I beg to call your Lordships' attention again to the precise terms of the deed. By the second clause of the deed, the creditors agree to accept in full of their debts, principal, interest, expenses, claims or demands of any kind whatever, against the estate of John Crawford, of such a sum as, including the dividends already paid to them, either from the estate of the bankrupt partnership, or from the estate of John Crawford, should make up twenty shillings in the pound of the principal sums, with simple interest, thus distinguishing between principal and interest in the course of the same line;—they agree to accept twenty shillings in the pound of the principal sums, with simple interest on their respective principal sums at 4 per cent., from the period at which interest was last paid. I can scarcely conceive any thing to be more distinct than that; it can hardly be supposed that the document, which was the foundation of the decree, can have been carefully copied, for the language is clear and distinct,—such a sum as together with some other sums, will make up twenty shillings in the pound of the principal debt, and that is accompanied with a provision as to the mode in which the interest shall be calculated, viz., that the interest shall be at 4 per cent. from a certain time. It appears to me to prescribe most distinctly the rights of the parties, when they are dealing with regard to those rights. The third clause of the same deed provides, that the creditors should not be allowed to claim beyond the amount stated in Bennet's scheme, after giving credit for the dividends paid or set apart to them as specified in the scheme. Bennet's scheme sets forth the principal debts; it does not deal with the interest in stating the sums for which the parties should rank. It seems to me that those clauses were intended to direct and govern the application of the payments, and that the language is sufficiently intelligible to that effect. The sums to be paid in future are to be of such an amount as, when added to the dividends already paid, shall make

June 8. 1852. up twenty shillings in the pound on the principal sum, with simple interest from the period interest was last paid. I think it is clear that the expression relating to the interest last paid did not refer to the dividends, and treat them as payments of interest; and if not, then the dividends could only be applied in reduction of principal, and the payments of the interest referred to must have meant payments antecedent to the bankruptcy, in which case, interest is provided to run from such last payment of interest to the time of ultimate payment. The effect of this clause seems to me to be, that the dividends theretofore paid, were to be applied in reduction of the principal, and that the future payments were to be applied in like manner.

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If the parties' intentions, in the language they have used in these deeds, may be inferred from the state of circumstances when such intentions were formed, such an application of the anticipated future payment would not be prejudicial to the creditors, because there is no doubt that a speedy payment or appropriation was contemplated. The last line of the first clause speaks of an immediate division of the funds; and the second clause shews that the debts were expected to be satisfied by one payment. The expression is, "that the creditors shall accept such a sum as shall make up 20s. in the pound," not using the plural word "sums," but the singular "sum;" and that substantially did take place, because 14s. in the pound was declared in December 1834, and 1s., making up 20s., in March 1835; and except for the delay caused by the investigation of the debt, the application of the payments as stipulated would not have operated prejudicially to the creditors. The expression in the third clause confirms my construction, as it declares that the claims of the creditors should not exceed the sums for which they were ranked in Bennet's scheme, after giving credit for the dividends previously paid, or thereby set apart to them, as specified in the scheme. In that scheme the respondent ranked for his principal only. This clause, therefore, distinctly expresses that the previous dividends were to be credited against the debt, and that such was intended is manifest from the scheme. The respondent's debt stands in that scheme No. 14, under the description of "heirs of Andrew M'Millan," and the "claim" is stated at the sum of L.1136 : 4 : 6, and the dividend from the company's estate of L.98 : 16 : 6 is deducted from the debt of L.1136 : 4 : 6, and the creditor ranked for the sum of L.1037 : 8 : 0. The clause in the deed refers to the scheme, and when the language of the clause and the scheme are read together,

it is apparent that the dividends that had before been paid, were June 8. 1852. deducted from the principal, although it is clear, that between the time when the claim was lodged and the time when the dividend was declared, interest had grown due. The 4th clause also furnishes an observation to the same effect. That clause anticipates that the sums for which the creditors had been ranked in the scheme, and in respect of which dividends had been declared, might have exceeded the debt which would ultimately be found to be due; and the clause declares that in such case, "the excess of the interim dividends which such creditors might have already received, should be applied as further payments of the debt really due," so that the creditors should not receive more than their debts finally admitted and fixed. There again the word "debt," in connection with the other parts of the deed, palpably means principal.

The opinion I have expressed is formed upon a consideration of the language of the deed itself, and not from any extrinsic matter; but at the same time, it is satisfactory to find that all the surrounding circumstances of the case strongly confirm the construction which I have stated. (In conclusion his Lordship said—) I am of opinion that the interlocutor of the Lord Ordinary met the law and justice of the case, and that it ought to be adhered to, and that the interlocutor of the Lords of the First Division ought to be reversed, and the cause remitted.

LORD BROUHAM concurred.

A discussion having taken place at the bar as to costs, particularly respecting the expenses of the reclaiming note in the Court below, their Lordships consulted together.

LORD TRURO. I move your Lordships in this case that the interlocutor of the Lords of the First Division be reversed, and the interlocutor of the Lord Ordinary be affirmed, I also move your Lordships, that in this case the parties are entitled to the costs which were occasioned by the reclaiming note against the Interlocutor of the Lord Ordinary. The question as to those costs was never before the Lord Ordinary, they are consequential, and subsequent to the interlocutor, the reclaiming note against the interlocutor of the Lord Ordinary was a reclaiming note, which this House is of opinion was not justified, and what expense may have been occasioned by it, this House is of opinion that the parties are entitled to.

Interlocutor complained of reversed, with directions as to costs

June 8. 1852. of reclaiming note, and interlocutor of the Lord Ordinary affirmed
 and costs remitted.

Scott v.
 Sandeman. *R. D. Hill, W.S., Edinburgh ; and John Richardson, Solicitor, Westminster.* } Agents for the Appellant.
W. Jollie, W.S., Edinburgh ; and G. and F. Webster, Solicitors, West- minster. } Agents for the Respondents.

No. 326.

HOUSE OF LORDS.

GIBSON, Appellant ; FORBES, Respondent.

Poors' Rates—8 and 9 Vict., c. 83—Minister's Manse and Glebe.—Notwithstanding the 8 and 9 Vict., c. 83, a minister of a parish in Scotland is not liable to be assessed to the poor in respect of his manse and glebe.

June 14. 1852. The respondent in this case was minister of the parish of Symington, within the Presbytery of Biggar, and as such, in possession of a manse and glebe, in terms of the statutes made for the purpose of providing parish ministers with manses and glebes.

Gibson v.
 Forbes. Prior to the passing of the Poor Law Amendment Act, 8 and 9 Vict., c. 83, parish ministers were not assessed for poor rates in respect of their manses and glebes. Subsequently to the passing of that Act, proceedings were taken by the appellant, as inspector of the poor of the said parish, to enforce payment of assessments for the poor made on the appellant's manse and glebe. The respondent applied for a suspension and interdict against such proceedings, and the First Division of the Court of Session having granted the same, the present appeal was brought.

The question was, whether the manse and glebe of the minister of a parish in Scotland were assessable for the relief of the poor? The following are the clauses of the Poor Law Amendment Act, 8 and 9 Vict., c. 83, which bear on this question: The 1st section defines "owner" as follows:—"OWNER shall apply to life-renters as well as fiers, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages."

By section 34 of that statute, it is enacted, "That when the parochial board of any parish or combination shall have resolved to raise by assessment the funds requisite, such board shall, either at the same meeting, or at an adjournment thereof, or at a meeting to be called for the purpose, resolve as to the manner in which

the assessment is to be imposed, and it shall be lawful for any June 14. 1852.
such board to resolve, that one-half of such assessment shall be ^{Gibson v.} ~~Forbes.~~
imposed upon the owners, and the other half upon the tenants or ~~Forbes.~~
occupants of all lands and heritages within the parish or combina-
tion rateably, according to the annual value of such lands and
heritages; or to resolve that one-half of such assessment shall be
imposed upon the owners of all lands and heritages within the
parish or combination, according to the annual value of such lands
and heritages, and the other half upon the whole inhabitants,
according to their means and substance, other than lands and
heritages, situated in Great Britain or Ireland; or, to resolve that
such assessment shall be imposed as an equal per centage upon
the annual value of all lands and heritages within the parish or
combination, and upon the estimated annual income of the whole
inhabitants from means and substance, other than lands and heri-
tages, situated in Great Britain and Ireland."

The 49th section enacts, "That clergymen shall be liable to be assessed for the poor in respect of their stipends." The 50th section declares, "that the privileges of exemption from payment of assessments in the city of Edinburgh, possessed and enjoyed by members of the College of Justice, and officers of the Queen's household, shall not be applicable to assessments imposed and levied for the relief of the poor, under the authority of this Act;" and the 91st section enacts, "that all laws, statutes, and usages, shall be, and the same are hereby repealed, in so far as they are at variance or inconsistent with the provisions of this Act, pro-
vided always that the same shall continue in force in all other respects."

Bethel, Q.C., and *Anderson*, Q.C., for the appellant. The minister is liable, in respect of his manse and glebe, to the poor-rate, either as owner, or as tenant and occupant, of lands within the parish. There is no exception in the language of the late statute, 8 and 9 Vict., c. 83; but all lands and heritages within the parish are to be assessed, and it is impossible to contend that the glebe is not land in the parish. During the incumbency, the minister is the owner of the glebe; he is therefore an "owner" within the meaning of the Act, and consequently is liable to be rated as such. The Court below assumed that under the old law a minister was not liable, and that therefore, and because there was no express enactment that a minister should be liable, the Court considered he did not come within the meaning of the

June 14. 1852 general words of the Act. It is necessary, therefore, to advert to the antecedent law. The earliest statute is the Act 1579, c. 74: by that Act the authorities are enjoined "to taxe and stent the baill inhabitants within the parochin, according to the estimation of their substance, without exception of persones." Then the Act 1663, c. 16, ratifies the former Act; and in directing how the assessment is to be made, says, "the one-half thereof to be payed by the heretors, either conform to the old extent of their lands within the paroch, or conform to the valuation by which they last payed assessment, or otherways, as the major part of the heritors so meeting shall agree, liferenters, and wadsetters always being lyable during their rights as heritors; and the other half to be laid upon the tenements and possessors, according to their means and substance." The case of the *Heritors and Kirk-Session and Minister of the Parish of Cargill v. Tasker and Others*, February 29. 1816, reported in the Faculty Collection, is relied on by the respondent, as shewing that before the late Act a minister was not liable; but that case only determined that under the former statutes a minister was not included, that he was not to be assessed according to his means and substance. The present question must turn solely on the construction of the late Act, which, it is submitted, uses the word "owner" designedly, as more comprehensive than the word "heritor." *Hay v. the Edinburgh Water Company*, 12 vol., 2 series of Session Cases, 1240. Dunlop's Parochial Law, 163, were also referred to.

The *Solicitor-General of England*, and *Rolt*, Q.C., for the respondent. Until the 8 and 9 Vict., c. 83, there had never been any assessment for the poor on any minister, *qua* minister; then what is the effect of the last statute? That statute does not impose (except where it is expressly mentioned) any liability on persons who were not liable before the statute. The members of the College of Justice had an exemption from taxes; and it was held that the college was not liable to poor-rates, notwithstanding the Act 1579 imposed an assessment on all the inhabitants. Jan. 29. 1788, M. 2418; and in the House of Lords, March 25. 1790. Now the Act 8 and 9 Vict., c. 83, has by sec. 50, expressly taken away this exemption on the part of the members of the college; but with respect to ministers, although the legislature knew that ministers were not liable, either in respect of their stipends or of the manse and glebe, the Act merely says that ministers shall be liable in respect of their stipends; this necessarily

Gibson v.
Forbes.

excludes them from being liable in respect of the manse and June 14. 1852.
glebe.

Bethel, Q.C., replied, referring to 5 Geo. IV., c. 72.

Gibson v.
Forbes.

The LORD CHANCELLOR. My Lords, in this case the question lies in a narrow compass, though it is one of great importance. The question is, whether a minister in Scotland is liable to be rated to the poor in respect of his manse and glebe. The question turns on the statute 8 and 9 Vict., c. 83. Before that statute, it must be taken as a fact that ministers in Scotland were not liable to be rated, either in respect of their manse and glebe, or in respect of their stipend. The case of *Cargill v. Tasker* is a decision that *qua* minister, he was not liable. Now it is clear that although the first Act does not in express words say "ministers," yet it uses expressions which would include ministers if you were to give them their natural import. The words there are, "all the inhabitants, without exception of persons." But notwithstanding these terms, it has been held in Scotland that ministers were not to be rated in respect of their stipend, or their manse and glebe. Then comes the Act 8 and 9 Vict., c. 83; and upon that Act I should clearly have been of opinion that, but for the clause to which I shall afterwards refer, the first section, taken in connection with the 34th section, did include ministers in respect of their manse or glebe. I should have been of opinion, that under the 34th section, (which describes the manner in which the assessment is to be made) the words there used would have included ministers in Scotland, in respect of their means and substance. Then the 91st section, which repeals all former laws at variance with that Act, would have rendered it more clear. Now, my Lords, the grounds on which I ask your Lordships to agree with the decision of the Court below, depend on the exceptions contained in the Act. When I find that by the 49th section there is an express provision that ministers should be liable in respect of their stipends, I see at once that the words used in the other part of the Act which, *prima facie*, include ministers in respect of their being owners of lands, do not do so, for stipends were not considered to be for that purpose included under the description of "means and substance" given in the 34th section, or it would not have been necessary to have expressly declared by the 29th section, that clergymen shall be liable in respect of their stipend. This shews, I think, my Lords, that the former part of this Act is not to be used in the sense I should have interpreted it, had it not been explained by the sub-

June 14. 1852. sequent part. If, then, under the words "means and substance," Gibson v. stipends are not included by the legislature, the preceding words, Forbes. owners or occupants "of all lands and heritages within the parish," will not include the manse and glebe; for if the words used are sufficient to embrace the one, they are also sufficient to embrace the other. When, therefore, I find the one, namely, stipends, which on the face of it would imply "means and substance," is not included, I think it clear that the words in this 34th section are not used in the sense of intending to alter the usage which had prevailed before the Act, but that it was intended by that section to leave a minister still exempt, as he was before that Act. Now the 50th section is material, for there was before the Act an express exemption from rates, of the members of the College of Justice. In that case the exemption is expressly made to cease. The 91st section only repeals all acts and usages, so far as they are inconsistent with this Act; but as already pointed out, this exemption is not inconsistent with this Act. My own impression, my Lords, is, that the construction which the Court below has put on this Act ought to be adopted, namely, that the Act did not intend that the minister should be assessed to the poor in respect of his dwelling, though it did intend that he should, in respect of his stipend. I therefore move your Lordships that this appeal should be dismissed.

LORD BROUHAM. No doubt, my Lords, the present question depends entirely on the construction to be put on the late Poor Law Act; but that does not exclude a consideration of the usage which existed prior to that Act; for we cannot well construe the Act without having regard to the law as it stood previously. The case of *Cargill* has been referred to; but I take the fact of the existence of such usage, independent of that case as to this; it is most important that we should have regard to the opinion of the learned Judges in the Court below. Lord Cuninghame says, "It seems to be ascertained that, prior to the passing of the present Poor Law Act in 1845, it was rested in the laws and practice of Scotland, that glebes and manses were not liable for public and parochial burdens. That has been an immemorial usage and understanding in this country. The only case in which such a claim had been attempted (in the parish of *Cargill*), terminated in a finding that the minister was not liable for poor rates in respect of his glebe. Nearly thirty years elapsed between the date of that decision and the passing of the present statute for provision of the

poor; but, during the whole of that time, no attempt was renewed June 14. 1852.
 to make the minister liable for rates in respect of his glebe." Then Gibson v. comes this statute of 8 and 9 Vict. c. 83; and it must be taken Forbes. that it was, at that time, within the knowledge of the legislature, that a minister was not liable, either in respect of his manse or of his stipend. That Act expressly enacts that a minister shall be taxed in respect of his stipend. The legislature knowing, therefore, that a minister was not liable in respect of his manse and glebe, or of his stipend, confines his liability to a tax in respect of his stipend.

Interlocutor affirmed, but without costs.*

Connell and Hope, Westminster; and *Menzies and Maconochie*, W.S., Edinburgh, Agents for Appellant.

Robertson and Simpson, Westminster; and *Hector M'Lean*, W.S., Edinburgh, Agents for Respondent.

* The Lord Chancellor was of opinion that the minister was suing in behalf of others.

FIRST DIVISION.

SNARE v. EARL OF FIFE'S TRUSTEES.

No. 327.

Damages—Process—New Trial—Excessive Damages—Surprise.—Where a jury returned a verdict for the pursuer, with L.1000 damages, apportioned with reference to a ground of damage, as to which the record was not explicit, the Court granted a new trial.

Circumstances in which the Court were of opinion that from the structure of the record, the damages awarded by the jury must be held to be excessive, and a new trial granted.

See *ante*, p. 281. No. 129.

In this case a rule having been granted to shew cause why a new trial should not be granted, the matter was argued by the same counsel who appeared on the discussion of the bill of exceptions, and this day the Lord President delivered the judgment of the Court, in which the grounds of the motion and the arguments from the bar will be found to be sufficiently set forth.

LORD PRESIDENT. The jury have found for the pursuer on June 18. 1852. both the issues, and have assessed the damages at L.1000, irrespective of *solutum*, which they did not take into view. The defendants ask a new trial on various grounds, including surprise, excess of damages, contrary to evidence, and the justice of the case. The general rule is against disturbing the verdict of a jury

Snare v. Earl of Fife's Trustees.

June 18. 1852. pronounced upon a full consideration of the case, and that rule is especially applicable to any attempt to disturb the assessment of damages by a jury. There is no absolute and inflexible rule to that effect ; but it is the general rule. It is a wise rule for obvious reasons, and it should not be deviated from without strong cause shewn. To estimate the bearing of that rule on the present case, and the weight of the grounds on which we are asked to deviate from it, I think it necessary to advert to the nature and circumstances of the case. I don't mean to go through them in great detail, but I wish to separate that which is essential or proper for consideration, from that which appears to me to be non-essential, or not proper matter in the consideration of the point now before us.

The pursuer, Mr Snare, is possessed of a certain picture or portrait of Charles the First, which he exhibits for gain. I don't inquire whether that picture was or was not painted by Velasquez, or what is its intrinsic value. I agree with the observation made by the counsel for the pursuer, that these questions were not of the essence of this inquiry. I hold that Mr Snare is entitled to make profit by the exhibition of a picture, by whomsoever painted, or of whatsoever value. Now, can I hold that the value of the exhibition necessarily depends on the intrinsic value of the picture, or on its authenticity ? The very reverse may be the fact. Doubt and mystery hanging over it may excite curiosity, increase the resort of visitors, and enhance the value of the exhibition, and the loss consequent on an interruption of that exhibition. Mr Snare chose to exhibit this picture ; it was an object of attraction, and probably a subject of profit. Mr Snare chose to attach a history to the picture. He said it was a certain picture of Valasquez, which had at one time belonged to the noble family of Fife. Far from concealing that fact, he avowed it, and laboured to establish it, with what success I do not inquire. He exhibited his picture with that pedigree, real or imaginary, in London and elsewhere. If he really possessed the Valasquez, he was rich in the possession of it. If he only believed that he possessed it, he was perhaps rich in the possession of that harmless belief.

At length he came to Edinburgh and exhibited it here. The substance of Mr Snare's complaint was reduced into the two issues on which the trial was had, and which raise two, and only two, questions of fact—viz., 1st, wrongous seizure ; 2d, wrongous detention. The jury returned an affirmative answer to both of these issues. I have given every possible attention to the

evidence, and I do not see any ground for holding, that in return- June 18. 1852.
ing an affirmative answer to both of these issues, the jury did ^{~~~}
wrong—did any thing to warrant the interference of the Court. <sub>Snara v. Earl
of Fife's
Trustees.</sub>

So far, I think, there can be little room for difference of opinion.
As to the damages, I must hold that they were assessed in respect
of the matters within the issues. Therefore I must hold that
they did not give damages in respect of the multitudinous litiga-
tions that took place, except in so far as these might be regarded
as part of the proceedings by which the picture was withheld,
and the exhibition for a time prevented. The proper penalty of
improper litigation is the payment of costs, and I must hold that
the damages were irrespective of that matter. So also I see, from
the verdict itself, that the jury put out of view another matter,
viz. *solutium*. It is not clear that any matter of *solutium* was
properly before them, and I have no doubt that they did right
in discarding it from their consideration, and in recording in their
verdict that they had done so. The two matters to which the
evidence of the pursuer appears to have been directed as the
sources of his damage were these—1st, The loss sustained by
him through the stopping of his exhibition, and keeping it closed
from 31st January till 17th March; and, 2dly, The injury done
to his credit and business as a bookseller and printer at Reading.
These injuries the jury have estimated at L.1000. The jury
have not made any separation or apportionment of the damages
between these two matters, neither had the pursuer given any
schedule, nor can I say that this was necessary.

It is said by the defenders that these damages are excessive—
that the loss at Reading should be thrown out of view entirely—
and that, if it be so, the damages are excessive, and that the ver-
dict ought to be set aside on that ground. If the Reading matter
were to be thrown entirely out of view, I think that the damages
would be excessive, and that one-fourth of the damages assessed
appears to be as large a portion of the damage as could, consis-
tently with the evidence, be ascribed to the loss sustained through
the stopping of the exhibition. But there was another element of
damage which was perhaps more important and extensive, and
probably did not admit of being deduced precisely in figures by an
accountant. I allude to the alleged destruction of his credit, and of
his trade as a bookseller and printer at Reading. This was a matter
in which perhaps more was necessarily left to the discretion and ar-
bitrement of the jury ; and apparently it was in reference to this ele-
ment of damage that the greater part, three-fourths of the damages,

June 18, 1852. were awarded. Now, it was to this part of the case that the defenders mainly addressed themselves in their argument for a new trial. They contended that the damages were excessive, and they also contended that the case fell within one or more of the other grounds for granting new trial. The first of these is *surprise*. They say that they did not expect that the pursuer would present any case in regard to his business at Reading, that he would go into that matter at all as an element of damage, and that they were not prepared for it, that they did not consider it to be within the summons or the issues. Accordingly, at the trial, they excepted to the ruling of the Judge that it was within the issues; the bill of exceptions was made the subject of full argument before the Court, and the result was, that the exceptions were disallowed, and the direction which had been given by the Judge at the trial was affirmed.

The judgment of the Court disallowing these exceptions, and affirming the directions of the Judge at the trial, is now the law of this case. It fixes that this element of damage is within the summons and the issue. But that is not conclusive in the question of surprise. If it was not within the summons or issues, there would be no room for the plea of surprise, because the more decisive plea of absolute incompetency would apply. It is only where that plea does not apply, that there can be any room for, or occasion to resort to the plea of surprise. The judgment on the bill of exceptions is therefore not conclusive against the defenders now asking for a new trial on the ground of surprise. It was maintained for the pursuer, that the defenders should have raised the question of surprise at the trial, and should have objected to the evidence on that ground, and that not having been done, so they are now precluded. I cannot adopt that view. The defenders, at the trial, raised the objection of utter incompetency, which was a stronger and more exclusive objection; and I am not prepared to say, that, according to our mode of pleading, mere surprise would have been a ground for excluding the evidence at the trial. I consider it, then, to be still open to the defenders to put their demand for a new trial on the ground of surprise, if they can make out that ground. Upon what do they rest the allegation of surprise? They say that the record gave them no warning—that it was silent in regard to the Reading matter,—and that they were reasonably in the belief that the case would be put by the pursuer entirely on other grounds, and were wholly unprepared to meet that matter, on which unex-

pectedly the major part of the pursuer's claim of damage was put at the trial ;—while, holding, as I am bound to do, that the summons is broad enough to cover this ground of damage, and that the issues are also wide enough to embrace it, I must say that I have rarely seen so meagre, or rather so silent a record in regard to a part of the case to which so much importance was intended to be attached at the trial. The explicitness of our records, by condescendence and answers, has been referred to here and elsewhere, as affording a valuable security against surprise. In the present case, the record was closed on the summons (which is in the old form) and the defences without any condescendence. That would have been of no consequence if the summons had been explicit on the point in question. But while it is very full on other points, I can find very little in it to indicate that the pursuer's business and credit at Reading were destroyed by the seizure and detention of the picture in Edinburgh, and that he intended to make the defenders responsible in damages for the destruction of that business and credit. Then, as to the evidence it goes to establish, that immediately, or very soon after the intelligence of seizure of the picture reached Reading, the pursuer's business fell off, and very soon ceased entirely, and they gave their opinion, that there was no other reason for this than the seizure of the picture ; but it does not shew how that seizure was to affect that business, so as to make it appear that the loss "flowed directly" from the illegal seizure and detention. Then, again, these witnesses say that they knew nothing of the state of the pursuer's affairs, or the profits of his business, but they say that he had a book-keeper of the name of Hamley, and of course books kept by Hamley. But Hamley is not brought forward, nor are the books produced ; neither are any of the pursuer's customers, nor any parties who had dealings with him, brought forward to give evidence.

Thus, while the defenders, on the one hand, were not prepared for this part of the case, the pursuer, on the other hand, has not thrown the light upon it which he ought to have done, or which would have enabled the defenders to sift it, and I don't think there were grounds for the award of so much, if any damages on that head, as the case stood in evidence. I think that this important part of the case has not been properly investigated or satisfactorily tried.

To enable us to grant a new trial, if it should be thought that the justice of the case demands that course to be followed, it is not necessary that the circumstances should be such as to bring it

June 18. 1852.

Snare v. Earl
of Fife's
Trustees.

June 18. 1852. strictly within the category of surprise, or of the verdict being contrary to evidence, or of palpable excess of damage. The *Snare v. Earl of Fife's Trustees.* statute (55 Geo. III. c. 42), after enumerating these and other grounds on which new trial may be granted, adds to the enumeration, "or for such other cause as is essential to the justice of the case." At the same time, although these words may appear to be of wide application, great care and caution must be exercised in the application of them. The Court will not interfere with a verdict rashly, or on any loose notion that the case might perhaps be better sifted by another trial. But if it should appear that the circumstances approach closely to one or more of those grounds, recognized as clear grounds for granting a new trial—if it should appear that one of the parties has been exposed to disadvantages bordering upon, if not amounting to, a serious hampering of justice—if it should further appear that the other party has failed in the duty he owed to justice, by throwing all the light upon the case which might reasonably be expected from him, and without which a satisfactory result could not be arrived at—and if the result which has been arrived at is an award of a sum for actual damages, to an extent for which we see no materials in the evidence,—I think it does not become the duty of the Court to interfere, to the effect of allowing the case to be tried over again, on such conditions as may be prescribed, in the hope that it may be tried more satisfactorily. This course has been followed in several cases; *Kitchen v. Fisher*, 2 Mur. 600; *Collins v. Hamilton*, 16 Sh. p. 537; *Wallace v. Gray and others*, 14 Sh. p. 541; *Gye and Co. v. Hallam*, 10 Sh. 710; *Miller v. Geils*, 10 Dunlop, p. 718.

Looking, then, to the circumstances of the present case as I have stated them, and looking to these precedents, and to what is necessary towards doing justice in this case, I have come to the conclusion that we ought to grant a new trial, on condition of the defenders paying the pursuer's fruстрaneous expenses at the former trial.

The COURT therefore pronounced the following interlocutor: "The Lords having heard the counsel for the parties, upon the rule granted to shew cause why a new trial should not be had, set aside the verdict in the case, and grant a new trial, the defenders paying the expenses of the former trial." *

James Lamond, S.S.C. Agent for Pursuer.

Inglis and Leslie, W.S., Agents for the Defendants.

* Since the above judgment and interlocutor were pronounced,

this case has been compromised on the terms set forth in the fol. June 18. 1852.
 lowing interlocutor, by which the authority of the Court has been ^{Snare v. Earl}
 interposed to the arrangement :—“ Edinburgh, 9th July 1852.—of Fife's
 The Lords, having heard counsel for the parties, interpose their Trustees.
 authority to the tender, No. 137 of process, and to the acceptance
 thereof, No. 138 ; but in respect the damages, amounting to L.530
 sterling, have been paid, find it unnecessary to decern for the
 same ; find the pursuer entitled to his expenses up to the date of
 the said tender ; appoint an account thereof to be lodged, and
 remit to the Auditor to tax the same, and to report.

SECOND DIVISION.

BILL CHAMBER.

THE PROVOST, MAGISTRATES, AND TOWN COUNCIL OF LANARK, No. 328.
 v. WYLIE AND OTHERS.

Mortification—Appointment of Bursars—Process—Declarator—Interdict.
 —A suspension and interdict, brought to prevent certain parties interfering with the appointment or continuance of bursars on a certain mortification, dismissed, on the ground that the question must be tried by a declarator, and not by a process of interdict.

This was a note of suspension and interdict against the Rev. June 18. 1852.
 John Wylie, D.D., late moderator, and the Rev. Thomas Ander-
 son, present moderator of the presbytery of Lanark, the Rev. Magistrates of
 Alexander M'Glashan, minister of the parish of Lanark, and Wylie, &c.
 Robert Smith, eldest bailie of the burgh of Lanark, as trustees of
 Battiesmain's mortification, to prevent them carrying into effect a
 resolution come to at a meeting held on the 5th April 1852, to strike
 off the roll of bursars receiving benefit from the said mortification,
 the names of certain parties, and to interdict them from further
 interfering with any appointment of persons made by the
 complainers, on the said mortification.

In the statement of the complainers, it was set forth that, by contract dated 7th December 1648, between John Carmichael, commissary of Lanark, and the then moderator of the presbytery of Lanark, the minister at Lanark, and the eldest bailie, he conveyed to them, and their successors in office, his lands of Battiesmain, for purposes declared to be as follows :—“ That the benefit should be collected by persons appointed by the moderator, minister and bailie, to be stockit and paid together at yr sight for proffet, ay and gll the samin suld amount to sic ane somme

June 18. 1852. as the yearly profit thereof might sufficiently entertain ane pair
Magistrates of scholar in meal and clothing in the schooll of Lanark, for sic space
Lanark v. as the said three persons should appoint, and so furth, to be stockit
Wylie, &c. and laid together for entertainment as said is of ane after anither,
they being only children within the territory of the burgh of
Lanark, until there be sufficient for the number of children
and puir scholars ;" and it was further provided, that the nomination
of the said children should be in the power of the said John Carmichael and his heirs. That for the whole period, from the date of
the mortification, the proceeds of the trust had been applied in pay-
ment,—1st, to the masters of the grammar school of Lanark, for
teaching the boys selected as bursars ; and, 2dly, for behoof of the
boys themselves, in providing them with books and clothing ; that
for at least more than the last 100 years, the complainers had exer-
cised the power of appointing the bursars, and all these now on the
roll, amounting to eighteen in number, were appointed by them ;
that the parties holding bursaries were generally continued on the
mortification for a period of three years ; that the trustees having, in
the course of their management of the trust, and of certain outlays
for draining, &c., contracted debt, they had, at a meeting, held on
5th April last, adopted a resolution,—“ That four of the bursars
(named) should be struck off the roll just now ; and that in
October the five who then retire should not be renewed.” The
complainers thought this resolution to be *ultra vires* of the trustees,
and they now sought to have it suspended and interdicted.
They pleaded that, having for a period of seven years been in the
use and wont to nominate or elect bursars, the respondents are
not entitled summarily to interfere, by striking off the four bursars ;
and that, having exercised for more than the prescriptive
period, the right of appointing the bursars and continuing them
on the roll, they were entitled to continue to exercise it, and that
the respondents, the trustees, are bound by acquiescence from
interfering.

In answer, the respondents stated that the nomination of bursars had been expressly reserved to Carmichael and his heirs ; that the magistrates of Lanark had no power of administra-
tion whatever conferred upon them, their interference was unauthorised, and for more than forty years past, the respond-
ents had asserted their exclusive right of management. For
instance, in 1836, they increased the number of bursars from
nine to twelve, reserving the power to reduce the number, or
further to increase it when they should think proper. Subse-

quently they increased them to eighteen, and at various meetings, June 18. 1852.
 they had by resolutions vindicated their right of management, and
 of increase or diminution of the bursars as they should see proper. ^{Magistrates of} Lanark v.
^{Wylie, &c.} That in consequence of certain outlays towards the improvement of
 the lands, they had incurred debt, which it was necessary to liquidate, and that what seemed the most judicious course, was to
 curtail the expenditure, by striking some off the list of bursars.

They pleaded that the complainers have no title to proceed with this suit, the question as to the proper number of bursars being one as to which the trustees alone had any right to judge, and that the complainers had acquired no right, by usage or otherwise, to interfere with the trustees in their fair administration of the trust, nor any power to nominate and elect parties to enjoy its benefits.

The Lord Ordinary on the bills, (Anderson), refused the note, and the complainers reclaimed.

Mure, (with whom the *Solicitor-General* for the claimants,) referred to a decree arbitral, in a submission dated the 27th Oct. 1802, between the provost, magistrates, and town council of Lanark, and the then trustees of the mortification, to Mr Blair, then *Solicitor-General*, whereby they referred to him the question as to which party had "a right of presenting the bursars and uplifting the said rents of the lands of Battiesmains." Mr Blair, in his decree-arbitral, says, with regard to the nomination of the poor scholars,—" I find that the trustees have not instructed any right thereto, either by the terms of the said contract or otherwise; and as it is admitted in point of fact, that from time immemorial, the magistrates and burgh have been in the use of presenting the poor scholars, I find and declare that the said magistrates and council are entitled to continue in the possession and enjoyment of the said power of nomination as heretofore, until some competitor shall appear and instruct a better title."

This submission or decree arbitral had not been referred to before the Lord Ordinary.

Broun and the *Dean of Faculty* for the respondents, were not called on.

LORD MEDWYN was of opinion that the complainers must proceed by declarator, and not by interdict.

LORD COCKBURN concurred. As to the decree arbitral, it was questionable whether it was competent for the trustees to settle by arbitration. Besides the result of the decree-arbitral is doubtful.

June 18. 1852. LORD MURRAY, and the LORD JUSTICE-CLERK, were of the
Magistrates of same opinion.

Lanark, v.
Wylie, &c. The COURT adhered.

Menzies and Maconochie, W.S., Suspenders' Agents.
Bell and M'Lean, W.S., Respondents' Agents.

FIRST DIVISION.

No. 329. NORTH of SCOTLAND BANKING COMPANY v. THOMSON.

Process—Relevancy—Summons—Debt—Fraud.—Circumstances in which a Summons at the instance of a Banking Company against a Director who had resigned, for illegal and fraudulent intromission with the funds of the Bank, and otherwise malversing his office, was held relevant.

Appeal, leave to—Leave to appeal against a judgment on the relevancy granted.

June 19. 1852. This was an action of declarator, reduction, and payment, at the instance of the North of Scotland Banking Company, and James Westland, manager of the Company, being the registered officer entitled to sue, and be sued, on their behalf, against George Thomson, junior, merchant in Aberdeen, in which the relevancy of the summons came to be considered. There was a plea as to certain docqueted accounts, set up as a bar to the action, by the defender, but it is unnecessary in this report to make any particular mention of them.

The summons set forth that the company was constituted for carrying on business as bankers in Aberdeen, and other places in the north of Scotland, in 1836. That, by the contract of copartnery, it is, *inter alia*, provided that the management and government of the company shall be vested in a governor, twenty-one extraordinary, and eleven ordinary directors. That the business of the company should consist of banking in all its branches, and the making of such investments as "may be approved of by the ordinary directors or committee of management," and entering into the other transactions therein specially enumerated, "but for or in no other adventure, trade, or merchandise whatever, than that of banking in all its branches, or the purchases and investments therein enumerated and described." That provision is also made in said contract, for the election or appointment of the directors of the company, and of a committee of management. It then goes on to libel, that the defender was ap-

pointed one of the ordinary directors of the company, at the first meeting of the partners, on the 19th of August 1836, and continued to hold that office until the 30th of December 1848; and, during the same period, or at least from the 8th day of November 1845, the defender was also one of the committee of management of the company. That it had turned out, and been ascertained, that the defender, taking advantage of his position as a director, and a member of the committee of management of said company, and of the influence, authority, and facilities thereby afforded him, had engaged in various transactions, whereby he had become largely indebted to the pursuers, and had incurred liability to them; and the circumstances connected with these transactions, and in which the debts and liabilities of the defender had been incurred, had only recently come to the knowledge of the pursuers. The summons proceeds to set forth specially three transactions, in regard to which it was alleged he had violated his duty to the bank as a member of the managing committee, fraudulently and wrongously availing himself of the influence afforded him as a director and member of the committee of management to carry these out. The first of these transactions referred to a railway, which was projected to be made from the line of the Aberdeen Railway, at Ferryhill, near Aberdeen, to Aboyne, to be called the Deeside Railway. "With reference to this railway, a scheme was devised and arranged by the defender, that he, along with Henry Patterson, then manager of the pursuers' company, and Robert Russell Notman, then and now residing in Aberdeen, as his associates, should buy up the scrip of the greater part of the said Deeside Railway concern, and then resorting to certain practices and manœuvres of a very disreputable character, raised up the said shares to a high price in the market, and did resell the shares, to their own interest and advantage." The summons avers facts arising from his correspondence, or otherwise, in respect of these practices, and states that "the defender and his associates in the said scheme, found it necessary to raise considerable sums of money, to enable them to carry on their operations in regard to the same, the money so required was obtained or taken from the pursuer's company" and placed to the defender's debit, in an account opened under his name marked "No. 2" in the books of the company. That, in consequence of the operations upon the account, there arose a sum at the defender's debit, amounting to L.18,684, 12s. 11d. That, in obtaining and taking these sums, the defender fraudulently and wrongously availed himself of the influence afforded by

June 19. 1852. his position as a director and member of the committee of management; and all the money from the company was taken with the sanction and authority, and with the concurrence and approbation, or at the request of the defender, and without the knowledge or consent of the company, or of their directors, or committee of management generally, as a body. That the defender knew that his associates in the scheme were worth little or nothing; yet that the defender, taking advantage of the authority, influence, and position as aforesaid, and without the knowledge or sanction of the company, or the directors, or committee of management, attempted to relieve himself from two-thirds of the foresaid sum of L.18,684, 12s. 11d., by getting Mr Paterson, who was then manager of the bank, to transfer the same from the debit of the defender to the debit of his associate, Notman. The summons shows how this was done, and afterwards goes on to libel, that "the whole procedure, with regard to that transaction, was fictitious, collusive, simulate, and fraudulent, and intended merely to relieve the defender from a liability under which he undoubtedly lay at the time to the bank." That, after crediting the defender with the value of the shares of the foresaid scrip, there still remained a balance of L.5601 arising from the transference to Notman, which the defender was resting owing, and indebted to the pursuers.

The second transaction related to a scheme alleged to have been devised and arranged by the defender and his associate, Paterson, for buying up shares or scrip of the Aberdeen Railway, and of the Cornwall and Devon Railway, and reselling them at a profit, or otherwise turning the said shares to their own personal interest and advantage. This transaction involved a balance alleged to be due by the defender to the company, of L.1403, 8s., and appeared to have been precisely of the same nature as the previous one, and was averred as inferring the same consequences and liability.

The third transaction related to a credit of L.40,000, agreed to by the company, on a letter addressed to the directors by the defender, and certain other parties, which credit had been largely operated upon, notwithstanding of which, as the summons proceeds to libel, the defender taking advantage of his position and influence as aforesaid, contrived to get his name deleted from the letter of obligation on which the credit had been given. That this was not done with the approval or knowledge of the pursuers, or their directors or committee of management; that there was no minute in the bank books on the subject, and that the defender had never intimated to the pursuers, that he was to

be held as relieved from his liability, in respect of the letter of June 19. 1852. obligation. And in regard to a plea of homologation set up by the defender, it was averred on the part of the pursuer, that the proceedings in reference to which such plea was maintained, were taken in ignorance of the actual state of matters touching the deletion by the defender of his name from the obligation in question; and, in particular, that "when the said bond and promissory note were taken and obtained by the bank, and the said meeting was held, and minutes made out, (being the proceedings referred to by the defender), the pursuers were not in the full knowledge of the circumstances, in which the name of the defender had been deleted from the letter before quoted; and these circumstances had not been communicated by him to the pursuers. It was farther libelled that the defender had no warrant, title, or authority to delete, or get deleted as aforesaid, his name from the letter in question, or in that way to attempt to relieve himself from the liability which he had undertaken, by having subscribed said letter." The summons had then appropriate conclusions, declaratory and petitory, in respect of the defender's liability, arising out of all these transactions, and also concluded for reduction of the accounts, entries of transference, docquet, and minutes, and other writs and documents connected with the same.

The defender denied the facts libelled, but pleaded, *inter alia*, that the pursuer's averments were not relevant or sufficient to support the conclusions of the summons, and that there were no valid grounds, either in fact or in law, to reduce the documents referred to in the summons.

The Lord Ordinary (Wood) pronounced the following interlocutor, "Repels the objection to the relevancy of the action, and farther finds that the defender has qualified no ground why the pursuers should be found not entitled to insist farther in the cause, by having the disputed facts inquired into, and ascertained by a jury or otherwise, and the action now put an end to by an interlocutor, either of dismissal or absolvitor, and decerns, and parties not having agreed as to the form of the issues for trying the cause, the Lord Ordinary reports the issues lodged by the pursuer to the First Division of the Court."

The defender reclaimed.

T. Mackenzie and Deas were for the claimer.

Macfarlane and the Dean of Faculty for the respondent.

The COURT were of opinion that the summons was sufficiently

June 19. 1852. relevant, although it might have libelled the facts with greater precision ; they therefore adhered, and appointed the parties to be heard *quam primum*, with a view to the adjustment of the issues, and reserving all questions of expenses.

North of Scot.
Banking Co.
v. Thomson.

Against this interlocutor, a petition was now granted for leave to appeal to the House of Lords.

Deas, in support of the petition. This case is one of the greatest importance to the petitioner, both in respect of the amount of money claimed, and the grounds on which the demand for that is made against him. It is not unusual to allow an appeal on a point of relevancy. *Landale v. Forbes*, 4 Bell's Ap. p. 54; *Skinner*, 9th March 1849. *Torrie v. Duke of Atholl*, *ante*, p. 830.

Dean of Faculty, contra. It is in the discretion of the Court to grant or refuse this application. There is here no difference of opinion on the Bench ; and, therefore, unless in every case as a matter of course, an appeal is to be allowed, I do not see how it can be allowed here. No doubt there is a large sum of money at stake, but that operates against the application, for it is wrongfully withheld from the pursuers. As to the character of the petitioner, there are certainly accusations brought against him ; but the sooner these are disposed of, the better for him, therefore all the statements on the other side only go against the application.

The COURT (Lord Cunningham dissenting) were of opinion that it was desirable to take the judgment of the House of Lords before obtaining an expensive proof, which, in the event of the appeal being ultimately sustained on the relevancy, would go for nothing. The case of *Irvine v. Kirkpatrick*, 7 Bell's App. Cases, 186, is an illustration of the expediency of thus exercising the discretion of the Court in a question of this kind.

Leave to appeal granted.

Lockhart, Morton, Whitehead, and Greig, W.S., Agents for the Pursuers.
James Ross, S.S.C., Agent for the Defender.

No. 330.

HIGH COURT OF JUSTICIARY.

Before LORD JUSTICE-GENERAL, LORDS IVORY and COWAN.
H. M. ADVOCATE v. KRONACHER.

June 21. 1852. *Relevancy—Falsehood—Fraud, &c.—Criminal letters charging falsehood, fraud, and wilful imposition, inasmuch as the prisoner represented*

himself as "a person of wealth, rank, and property, and as being able and ready to pay for any goods or articles he might purchase *on delivery or on demand of payment* for the same :"—*Held* relevant. *Time, latitude of Opinion of the Court on this subject.*

The prisoner was stated in the criminal letters to be guilty of June 21. 1852. falsehood, fraud, and wilful imposition, "in so far as the said ^{Adolph Kronacher, or Adolph Leo Kronacher, alias Alexander de Kuffner,} _{H. M. Advo. v. Kronacher.}" having conceived a wicked and felonious scheme to cheat, impose upon, and defraud the lieges, by fraudulently obtaining from them goods and articles for his own uses and purposes, by means of false pretences, and, in particular, by assuming a false name, title, or character, and falsely representing himself as a person of wealth, rank, and property, and as being able and ready to pay for any goods or articles he might purchase, *on delivery of, or on demand of payment* for the same ; whereas the said Adolph Kronacher, &c., was not a person of rank, wealth, and property, and was not able and ready, and did not intend, to pay for such goods or articles, he the said Adolph Kronacher, in prosecution of said scheme, did, on one or more occasions between the and , the particular days or day being to the prosecutor unknown, within the shop or premises, &c., falsely and fraudulently assume the name or title of Baron de Kuffner, and falsely and fraudulently represented himself to be a German nobleman, and a person of wealth, rank, and property, and as able and ready to pay for such articles as he might then and there purchase, on delivery of, or on demand of payment for the same, and did, by means of these, or the like false and fraudulent representations and pretences, or part thereof, wilfully impose upon and deceive, and induce them, or one or more of them, to sell to the said Adolph Kronacher, &c., to be paid for on delivery, or on demand of payment as aforesaid, four, or thereby, pairs of trowsers, &c., the property, or in the lawful possession, of the said firm ; and the said articles having been, time or times above libelled, forwarded to and delivered to the said Adolph Kronacher, within or near the hotel situated at or near Wemyss Bay, where the said Adolph Kronacher then lodged, the said Adolph Kronacher, did thereupon feloniously appropriate them to his own uses and purposes, without paying, or intending to pay for them, and did immediately, or soon thereafter, abscond therewith, whereby the said parties were cheated, imposed on, and defrauded."

Then followed several other charges, all in similar terms, and

June 21. 1852. all said to have been committed in pursuance of the general scheme to defraud just narrated.

H. M. Advo.

v. Kronacher.

W. Thomson and *Crawfurd* for the pannel, objected,—In each of these charges, there is not a complete averment of the crime libelled. The goods are stated to have been obtained on certain pretences, “to be paid for *on delivery*, or on *demand of payment*.” The first of these alternatives has no relevancy to a charge of falsehood, fraud, and wilful imposition, for that crime necessarily implies the obtaining of *credit* on false pretences, and a sale for payment on *delivery* does not involve the giving of credit at all. The averment of the crime must therefore be held to be made in reference to the second alternative, “*payment on demand*.” There is, however, no statement of any *demand* ever having been made for payment. It is not stated to have been made at the time of delivery, or at any subsequent time up to the present moment. The prosecutor, therefore, has begun to aver very fully a series of facts amounting to the crime libelled, but had neglected to complete his statement, omitting the most essential fact of all. Should it be answered that the desideratum was supplied by the statement that the pannel “did immediately, or soon thereafter abscond, the latitude of time assumed by the prosecutor formed a sufficient reply; for if the crimes libelled in the first charge were committed at the beginning of that time, there were still 15 days left “for the demand of payment.”

Milne, A.D., and *Solicitor-General*, were for the Crown.

The COURT repelled the objection, and found the libel relevant.

In the course of the trial the Crown proceeded to prove, by means of the injured parties and their shopmen, the exact days on which the various alleged acts of fraud were committed. It was maintained on the part of the prisoner, that if the Crown, after taking a considerable latitude of time, as they had here done, and especially with the words, “the particular days or day being to the prosecutor unknown,” should afterwards prove the particular days, so as to shew that they must have been, from the beginning, within their knowledge, or within their reach, the whole prosecution must fall to the ground; and referred to the case of *Robert Gillies*, 23d May 1831 (Bell's Notes, p. 198).

Objection repelled.

James Tyler, W.S., Crown Agent.

James M. Stacy, S.S.C., and
Alexander Strathern, Writer, Glasgow, } Agents for Pannel.

FIRST DIVISION.

M'CUBBIN v. FULTON.

No. 331.

Fuga Warrant—Bond of Caution de judicio sisti—Warrant of Incarceration—Held that a fugæ warrant, until caution should be found under the penalty of the debt, and also for expenses, was illegal, and liberation granted; also, that the warrant of imprisonment was indivisible, and could not be sustained in part and suspended in part.

This was a note of suspension and liberation for M'Cubbin, June 22. 1852. who had been incarcerated at the instance of Fulton, on a *mediatione fugæ* warrant. The petition presented by Fulton to the Sheriff craves for warrant to apprehend M'Cubbin, "and thereafter to commit him to the tolbooth at Dumfries, therein to be detained until he finds sufficient caution acted in your Lordships' Court books, *de judicio sisti*, in any action for payment of said debt, and consequents, &c." The warrant provides that the complainant "be detained until he find sufficient caution acted in the books of Court *de judicio sisti*, in any action for payment of the debt mentioned in the said petition, to be brought against him at the petitioner's instance, in any competent Court within three months from this date, under a penalty of L.34 : 15 : 5 sterling, being the amount of the debt specified in the oath, and petition aforesaid, and also caution, acted as aforesaid, to free and relieve the petitioner from any expenses that may be recovered by him in prosecuting said action, in so far as the same may be awarded against the said William M'Cubbin."

On this warrant, M'Cubbin was apprehended and imprisoned, and the present suspension was now brought on the ground, *inter alia*, that the warrant of commitment, being inconsistent with the prayer of the petition, is null and void, and that at all events the Sheriff's warrant, in so far as it commits the complainant to prison, until he finds *caution* to "free and relieve the petitioner from any expenses" he may incur, is altogether illegal. The complainant was ready to find caution for the amount of the debt itself.

The respondent pleaded, that even supposing the warrant in question to require caution to be found, it is competent for the Court to restrict it *quoad excessum*, and it ought not to be set aside *in toto*. *Separatim*, The respondent having offered, both extrajudicially, and judicially, to remove any doubt and ambiguity, by consenting to hold the warrant as limited, and to accept of simple caution *de judicio sisti*, in usual form, this consent cured all

June 22. 1852. defects in the warrant, and the present proceedings are unnecessary and vexatious.

M'Cubbin v. Fulton. The Lord Ordinary on the bills, (Anderson), "in respect, (1st), That the complainer was on the eve of leaving this country when apprehended; (2d), That the allegations in the reasons of suspension are not supported by proof of any kind, and are positively denied by the respondent; and, (3d), That the note is presented without caution: refuses the note; finds the respondent entitled to expenses," &c.

Against this interlocutor, M'Cubbin reclaimed.

Patton, for the claimer, referred to the case of *Campbell v. Robertson*, 20th November 1847; *Gairioch v. Wilson*, 17th July 1851, 13 D. 1377.

Gifford and Penney, for the respondent. When a party asks two separable things, it is not only within the power, but it is the duty of the Court to separate them; and, as in this case, to sustain this warrant so far as it is legal, and cut it down so far as objectionable; *Maitland*, 11 D. p. 71, Nov. 14. 1848; *British Linen Company v. Clark*, 7th Dec. 1765, M. 2054; *Harris v. Liddesdale*, 7th March 1775, M. 2044.

The respondent put in a minute, restricting the warrant to find caution *de judicio sisti*.

THE LORD PRESIDENT. This case is in my opinion attended with some nicety and difficulty. The application for the warrant is well made. It is in ordinary form; and a warrant in the same terms would have been a good warrant. But two things are annexed to it. There is a penalty of L.34, &c., and the complainer is to find caution not only for the debt, but for the expenses. Now the objection was taken, that with regard to this last part at least—as to caution for expenses—that that was incompetent and illegal. Now, looking to the cases that have been decided in the later period of the law relative to *meditatione fugæ* warrants, there is authority for the doctrine contended for by the complainer. It appears to me that everything that is contained in this warrant, on the subject of penalty or expenses, should have no place there at all. The obligation in the bond *de judicio sisti* is not an obligation to pay, but to produce the party in Court; and the magistrate granting the warrant has nothing to do with the consequences at all, and was irregular in attaching a penalty. This was introducing into the warrant elements which ought not to have been introduced at that stage of the proceedings. Now I apprehend the proper course

for us to take is to treat the warrant as a whole. I think that, in June 22. 1852. regard to a warrant for apprehension, if it be an irregular warrant, ^{~~~~~} it is dangerous for the Court to shape and square out of it some- ^{M'Cubbin v.} Fulton. thing that might be made to be a good warrant. I do not say that there may not be a case in which caution for the debt and caution for expenses may not be separated, and treated as distinct things ; but the party might say here, at the time this warrant was granted, if it had been in regular form I could have found good caution, and I do not think that it is a matter of great hardship on the creditor to deal with it in this way ; therefore I am of opinion that the warrant was irregular, and that the bill should be passed.

LORD CUNINGHAME. While I agree in the conclusion, and in the greater part of the observations made by your Lordship, I must observe, that if there had been only an unnecessary surplusage in the conclusion of the bond of caution, I should have hesitated to pronounce the warrant objectionable. For example, if the bond, after binding the cautioner for a debtor *de judicio sisti*, had merely added, "under the declaration that if he failed to present the debtor, he should be liable in such part of the debt and expenses as the Judge, in the action to be brought as aforesaid, might find due," that would only be declaring the legal and technical extent of the obligation to find caution *de judicio sisti*, and it would seem hard to hold that as an incompetent mode of certifying to plain men the real extent of the obligation they undertake, especially as the style of these bonds is not fixed by statute, and the whole proceeding of apprehension *in fuga* is not very ancient. But the present is a different case. The obligation in the bond for the principal sum is erroneously made absolute, "under a penalty of L.34 : 15 : 5 sterling," being the amount of the debt, &c. After which follows the clause as to expenses, in these words. The obligation is added ;—"and also caution, acted as aforesaid, to free and relieve the petitioner from any expenses that may be recovered by him in prosecuting said action, in so far as the same may be awarded against the said Wm. M'Cubbin." That obligation as to expenses appears to me less exceptionable ; but the preceding clause as to the *principal sum* cannot be sustained, and it vitiates the warrant. My chief difficulty has arisen from the proposition talked of, to *restrict* the warrant to the first and leading appointment of the Sheriff to find caution *de judicio sisti*; but the debtor has been detained some weeks in jail on a wrong warrant ; and I cannot, in a question affecting the liberty of the subject, dissent from your Lordship's proposition to suspend this warrant, leaving the credi-

June 22. 1852. tor to apply again, if he be so disposed, for a warrant against the
debtor in proper and competent terms.

M'Cubbin v.
Fulton.

LORD IVORY. I have arrived at the same conclusion. This is a question which occurs in a department of law in which it is evidently the duty of the Court to be jealous of the strictest regularity and order. The objection is not frivolous, but enters into the substance of the case. The warrant is *ultra petita*. It is irregular in itself, and, as granted, is a nullity. Had the warrant stopped at the words "within three months from this date," it would have been correct. The blunder begins with the introduction of a penalty. The caution is to be of an indefinite character. There are many applications in which *meditatione fugæ* warrants have been presented in the case of ill-grounded claims, where random sums have been concluded for; and if a penalty were to be always attached to the extent of the claim, it is clear that the party would be exposed to serious hardship. But it is not on that part of the case that I wish to rest my opinion. The great blunder which has been committed here, is in the second branch of the warrant. That is not an obligation *judicio sisti* at all; it is an obligation *judicatum solvi*. Now, so far it is *ultra petita*. It is illegal in itself, for if it is not within the prayer of the petition, it is incompetent. Therefore the warrant was illegal in its origin, and when the party was thrown into jail on such a warrant, I think he is entitled on his prayer to be instantly restored to liberty. It has been said that the warrant is separable in its departments. But the warrant is one and indivisible. There are not two separate conditions. It is a condition that the debtor shall find a certain amount of caution, which is described. If he finds a less amount of caution, he does not fulfil the condition. It is the indivisibility of the condition, therefore, on which the imprisonment proceeds, that is the element with which we are to deal in this matter, and the rule in regard to it cannot be better expressed, than as laid down in the case of *Gairloch*. It is very true, that in the case of imprisonment for debt, it is competent to suspend the diligence in part, and until the last shilling is paid, the warrant for incarceration is as good as at first, so that a party may be kept in prison, on a warrant for a claim, part of which is not due; for as the warrant applies to every portion of the debt, there can be no objection taken to it. But if a party has been kept in jail, for a sum other than the balance of the debt, there can be no difficulty in dealing with it. An obligation to pay debt is not divisible. In this case, the obligation is said to be

divisible ; and this is the difference between the two cases. June 22. 1852
 The party is entitled now to be released. He remains in jail ^{June 22.} *M'Cubbin v. Fulton.*
 at the peril of this party ; and I think that the Court, where a party is detaining another on an illegal warrant, cannot hear him on an application to assist him in discovering matter for a legal, out of an illegal warrant. Some of the principles now recognised do not accord with the earlier decisions ; and I go in the face of these decisions for this reason, that it was not well understood in what cases caution *judicio sisti* and *judicatum solvi* should be taken. I think that in these cases, much of the discussion must have proceeded on the question of jurisdiction, whether the Admiralty Court did not interfere ; but at any rate, sitting here on the liberty of the subject, I cannot consider myself tied down by these authorities, which were decided at a time when the subject was but little understood.

The COURT, "in respect of the circumstances, alter the interlocutor of the Lord Ordinary, and remit to his Lordship to pass the bill, and grant liberation."

W. Lorimer, W.S., Suspender's Agent.

R. Arthur, W.S., Respondent's Agent.

FIRST DIVISION.

THOMSON *v.* FARRELL.

No. 332.

Process—Expenses awarded by the Lord Ordinary—Rule observed by the Inner House on reviewing the judgment.

In this case the Lord Ordinary had given articulate findings on the question of expenses. While the pursuer was found generally entitled to them, the Lord Ordinary ordered certain deductions to be made, and found the defender entitled to one-half the expense of making up the record. The pursuer reclaimed, contending that as he had substantially gained his case, he was entitled to his whole expenses.

The COURT adhered to the Lord Ordinary's judgment, re-June 22. 1852. marking that the Inner House will not interfere with a judgment ^{June 22.} *Thomson v. Farrell.* of the Lord Ordinary on the point of the expenses of a case which has been conducted before him in the Outer House, unless they are of opinion that a point of principle is involved, or that in the whole circumstances of the case the Lord Ordinary has not exercised a sound discretion in dealing with the costs.

June 22. 1852. *Shand was for the pursuer.*
Macfarlane for the defender.

Thomson v.
Farrell. *Shand and Farquhar, W.S., Pursuer's Agents.*
Gordon, Stuart and Cheyne, W.S., Defender's Agents.

FIRST DIVISION.

No. 333. Petition, The EARL OF AIRLIE.

11 and 12 Vict., c. 86, § 21—*Entail Amendment Act—Provisions to Children.*—In applications to charge entailed estates with provisions to younger children, the bonds to be granted for the amount thereof must be to the parties directly in right thereof, and not to a third party.

June 28. 1852. This case was reported on the 12th June by the Lord Ordinary (Cowan) in order to obtain the judgment of the Court on the following point:—This is an application for authority to charge three entailed estates possessed by the petitioner, with the amount of provisions to younger children, under the 21st section of the Entail Amendment Act. The prayer of the application is alternative, either to charge portions of the three entailed estates with the proper proportion of the said sum, when divided among the estates according to their free rents and proceeds severally, or, to charge portions of each of the said entailed estates with one accumulated principal sum. The prayer, as regards each of the estates is, that specified portions thereof shall be charged with the proportional share of the total amount burdening each estate, by executing—in favour of parties in right of the children's provisions for their respective shares thereof, or in favour of any party or parties who may advance the said sum, to enable the petitioner to settle with the above named parties, or other party or parties who may be in right of said provisions, upon obtaining valid discharges by the parties in right thereof—a bond and disposition in security, or bonds and dispositions in security, in ordinary form, over such portions of said lands and baronies, or any part or portion thereof.’ The question was, whether under the statutory words, the bonds to be granted for the amount of the provisions must be to the parties in right thereof directly, or may be to a third party advancing the amount on the faith of the security, in order that, by means of such advances, the provisions may be paid off and discharged.

Donaldson was for the petitioner.

The case was continued, and, of this date, the Court expressed

an opinion, that to allow bonds to be granted to a third party June 28. 1852. would be to experiment on the statute in a way which ought not ^{to be sanctioned.} They therefore "authorised the petitioner to charge the fee and rents of the various estates, with the proportions of provisions applicable to each," and that by granting bonds and dispositions in security in favour of certain parties named, "for their respective shares of said provisions, as specified in the petition, or in favour of any party or parties who may be in right of their respective shares, and decern," &c.

J. and W. R. Kermack, W.S., Petitioner's Agents.

FIRST DIVISION.

ANDERSON v. THOMSON.

No. 334.

Process—Breach of Interdict—Fixtures.—(1.) A party complaining of breach of interdict will not be allowed to enlarge, on revisal, the complaint made in the statement of facts appended to the petition, or to obtain proof of more than the specific charges in the original petition. (2.) In a petition for breach of interdict against a tenant for removal of fixtures, the character of the erections removed as fixtures must be very clearly proved; and *observed*, that, in a question between landlord and tenant, the same things will not be held fixtures which will be considered as such in a question between heirs and executors.

This was an advocation from the Sheriff-Court of Glasgow, June 28. 1852. Anderson presented to the Sheriff of Lanarkshire a petition, praying the Court to find Thomson "guilty of the breach of interdict Thomson complained of, and referred to in the annexed statement of facts." In the statement he set forth that he had let certain premises in Glasgow on lease to Thomson, for the purpose of being used in his business of machine making, it being a condition of the lease that Anderson should be entitled at its expiry to take possession of such machinery put up by Thomson as might be fixtures, or could not be removed without hurt or damage to the said premises thereby let. Afterwards, understanding that it was Thomson's intention to remove out of the building certain machinery bearing that character, he had applied to the Sheriff to interdict Thomson from taking down or removing such of it "as cannot be taken down or removed without injury or damage to the said premises, the walls, and buildings thereof," or "as may be so fixed or attached to the buildings, or so placed, as not to be removed with-

June 23. 1852. out occasioning detriment, injury, damage, and danger to the said property," &c, whereupon the Sheriff "in the meantime interdicts, prohibits, and discharges as craved, till the future orders of the Court," and afterwards, by another interlocutor, he made the interdict perpetual. The statement further set forth, that notwithstanding this interdict, Thomson had sold and disposed of, and taken down certain parts of the machinery, and, in particular, "an iron beam or pillar," therein described, and also "the horizontal shaft and perpendicular shaft connected with the working engine," &c. The petitioner afterwards revised his statement, and in the revised statement he enlarged the specification of fixed machinery removed. Answers were given in and a proof of the averments allowed. Proof was led at great length in regard to the removal, &c. of the specified portions of machinery, and some other portions not specified. Proof was also led by the defender to show that he had not removed any of the machinery complained of, but that it had been done by others to whom he had sold it previous to the granting of the interdict; and further, that the machinery removed was not of the character of fixtures.

The Sheriff-depute, confirming the opinion of the Sheriff-substitute, found that the removal by the respondent of the machinery specified had not been proved; and further, that though it had, it was doubtful whether it could be said to have the character of fixtures, and refused the interdict.

Anderson advocated the cause, but the Lord Ordinary (Dundrennan) adhered. Anderson reclaimed.

Horn and G. G. Bell were for the claimer.

W. Peddie and Macfarlane were for the respondent.

The COURT, without calling on the respondent's counsel, pronounced an interlocutor substantially affirming the Lord Ordinary's judgment, although altering the interlocutor in some of its findings.

The LORD PRESIDENT (the other Judges concurring) remarked, that the petitioner was not entitled to much of the proof which had been allowed. Some of the machinery referred to in that proof was not specified even in his revised statement. A petition for breach of interdict being a *quasi* criminal action, the petitioner must state his complaint fully in the petition, and no proof could be allowed him of anything not embraced in the original petition. Again, the consequences of the respondent being found to have committed a breach of interdict being penal, the Court would require very clear proof of his having committed it. It would be necessary to shew very clearly, first, that it was by him, or with

his knowledge, that the articles had been removed, and, next, June 23, 1852, that they were indisputably fixtures. If this were a matter of ^{some} doubt, so that men of experience differed as to their being so, the ^{Anderson v.} Thomson. Court could not subject the respondent in the consequences of a breach of interdict. The rule which regulated the character to be attached to machinery, as to whether it was fixtures or not, was different in some respects in questions between landlord and tenant, and where the question rose between the heir and the executors. In the former case the tenant was always to be very favourably viewed.

John Ronald, S.S.C., Advocate's Agent.

James Peddie, W.S., Respondent's Agent.

FIRST DIVISION.

Petition, A. T. F. FRASER of Abertarff.

No. 335.

11 and 12 Victoria, c. 86—*Entail Amendment Act—Montgomery Act—Fee-simple possession—Improvements—Consigned Money—Authority to uplift.*—An heir of entail made up a fee-simple title to estates, holding that the fetters of the entail did not apply to him. The entail was ultimately found to be good, and an entail title was made up. During his fee-simple possession, a portion of the estate was sold under the authority of an Act of Parliament, and the price consigned by the purchasers in bank, and certain improvements were also made by him:—*Held* that the improvements formed a good claim under the Entail Amendment Act against the estate; and that an application to apply the consigned money in repayment of the sum expended in improvements might competently be granted.

This was a petition for warrant to uplift and apply consigned ^{June 24, 1852.} money, and was reported to the Court by the Lord Ordinary ^{Pet. Fraser.} (Anderson). The fund in question was obtained by the sale, under the authority of an Act of Parliament, of a portion of the estate of Abertarff to the Caledonian Canal Commissioners, and was consigned in Court on an application by the Commissioners. The petitioner succeeded to the estates of Abertarff and others, under an entail executed by Fraser of Lovat in 1808, and deed of nomination executed by him in 1812.

Abertarff holding that the fetters of entail did not apply to him, made up a title to the estate in fee-simple, and a long litigation ensued, as to whether Abertarff was bound to execute an entail title, or was entitled to hold the estate in fee-simple. In 1848 it

June 24. 1852. was held by the House of Lords, affirming the decision of the Court of Session, that Abertarff was only entitled to hold the estate under the fetters of the entail, and that he was bound to execute an entail of the estate, and accordingly, in 1851 an entail title was made up. The consigned fund arose from sales during that litigation.

Pet. Fraser.

This petition set forth that the petitioner, in terms of the statute 10 George III., cap. 51, during the years 1829 and till 1843 inclusive, expended the sum of £4060, 11s. sterling, in executing permanent improvements upon the lands and estates belonging to him, by erecting, rebuilding, and repairing dwelling-houses, planting, draining, &c. "all conform to accounts thereof, with relative vouchers duly recorded in the Sheriff-Court books, in terms of the last mentioned statute, and herewith produced." And the petition prays for authority to apply the consigned money in repayment, *pro tanto*, of the sum so expended by him.

The petitioner having moved the Lord Ordinary for a remit to a man of skill to report on the improvements, the objection was taken that there could be no claim for improvements at all, in respect the whole melioration had in that case been executed while the petitioner was possessing under a fee-simple title. This point being prejudicial, was reported by the Lord Ordinary to the Court.

H. J. Robertson, for petitioner. The statute provides that money consigned in circumstances like the present may be applied in repayment of permanent improvements. There is no qualification as to those improvements, and no reference to the Montgomery Act as limiting the improvement. The present Act confers powers and privileges on heirs of entail, which were not given by the Montgomery Act.

Moir, for the objectors. The claim must either be a debt against the estate, or capable of being made a debt either under the Montgomery Act or the recent statute. Unless this be a debt under one statute or the other, it is incompetent to apply this money for the purpose of repayment of improvements. Now, as this party was, during the whole time of the transactions out of which this fund arose, holding that estate on a fee-simple title, he could not have made this claim a charge against the estate under the Montgomery Act. By the recent statute also he must have been an heir *in possession of an entailed estate* at the time of the improvements. The only difference between that statute and the Montgomery Act is, that the latter removes some of the formal

difficulties in the way of the procedure; but it makes no change June 24. 1852.
on the character of the debt.

Pet. Fraser.

The LORD PRESIDENT. I do not think we are here under the Montgomery Act at all. If we were, it would be a nice question. At the time this money was consigned, and the improvements were made, it is said that the estate of Abertarff was held in fee-simple. That is, there were the deeds of 1808 and 1812 making an entail, but the party who held under these deeds had made up a fee-simple title. But then he had made up a fee-simple title wrongfully, for the result of the litigation, which was instituted against the petitioner at the instance of the tutors of Lovat, was to establish that an entailed title should have been made up; and a deed of entail was accordingly executed by the petitioner, by order of the Court in 1851. The first point we have to look to, therefore, is, what are we to regard as the date of this entail? Now the Act says, its provisions are to be applicable to cases where there is not a completed title under the entail,—where lands are not yet entailed,—to cases where there are no lands at all, but only money for the purchase of lands; therefore it extends to all those conditions in which the party is placed fairly under an obligation to entail. Now, in reference to entails under that Act, and when a title has not been made up, &c., the date of the entail is taken to be the date of the deeds on which the obligation to take the entail exists. I apprehend that this would carry this entail back to the old deeds of 1808–12. And under this Act, if the question be raised, whether this is to be dealt with as an entail posterior or prior to the late Act, there would be no question that it is an entail prior to 1851, and not subsequent to the passing of the Act, and therefore it must go back to the date of these deeds; and so also these improvements having been made in 1829, were improvements on an entailed estate. It also appears to me, that looking to the sales that took place, and which took place long prior to 1851, and with regard to which, the price is said to be part of the price of the entailed estate, if the estate is to be held as entailed at the date of the sales, it must also be held to have been entailed at the date of the improvements. Therefore the present application is well founded, if the petitioner can shew that the improvements are of a kind that the Court will sanction; but that is an after enquiry. Therefore I am of opinion that the prayer of the petition ought to be granted.

LORD CUNINGHAME. I entirely concur, and think it unneces-

June 24. 1852. Pet. Fraser. sary to add any thing to the views now expressed. There is not the slightest doubt, that this estate, at the time these improvements were made, was substantially an entailed estate.

LORD IVORY. I am of the same opinion. The whole matter lies in a very narrow compass. Either the entail of 1808, which is a personal entail, is the entail that regulates the matter in regard to the present Abertarff, in which case, § 42 applies, coupled with § 52, or, if it be dealt with as a mere direction to entail, then § 28 applies. Between these two sections, it is impossible that this case can escape.

The COURT "Find that the application is well founded, if the petitioner can shew that the improvements are of the right character, and remit back to the Lord Ordinary to enquire and report."

Aeneas Macbean, W.S., Petitioner's Agent.

SECOND DIVISION.

No. 336.

A. & J. FOWLER v. MESSRS ROBERTSON & ADIE.

Coal Works—Colliers' Wages—Sequestration—Reduction—Expenses.—Circumstances in which the Court reduced a process of sequestration on the ground that the rent had been paid, and that the parties applying for the sequestration had in hand wages due exceeding the amount of the rent claimed.

June 24. 1852. Fowlers v. Robertson, &c. The Fowlers engaged as working colliers in the coalworks of Messrs Robertson & Adie, on 13th Feb. 1850. They each got possession, from their employers, of a small house, for which they were to pay rent. On the 19th they both left the coal-pits, alleging the mode of working to be unsafe; and, on the same day, a petition for sequestration, (on the narrative that they were due rent for their houses,) was presented, and warrant of service granted; and their furniture and effects were inventoried and sequestered. Answers to the petition were lodged; a record was made up and proof led, which ended in the judgment of the Sheriff-substitute, which was favourable to the Fowlers, being reversed by the Sheriff-depute.

Before any steps were taken by Messrs Robertson & Adie to carry into effect the judgment of the Sheriff, the pursuers of this action raised a summons of reduction and damages, seeking to reduce the adverse interlocutors in the sequestration process, and claiming the expenses of that process, and damages, in consequence of the conduct of their employers.

The Lord Ordinary, (Robertson,) pronounced an interlocutor,

reducing, in terms of the libel, and finding the defenders liable for June 24. 1852. the expenses both of the reduction, and in the Court below, on the grounds that on the evening of the 19th or morning of the 20th, the rent had been actually paid, and that their employers had in their hands wages due exceeding the amount of the rent claimed.

The defenders reclaimed.

Moncreiff and Deas. There is no attempt here to set aside the sequestration. The sequestration is not brought here by advo- cation, but only certain interlocutors are sought to be reduced. Therefore it must be assumed that the sequestration was rightly awarded, and the allegation of subsequent payment is equivalent to an admission that rent was due. The evidence does not show that payment was made. It is said that the pursuers are entitled to set off this rent against the wages due to them; but even if that were permissible, the defenders were not bound to do so. A landlord is bound to pay wages when due. The Truck Act, § 3, provides for this in cases such as the present, and it follows that he must be entitled to demand rent when it is due. Assuming, however, that the rent must be held to have been paid, the question still remains, ought there to have been a war- rant of sale? The expense of this unchallenged sequestration had been incurred before the date of the alleged tender of pay- ment. The prayer of the petition is to inventory and sell for rent and expenses—therefore the warrant, it might be, should have been restricted in amount, but still ought to have been granted, the only tender should have been, not of rent alone, but of rent and expenses in the process. There is no rule more fixed than this. It is submitted then, 1st, That there has been no payment of rent; 2d, That if there had been, the defenders were still entitled to the expenses of the process.

Macfarlane. The sequestration is not in *security*, but for pay- ment of rent already due, and though the application was made on the 19th, it was not served till the 20th, after the rent had been paid, or at least after payment had been tendered. The pur- suers are therefore clearly entitled to expenses. The pur- suers' proof showed that payment had been made—at all events the books of their employers showed a more than sufficient amount of wages to have been due.

LORD JUSTICE-CLERK. We are not called upon to determine whether the original sequestration was right or not. I am satis-

June 24. 1852. fied by the evidence that the alleged payment was made to a
 Fowlers v. Robertson, &c. party whom we must consider as the defenders' manager, and of whose acts they must be considered cognisant. Then the mode in which the pursuers have kept their books shows that they did consider themselves entitled to retain the amount of rent out of the wages, and so would bar them from founding on the Truck Act, even if it had any application here. Then it rather appears that the payment was actually made before the service. I am for adhering.

The rest of the COURT concurred, LORD MEDWYN remarking, that although the point was not so raised as to call for any decision, it seemed to him a most objectionable form in which this matter had been discussed. The whole case should have been brought up together.

The LORD JUSTICE-CLERK concurred in this observation as to the inexpediency of the shape of the proceedings.

The COURT adhered, with additional expenses.

John Leishman, W.S., Pursuers' Agent.

W. Wotherspoon, S.S.C., Defenders' Agent.

SECOND DIVISION.

No. 337.

STEWART v. WALKER AND CO.

Process—Jury Trial—Motion after issues adjusted.

June 24. 1852. During the discussion in this case, which came before the Court on a motion for a diligence,

Stewart v. Walker, &c.

The LORD JUSTICE-CLERK remarked, that he observed that since the issues in this case had been adjusted, which had been done by the Lord Ordinary, two incidental motions (for diligence as was understood) had been made before the Lord Ordinary. This, his Lordship remarked, was irregular, it being, as he understood, the rule that after the adjustment of issues, whether these were adjusted by the Lord Ordinary or in the Inner-House, all motions in the cause should be made before the Inner-House, unless it was fixed that the cause should be tried by the Lord Ordinary.

Duncan and Dewar, W.S., Pursuer's Agents.

Patrick, M'Ewen, and Carment, W.S., Defenders' Agents.

HOUSE OF LORDS.

THOMSON and ANOTHER, *Appellants*; and THOMSON and
ANOTHER, *Respondents*.

No. 338.

Trustee—Liability for Breach of Trust—Negligence.—Circumstances under which a trustee was held personally liable for a loss produced by neglect on his part, notwithstanding the deed of trust fully empowered him tosist on the trust without any other control than his own discretion, and expressly declared that he should not be liable for neglects or omissions of any sort, but only for actual intromissions.

By trust disposition and settlement of the 25th September 1785, June 16. 1852. Matthew Haldane, of Kingston, conveyed his estate, moveable and heritable, to certain persons, amongst whom was James Thomson, &c. son, writer to the signet, since deceased (who is represented by the present appellants), as trustees for behoof of certain persons therein referred to. By the said trust-deed, the trustees were directed to convert into money the whole heritable estate, and to invest the same upon securities, in their own names in trust, for the uses of the settlement. The deed also contained the following clauses in favour of the trustees :—“The trustees having otherways full and absolute power to do in all the premises above mentioned just as they think best and fittest, being limited only by their own discretion, and the trust and confidence by me reposed in them, and noways liable to any control, challenge, interference, action, demand, or account from, by, or to the children of my said niece, or any other person whatever, either in respect of what the trustees do, or what they do not think fit to do, but that they shall be guided and directed by their own judgment and discretion only, and by no other rule, nor be under or subject to any other authority or power whatsoever,—all and everything to the contrary, whether in law, usage, or custom notwithstanding, the same being hereby in the most express manner excluded, debarred, and discharged: Such being, and being hereby declared to be the nature and extent of the trust and confidence I have and hereby do place in my said trustees.” And the trustor also thereby declared, “that the said trustees shall be entitled to all their costs and charges in executing this trust, upon accounts made by themselves, without other evidence or voucher, out of the first end of their receivings, and shall not be liable *in solidum*, but only each for himself; neither shall they be liable for neglects or omissions of any sort, but only for actual intromissions, and the said trustees are hereby

June 16, 1852. allowed, authorised, and empowered to name a factor under them, ^{for whom they shall not be answerable."} Mr Haldane died in Thomson, &c. v. Thomson, January 1789, and in 1806, by reason of the death of the other &c. trustees, Mr Thomson became the sole trustee, and, as such, conducted the affairs of the trust. In 1819, Mr Thomson instituted

a process of multiplepoinding and exoneration, in order to bring together the parties interested in the trust-estate, for the purpose of having the trust-estate distributed, and receiving a discharge from all liabilities as trustee. Mr Thomson lodged his accounts and vouchers down to the year 1821, which were remitted to an accountant for an examination ; and, for several years afterwards, various proceedings in the process took place, when, in 1828, Mr Thomson, in consequence of age and bodily infirmity, retired from business in favour of his nephew, Mr Thomson Paul, who had been his managing clerk. Mr Thomson died in October 1831. After Mr Thomson's death, Mr Paul appeared in the process, and craved to be sisted as trustee in his uncle's place, in virtue of a deed of assumption, said to have been executed in his favour, and accordingly he was for a time formally sisted as trustee. This appointment of Mr Paul to the office of trustee was opposed by both the present appellants and respondents, and a record was appointed to be made up to try the question, whether he had a right to act as trustee. After the record was closed, but before any judgment was obtained upon it, the Court of Session, on 10th July 1834, appointed a judicial factor. In February 1835, the appellants were appointed to lodge in process the accounts of the trust-estate ; the judicial factor, in February 1838, made a report thereon. Upon the debate which took place on this report before the Lord Ordinary, the present respondents (who are claimants, having a beneficiary interest in the reversion) insisted against the late Mr Thomson's representatives for a debt of L.600, amounting with interest to L.1068 : 17 : 1d., together with subsequent interest, in respect of gross professional culpability and negligence on his part. The facts as to this sum are the following :—

On 4th March 1826, Mr Thomson lent a sum of L.600, part of the trust-funds, to a Mr Ireland, upon two houses in Edinburgh, and a bond and disposition in security for that sum was granted by Ireland, and a Mr Alison, to Thomson as trustee. There was existing at the time a prior security of L.3000 over the same subjects, but they were said by the appellants to be then worth, at the least, L.4,400. Interest was paid down to the term of Whit-sunday 1828, but in that year, Mr Ireland being in embarrassed

circumstances, Mr Thomson exposed the subjects to sale under ^{June 16, 1852.} articles of roup, which provided that the purchasers should, within ^{Thomson, &c.} twenty days after the sale, grant bond, with sufficient caution, for ^{v.} Thomson, the payment of the purchase money. Persons of the name of ^{&c.} Scott and Tasker appeared at the sale and purchased the subjects for L.4,010, on behalf of the said Mr Alison, one of the granters of the bond and disposition in security, and they granted dispositions to Mr Thomson Paul, in trust, to hold for the said Mr Alison. The condition of sale requiring security to be given by the purchaser was not enforced, and dispositions to both of the houses were executed by Mr Thomson, in favour of Mr Alison, as purchaser, on 17th Jan. 1829, but the testing clauses were not filled up, though a note was attached for completing these clauses, and the signatures of the two witnesses duly adhibited. The dispositions purported to be made by Thomson, as Haldane's trustee, with consent of Mr Paul, but the signature of Mr Paul thereto was wanting. These deeds, together with the title deeds of the subjects, and the bond for the debt of L.600, were delivered to the purchaser, Mr Alison, who ever since the date of the purchase was allowed to be in possession, drawing the rents as proprietor, without paying any part of the price, or any interest on the loan of L.600 after Martinmas 1828. In 1837, Alison being insolvent, conveyed all his property, including the aforesaid subjects, to a trustee, for his creditors. Previously to this, on 29th Sept. 1836, the judicial factor wrote to Mr Alison, with a state of the debt due by him under the bond, and requested a settlement, and there was afterwards some correspondence in 1836, between the judicial factor and the agents of Mr Alison, which led to its being discovered that the dispositions to the houses were in the hands of Mr Alison's agents.

There was evidence of Mr Paul having acted as trustee or agent for the trustee in the matter, from 1829 to 1834, when the judicial factor was appointed.

The Lord Ordinary was of opinion that there had not been such neglect or misconduct on the part of the late Mr Thomson, during his life, to make him personally liable for this sum of L.1068, 17s., 1d., and, therefore, found that the claim which had been made in respect of it, against his representatives, was not sufficiently established.

A reclaiming note against this interlocutor of the Lord Ordinary was lodged for the present respondents, upon which the Lords of the First Division unanimously pronounced an interlocutor re-

June 16. 1852. calling the interlocutor of the Lord Ordinary, and finding the representatives of the late Mr Thomson liable for this said sum of L.1068 : 17 : 1, and subsequent interest. The present appeal was brought against this interlocutor.

Biggs Andrews, Q.C., for the appellants, contended that Mr Thomson had not been guilty of any culpable neglect or misconduct ; that after this sale, Mr Thomson had retired from business, when the administration of the property came into the hands of Mr Paul, who acted as trustee, and that Mr Thomson was not liable for any misconduct on the part of Mr Paul. Reliance was placed on the clauses in the trust-deed, protecting the trustees from any responsibility ; giving them an absolute discretion as to the trust, and it was also said that the parties beneficially interested had been guilty of remissness after the death of Mr Thomson, and that but for their delay and that of the judicial factor, the money might have been recovered from Alison, who was solvent in 1831. The case of *Campbell v. Campbell*, 17 Scot. Jurist, 500, was cited.

Rolt, Q.C., and *Anderson*, Q.C., for the respondents, contended that the original advance of the L.600 had been improperly made, and, next, that the transaction upon the occasion of the sale was a clear breach of trust, for which Mr Thomson was personally liable, and that as regards the delay which had taken place since the death of Mr Thomson, that was accounted for by the difficulty the factor had in obtaining information as to the real nature of the transactions, and by the fact, that up to 1836, the respondents were, together with the appellants, litigating the question whether Mr Paul was a trustee or not, he claiming to be such under a deed of assumption executed in his favour by Mr Thomson. They cited *Moffat v. Robertson*, 12 Shaw and D. 369.

Biggs Andrews, Q.C., replied.

THE LORD CHANCELLOR. My Lords, in this case, the question has arisen out of the investment of certain trust-moneys of the estate of a Mr Haldane. The late Mr Thomson, the father of the appellant, Mrs Thomson, was a writer to the signet, and one of the trustees under the deed of settlement. There are certain very large discretionary powers, and indemnity given to the trustees under that deed. Now, in 1819, Mr Thomson, who had then become the sole surviving trustee, and was also the law-agent for the trust, instituted certain proceedings in the Court below, with the view of bringing together the persons interested in the

estate, and having the trust-funds distributed. Accordingly, he brought in his accounts, and four years afterwards, in 1826, he advanced the sum of L.600 out of part of the trust-funds. Now, by the deed of settlement he was bound to lay out and invest the funds on security, and by this, it must be understood, was meant such security as a trustee could take, though, at the same time, I am willing to admit that the extraordinary indemnity contained in the settlement might give the trustee a protection in this instance which he would not have had in another case. Well, my Lords, Mr Thomson, without consulting any of the persons beneficially interested, or taking the opinion of the Court, advanced this L.600 upon two houses in Edinburgh. The houses were then already mortgaged for the sum of L.3000; but there is some evidence that at a later period the property was of a larger value than the mortgage and this advance of L.600. That evidence is, however, very slight, and is little to be relied on; for it is painfully observable, that in all cases, evidence as to value is seldom to be trusted. Now, this L.600 was advanced by way of a second mortgage on this property, and a person of the name of Alison joined in a bond as security. That this was an improper security by the law of England is, my Lords, beyond all doubt; but I do not recommend your Lordships to act on the law of England as ruling that of Scotland. It may, however, my Lords, be left out of the present question, whether this was a breach of trust according to the law of Scotland, because, if the clause of indemnity is not in such a case to apply, it would be wholly inoperative. But, my Lords, this question does arise, whether according to the law of Scotland, it is proper to advance money on property not worth much more than the value of the first mortgage on it. At no time is house property a very satisfactory security for trust money, for house property is liable to casualties which land is not, as, for example, it may be destroyed by fire, and therefore, unless trustees always keep an insurance on foot, there may be no property to answer the trust money. I make these observations rather with the view of guiding all trustees in Scotland than as a matter bearing on the present case. Thus, my Lords, the matter stood until 1828, when it was found necessary to call in the money, and Mr Thomson, accordingly, then acting under the powers of sale given by the mortgage, put up this property for sale in lots. The property was bought by two different persons, who appeared to be real purchasers, for a sum of money which was more than sufficient to pay off both the first and second mortgage, and even to leave a

June 16. 1852. balance, and Mr Thomson was paid for his professional charges in carrying out such sale. Now, my Lords, it appears that the persons who bought were merely nominal purchasers, and that they had bought it for the Mr Alison who had joined in the bond given by way of security on the advance of L.600 being made.

v. Thomson, &c. If there was anything likely to excite suspicion, and call for caution on the part of the person charged with the duty of carrying the sale out, it was, that Mr Alison had become the purchaser. It was stipulated by the conditions of sale that the purchaser should find caution bond, and the learned Judges of the Court below thought that he was answerable for not having demanded caution, according to the articles of roup. But, my Lords, I do not think that this is a sufficient ground to charge a trustee with, for conditions of this nature are always inserted, but it is seldom in practice that they are ever resorted to; and therefore I cannot recommend your Lordships to put the breach of trust on this ground. Now, this further appears, Alison had not the money forthcoming to complete the purchase, and yet Thomson changed the whole security, and as far as was in his power, destroyed the original security. Observe what took place—not a shilling of the purchase money was paid, yet Thomson conveyed the lots to Alison, and delivered over to him all the title-deeds, and the actual possession of the property. It is true that the conveyance was not perfectly executed, inasmuch as the attestation clause had not been written out and signed; but that might have been added at any time afterwards, and then the deed would have been perfected. It is not worth considering whether there was any lien on the deeds for the purchase money, for it is not to be tolerated that a trustee should act in such a manner as this, which is so manifestly a breach of trust, that in our Courts of Equity in England, it would not for a moment be doubted. No one is more reluctant than myself to visit harshly any trustee, but this was a transaction which cannot be defended, whatever might be the cause which occasioned it. The illness of Mr Thomson has been suggested as the reason for his neglect; that might possibly be the case, but it cannot now avail; for no man would be safe in disposing of his property in trust, if, for such transactions as this, trustees were allowed to escape with impunity. The sale was his own act, and was clearly an intromission which would make him liable by the law of Scotland, and the neglect which had taken place was not one which the clause of indemnity in the settlement could protect him from. It is said that the parties beneficially interested had not got a

judicial factor appointed until 1834, and that they ought to have applied before they did to have had one appointed ; but it is clear that the parties were for a long time occupied in litigating the question, whether Thomson Paul was a trustee or not, and the delay, if any, was therefore attributable to Mr Thomson himself and his representatives, and therefore they cannot take advantage of it. Then it is also said that the judicial factor took no proper steps to get in the money, but treated Alison as debtor, and as if the money was properly in his hands ; but the correspondence does not bear this out. It shews that the judicial factor was not, until some time after his appointment, aware of the real state of the matter, for in his letter to Mr Alison of September 1836, he applies to him for the £.600 money lent. It is clear, therefore, that the decision of the Court below is correct, and I move your Lordships that it should be affirmed, and this appeal be dismissed with costs.

Appeal dismissed with costs.

*Law, Holmes, Anton, and Turnbull, London ; } Agents for the Appel-
Arnott and Malcolm, W.S., Edinburgh, } lants.
Richardson, Loch, and M'Laurin, Solicitors ; and } Agents for the Re-
Thomson Paul, W.S., Edinburgh, } spondents.*

HOUSE OF LORDS.

THE ABERDEEN RAILWAY COMPANY, *Appellants* ; and BLAIKIE No. 339.
and OTHERS, *Respondents*.

SAME v. SAME. (Second Appeal.)

Arbitration—Construction of Contract—Power of Arbitrator—Damages.—
A railway company entered into a contract with B. and Co., by which the latter were to supply the railway company with certain specified materials for the railway, or such further quantity, more or less, as the company's engineer should require ; and both parties agreed to refer to G., all disputes "regarding the true interest and meaning of any of the provisions thereinbefore written, or regarding the quantity, state, and condition of the materials thereby contracted for, or the quantities that might require actually to be furnished by the said B. and Co., and generally all disputes and differences in any way connected with, or arising out of the execution of, or failure to execute the work thereby contracted for" :—*Held*, (affirming the decision of the Court of Session), that the arbiter had, under the above submission clause, power to determine the question, whether upon the true meaning of the contract, the railway company were bound to take from B. and Co. all the materials they

required for this railway; but held also, (*reversing in this respect the decision of the Court of Session*), that the arbiter had no power to assess damages consequent upon the railway company refusing to take such materials from B. and Co.

June 17. 1852. In September 1847, the appellants, the Aberdeen Railway Company, entered into a contract with the respondents, who are merchants in Aberdeen, having reference to the supply of certain materials mentioned in a schedule thereunto annexed, with a view to the construction of their railway. The contract was made between the appellants of the first part, and the respondents of the second part, and after reciting that the appellants had determined forthwith to execute their line of railway, and to contract for the supply of the materials mentioned in the said schedule, contained the following, viz., "And whereas the said second parties have made an offer to provide and furnish the whole of the articles mentioned in the said schedule or list of prices, to the extent respectively after mentioned, at the respective prices which are thereunto annexed. And whereas the said first party has accepted of said offer, subject to the conditions herein contained. Therefore, the said second parties have become bound and obliged, and hereby bind and oblige themselves and their respective heirs, executors, and successors, conjunctly and severally, that they shall and will, well and honestly, and to the entire satisfaction of the arbiter hereinafter named, provide, furnish, and deliver the whole of the said articles mentioned in the schedule, which is hereunto attached, and according to the quality, dimensions, sizes, and descriptions which the said first party's engineer, or his assistants, may, from time to time, direct; which descriptions, as well as any orders or instructions in regard to the quality, dimensions, sizes, and descriptions of the same, which may, from time to time, be given by the said first party's acting engineer, or his assistants, (to which effect power is hereby given to such engineer) for the purpose of carrying the said contract into effect, the said second parties bind and oblige themselves and their foresaids, to abide by and implement; and further, the said second parties bind and oblige themselves, uniformly and regularly, to provide and furnish the said whole quantity of materials mentioned in the said schedule or list of prices, which is hereunto annexed, or such further quantity, more or less, at such times, and in such manner as may be pointed out to them by the said first party's said engineer, or his assistants, and also to complete the said contract, in all points, to the satisfaction of the said arbiter in every respect."

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Then followed provisions against the respondents in the event June 17. 1852. of failure on their part to complete the contract, and afterwards, this obligation, on the part of the appellants, "For which causes, Aberdeen v. and on the other part, the said first party bind and oblige themselves to make payment to the said second parties of the sum of L.25,227 : 1 : 8 sterling, or of such larger or lesser sum according as the first party shall require a greater or lesser quantity of the several articles and materials hereby contracted for, furnished to them, than the nominal quantities of articles and materials specified in the said schedule hereunto annexed, shall be increased or decreased, which schedule, or list of prices, is hereby declared to be the rule by which any increase in the quantity of articles and materials therein specified shall be charged, or any decrease in the quantity thereof shall be modified or deducted—which payments shall be made in manner following: that is to say, the said first party bind and oblige themselves, at the expiry of every calendar month next after the delivery of such quantity of the articles and materials hereby contracted for, as shall have been required and delivered in the immediately preceding month, and conform to the said schedule or scale of prices, and at the times and places to be pointed out to them by the said arbiter, either to pay to them, the said second parties or their foresaids, a sum equal to nineteen-twentieth parts of the value of all such articles and materials which shall have been delivered in the preceding month, as such value shall be estimated and fixed by the certificate of the arbiter after mentioned, and the remaining twentieth part of the value of the said materials provided and delivered at the period of each progressive payment, shall not be due to, nor exigible by the said second parties, but shall remain in the hands of the said first party, and shall become due and exigible by the said second parties only when the whole materials hereby stipulated for, or such part thereof as may be required, are provided and delivered by the said second parties in a proper workmanlike, substantial, and complete condition, and a certificate to that effect is obtained by them from the said arbiter. And all parties hereto bind and oblige themselves and their foresaids, to implement and fulfil this agreement to each other in the whole heads, articles, and clauses thereof, under the penalty of L.500 sterling, to be paid by the party failing, to the party observing, or willing to observe the same, over and above performance. And further, all the parties hereto hereby submit and refer to the final sentence and decree-arbitral of the said Alexander Gibb, (whom failing) of William Cubitt, civil

June 17. 1852. engineer in London, (* who may continue and remain, the said
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 first party's acting and consulting engineers respectively, and shall
 not be disqualified thereby from acting under this submission ;
 declaring also that each or either of them being or becoming a
 shareholder in the said company, shall not, in any way, disqualify
 him or them from acting) as arbiter in all disputes and differences
 which may arise between the several parties hereto regarding the
 true intent and meaning of any of the provisions herein before written, or regarding the quantity, state, and condition, of the materials
 hereby contracted for, or the quantities that may require actually
 to be furnished by the said second parties ; and generally all disputes
 and differences in any way connected with, or arising out of the
 execution of, or failure to execute the work hereby contracted for,
 whether herein specially submitted or not ; and whatever the said
 arbiter shall direct or decide, by any decree, interim or final, pro-
 nounced by him, the said parties bind and oblige themselves and
 their foresaids, to execute and abide by, under the penalty above
 mentioned."

At the date of the contract Gibb was the acting, and Cubitt
 was the consulting engineer of the railway company ; but in
 August 1848 they ceased to act in that capacity, and in their
 place Messrs Locke and Errington were employed as the en-
 gineers of the railway company, and shortly afterwards the rail-
 way company ceased to take any work from the respondents, and
 went to other parties for their supplies. The respondents having
 insisted that the appellants were not entitled to enter into any
 contracts with other parties, in so far as these involved the furnish-
 ing of the materials mentioned in the contract with the respondents,
 laid a claim before the arbiter, Mr Gibb, who afterwards, on 6th
 September 1849, pronounced an interim decree-arbitral in the
 terms of their claim, finding in substance, 1st, That by the con-
 tract, the appellants were bound to take from the respondents at
 the specified prices, the whole articles of the specified description ;
 and, 2d, That the appellants were liable in damages for the injury
 the respondents might suffer by their taking articles of the speci-
 fied description from other parties. Afterwards a claim for da-
 mages was laid before the arbiter by the respondents, and the
 arbiter, after hearing evidence thereon, issued another decree on
 the 30th July 1850, by which he awarded to the respondents the

* This parenthesis was proposed to be placed as above by the counsel on the argu-
 ment, in order to make this part of the submission intelligible.

sum of £1704, 15s. 2d., as such damages. During the dependence June 17. 1852. of the proceedings before the arbiter, the appellants raised an ac-
 tion of declarator, concluding to have it declared that the said Mr Aberdeen
 Gibb was not entitled to take proceedings regarding the aforesaid Rail. Co. v.
 Blaikie, &c. claim, or to assess the claim for damages. The appellants also afterwards presented a note of suspension, in order to stay execu-
 tion, for the damages awarded. This note was passed, to abide the fate of the declarator.

In the action of declarator, the Lord Ordinary, on 20th July, pronounced an interlocutor, dismissing that action. The appellants reclaimed to the First Division of the Court of Session, when their Lordships adhered to the interlocutor of the Lord Ordinary in the action of declarator, and remitted to the Lord Ordinary to refuse the note of suspension, with expenses.

The present appeals were brought to reverse these interlocutors, The two appeals were now argued together by—

Bethell, Q.C., and Anderson, Q.C., (Johnson with them) for the appellants, who contended that there had been an excess of jurisdiction by the arbiter in determining that the company were bound to take of the respondents all the materials of the description specified in the contract, which might be necessary for the construction of their railway. It was submitted that this was not a matter in difference between the parties contemplated in the submission clause, and thereby referred to the arbiter, and it was contended that the general words of the submission were restrained by the words, "or regarding the quantity, state, and condition of the materials hereby contracted for." To shew that general words can be restrained, they cited 3 Ersk. tit. 4, sec. 9; and, generally, as to the decree arbitral being *ultra vires*, *Steele v. Steele*, 15 F. C. 345; *Napier v. Wood*, 7 Bell and M., 2d series 166, were referred to.

It was next contended that the arbiter had no authority to assess the damages; also, that there had been misconduct on the part of the arbiter in refusing to hear the parties; also, that the Court were wrong in rejecting the note of suspension pending the issue of an action of reduction; and also, that there was an irregularity in the charge of horning. [This last point had not been brought before the Court below, and upon the Lord Chancellor stating that it was a matter of practice which the Court below would understand much better than this House, it was withdrawn, and the first and second points were mainly relied on.]

June 17. 1852. *Rolt, Q.C., and Young,* for the respondents, contended that the arbiter had power to determine the question as to the obligation of the railway company to take the materials of the respondents—that everything relating to the work was referred, and that therefore, whether the appellants were bound to take these articles of the respondents, was a question referred, and which properly came within the jurisdiction of the arbiter to determine; and it was also contended that the arbiter had power to assess damages for the loss which the respondents had sustained, in consequence of the railway company not having the materials of them. They cited *Gray v. Brown*, 11 Shaw and D. 353; *Pitcairn v. Drummond*, 1 Wilson and Shaw, 194; *Mackenzie v. Girvan*, 2 Bell's App. 43. *Bethell, Q.C.*, replied.

LORD CHANCELLOR. My Lords, in this case, which depends on a question of construction of the articles of agreement, which were entered into between the parties, several questions were raised. The main point was, whether or not the arbiter had, under the articles in question, a power to determine the construction of all the covenants and obligations in the instrument, that led to a consideration of what was the true construction of the agreement, although they are very distinct questions. The third question was, whether he had exercised properly the power which he assumed, of assessing the damages for the breach, and continuing to assess those damages. Now, my Lords, I am clearly of opinion, that by the true construction of the agreement, the appellants were not bound to take all the materials which they required, from the respondents, but the question of the construction of the arbiter's power is quite a different question, for if, by that clause, power is given to the arbiter to decide upon the true meaning of all the obligations, it is then perfectly indifferent what my opinion may be in regard to the true construction, because, whether he has decided erroneously, or correctly, if he had the power, that must be the construction adopted. Now, my Lords, that is a mere question of construction, and not depending upon any rule of law. The words naturally import, no doubt, upon looking at them, that the arbiter had the power. Four Judges of the Court below were in favour of that construction. My noble and learned friend is of opinion with the majority. My opinion upon the true construction of the contract certainly would be, that the arbiter had not the power, but as the matter stands, it is a question simply of construction; it is an ambiguous clause, and there being

so much authority in favour of the construction of the Court below, that part of the judgment of the Court below will be affirmed. My noble and learned friend and myself have both agreed that the arbiter had exceeded his power as regards the assessing of the damages, and therefore that part of the interlocutor which affirms his proceeding in that respect will be reversed, and the cause will be remitted to the Court below, to do what may be just, and we will ask the learned counsel on both sides to draw up a minute of what they think should be the nature of that remitter. My Lords, with regard to the second appeal, we think there is no sufficient ground for that appeal; and therefore it will be dismissed with costs.

LORD BROUHAM. My Lords, my noble and learned friend has very distinctly stated the three points which arose in this case; one point was, whether or not the construction put on the agreement of the parties to the reference by the arbiter was accurate or not, in which we differ from the arbiter. But, as my noble and learned friend has just observed, that is wholly immaterial in this case, because the real point of the case is, whether or not the parties did intend to submit that among other matters to the arbiter. My noble and learned friend and myself unhappily differ upon the second point. It is quite unnecessary to say whether we agree upon the first, because differing upon the second, and agreeing, as my learned friend does, in the propriety of our affirming upon that second view of the case, it becomes wholly unnecessary to consider which way the right is on the first. My Lords, on the other point, namely, with respect to the assessment of damages, we are entirely agreed; therefore, upon that point, there will be no difficulty as to the judgment to be pronounced. At the same time, it is well, as my noble and learned friend said, that the learned counsel should give in a scheme on both sides. I entirely agree with my noble and learned friend, that our course here would not be difficult if it was a mere question of law; but we consider this to be a question on the construction of an instrument, which is to a certain degree a question of law, inasmuch as these questions are for the Court, not for the jury. Nevertheless, it is in the nature of a question of fact so far, that it is for the purpose of discovering what the intentions of the parties are, that you undertake the examination of that instrument; and therefore, on that ground, it is, that we have come to this opinion.

June 17. 1852. First Appeal—Interlocutors in part affirmed, and in part reversed, with a remit.

Aberdeen Rail. Co. v. Blaikie, &c. Second Appeal—Interlocutors affirmed, with costs.

*James Davidson, Solicitor, Westminster; and } Agents for the Appel-
Webster and Renny, W.S., } lants.*

*Dodds and Greig, Solicitors, Westminster; and } Agents for the Re-
Lockhart, Morton, Whitehead, and Greig, W.S., } spondents.*

No. 340.

FIRST DIVISION.

MILN v. HAZEEL.

Trust-Estate—Investment—Approbate and Reprobate—Personal Objection.

—Where the purchase of house-property and furniture was pleaded as not being proper investment of trust-funds, but which was not only sanctioned, but expressly stated in the record as not repudiated by the beneficiaries, the Court, in a question of accounting, held that the doctrine of probbate and reprobate applied, and that the accounting must proceed on the footing of the property forming part of the trust-funds, in so far as the interest of one of the parties was concerned.

June 25. 1852. This was a conjoined process of declarator and multiple poinding at the instance of the pursuer, as a trustee and as an individual, Miln v. Hazeel, against the defender, Mrs Hazeel, her husband, Henry Johnston Hazeel, James Hunter, her judicial factor, and William Myles, accountant in Dundee, trustee on the estate of Messrs M'Ewan and Miller, writers there, and also of count and reckoning at the instance of the defender and her husband, advocated *ob conting-tiam*. The leading facts, and the points now to be reported, are sufficiently set forth in the subjoined interlocutor of the Lord Ordinary, but as introductory to the findings therein, the following brief abstract of the record is here given. It appeared that, by trust-disposition executed by the defender previous to her marriage, which shortly thereafter took place, she conveyed funds and effects therein specially mentioned, to certain trustees, of whom her brother, Henry Palmer, and David M'Ewan, writer in Dundee, both since dead, and the pursuer, David Miln, accepted; and of these it appeared that M'Ewan conducted the administration of the trust, acting either by himself or through his firm of M'Ewan and Millar, writers in Dundee. It was provided by the trust-deed, as stated by the Lord Ordinary, that the funds should, when recovered, be invested in Government stock, or on heritable or good personal security. These funds consisted of cer-

tain sums, to which the pursuer, in common with her brother, ^{June 25. 1852.} Henry Palmer, had right; and of these sums M'Ewan, the acting trustee, by himself or by his firm, recovered moneys, amounting in whole to £800 or thereby, which sums were laid out by M'Ewan in the purchase of an heritable property in the Nethergate of Dundee, which had previously belonged to the defender's husband, as heir of his father entered *cum beneficio inventarii*; and a disposition to that property was accordingly granted in favour of Henry Palmer M'Ewan and the pursuer, as trustees. The full amount of the trust-funds had not been realised at the date of this transaction, and, in consequence, the sum of £200, being the amount of the deficiency of the price, was raised by a bill granted by Henry Palmer and M'Ewan to the defender's husband, which bill was afterwards paid out of the funds of the trust realised subsequently by M'Ewan as trustee, or by his firm on his behalf. The rents of this property were for a time drawn directly by the defender, and were afterwards intromitted with by M'Ewan, and accounted for by him to Mrs Hazeel, to whom, from time to time, various payments were made. It was alleged that Miln, the pursuer, had no intromissions with the trust-estate, and he complained by the present action, that, notwithstanding, very heavy and serious claims had been made, and various actions raised against him in connection with the trust. The claims thus made against him were of a double and conflicting character, and he therefore now concluded for declarator, relief, and discharge of the liability thus sought to be laid upon him. In particular he concluded that the trust and trust property were now vested in him, as sole surviving trustee, and that he was entitled to sell and dispose of the Dundee property for the purpose of paying the debts due by the trust-estate (one of which was a considerable sum due to the Dundee Union Bank), the surplus to be held by him for the purposes of the trust; with an *ultimatum* conclusion for behoof of himself or of any other party entitled to the price, should the property in question be found to form no part of the trust-estate.

The defender, Mrs Hazeel, pleaded in defence, that the facts of the case did not justify the raising of this process, and, in particular, she stated that she and her husband had no desire to repudiate the purchase of the house in Dundee as an investment *pro tanta* of the trust-funds, and she therefore maintained that any declarator to that effect was unnecessary.

Defences were also lodged for William Myles, who pleaded that the acts challenged were those of Mrs Hazeel's trustees, and could

June 25. 1852. form no ground of action against the estate of M' Ewan and
 ~~~~~ Millar.

Miln v. Hazeel.

In the debate before the Lord Ordinary (Robertson) the doctrine of probate and reprobate, and of personal objection, were founded on against Mrs Hazeel, in regard to the purchase of the house in Dundee. There was also a question as to furniture, the investment for the purchase of which, Mrs Hazeel objected, formed no part of the trust-estate, as to all which, and, *inter alia*, his Lordship found as follows:—

"The Lord Ordinary having heard parties' procurators on the closed record, and whole process—In respect, it was provided by the trust-deed executed in contemplation of the marriage of Mrs Palmer or Hazeel, that the funds there mentioned should, when recovered, be invested in government stock, or in good heritable or personal security, and that the purchase of the house in Dundee did not fall within the express powers of the trustees, and that the judicial factor, James Hunter, writer in Dundee, by minute lodged in this process, on 5th May 1850, judicially repudiates the said purchase as not being a legal investment of the trust-funds: Finds, decerns, and declares, at the instance of the pursuer, David Miln, that the said subjects form no part of the trust-estate aforesaid, and that the said Ann Maria Palmer or Hazeel, and her husband, and their children, and the said James Hunter, as judicial factor foresaid, have no right, title, or interest in the said subjects, and that the pursuer, the said David Miln, is at liberty to sell and dispose of the said subjects, free from any claim at the instance of the said parties thereanent, for his own behoof: Finds that the said David Miln, in accounting with the said judicial factor, is now bound to state against himself the sum of L.800, with interest from this date, in place of the value of the said house and rents thereof, subject to deductions, if any, so far as applicable to the fee of the estate: But, in so far as regards arrears, and in any accounting with the defenders, Mr and Mrs Hazeel, in this process, in respect the purchase of the said house was not only sanctioned by them, but that the same is expressly stated on the record not to be repudiated, Finds that the said accounting must proceed up to this date, on the footing of the said house forming part of the said trust-funds, in so far as regards the liferent of the said Mrs Hazeel: . . . . . Finds that the investment in the purchase of the furniture was made with the sanction of the parties—that the sums vested on this head form a proper charge against the income of the estate—and that Mrs Hazeel, being now

in possession of the said furniture, and not offering to return the same, and to give credit for an adequate rent therefor, during the period of her use of the same, cannot have the fair value struck out of this accounting, so as to retain the said furniture without consideration therefor.

There are certain points in the case which the Lord Ordinary, in the meantime, superseded, and reserved all questions of expenses.

Mrs Hazeel and her judicial factor reclaimed, but the Court adhered: Found the reclaimers liable in expenses since the date of the Lord Ordinary's interlocutor, and remitted the cause back to his Lordship, to proceed further therein, as may be just.

*Deas* was for Mrs Hazeel.

*Penney* for Mr Miln, and

*Millar* for Myles.

*W. Wotherspoon, S.S.C.*, Agent for Mrs Hazeel.

*David Smith, W.S.*, Agent for Mr Miln, and

*Duncan & Millar, W.S.*, Agents for Mr Myles.

#### FIRST DIVISION.

MACALISTER v. MACGREGOR.

No. 341.

*Cessio—Title to Sue.*—A trustee under a *cessio* having died, a meeting of the creditors was called by a single creditor, and appointed a successor to the original trustee:—*Held* that the appointment was good, and conferred a title to recover debts.

This was a competition as to a sum of L.173 : 17 : 6. The question now raised was, whether one of the competitors had a title to sue. The fund originally belonged to Mrs Flora Macdonald or Macintosh. Her husband became bankrupt, and, in 1833, raised a *cessio*, in which decree was pronounced. The bankrupt had executed a disposition *omnium bonorum*, in favour of David Stalker, as trustee for his creditors, whom failing, in favour of any other trustee whom the creditors might appoint. Stalker died, and, in 1847, the claimant Macgregor was appointed trustee in his place at a meeting called by one of the creditors by advertisement in the North British Advertiser and Edinburgh Gazette. Mr Macintosh having died, in 1843 her two sons, being minors, with consent of their father, assigned the claim in favour of the other claimant Macalister, which assignation was duly intimated to the holder of the fund. The question therefore was, whether

June 25. 1852. Macgregor the trustee had a good title to compete with the other claimant Macalister for the fund *in medio*.

Macalister v. Macgregor. The Lord Ordinary (Robertson) found that Macgregor was duly appointed trustee, "and, with the full approbation of the bankrupt, instructions were given to the said James Macgregor to take the necessary measures for realising the present claim; and therefore finds that the said James Macgregor has a sufficient title to insist in any right which belonged to the said John Macintosh, and was conveyed by the disposition *omnium bonorum* aforesaid, and that *ad hunc effectum*, the title of the claimant is as effectual as that of the said David Stalker would have been had he been still alive."

Macalister reclaimed.

*Penney*, for the reclamer. Macgregor has not a good title to insist, for a disposition *omnium bonorum* has merely the effect of a voluntary deed; the appointment of Macgregor is bad. There was no application to the Court for authority to call a meeting of creditors, and there is no evidence that a majority in value of creditors concurred in the appointment.

*Gordon*, contra. The nomination was good. It was done in the way in which a successor is usually appointed to be a trustee in a *cessio*.

The COURT adhered.

*Horne and Rose*, W.S., Reclamer's Agents.

*Baxter and M'Dougal*, W.S., Respondent's Agents.

## SECOND DIVISION.

### No. 342.

### SMART v. BEGG.

*Sale—Inspection of Goods—Mora.*—Circumstances in which the purchaser of meal, found sometime after the sale to be of inferior quality—held barred from claiming repetition of the price, on the ground of his failure to make timeous inspection of it after delivery.

June 25. 1852. Smart, who is a merchant in Aberdeen, agreed to purchase from Begg, the defender, who is a merchant in Montrose, a quantity of meal, which Begg had himself purchased from a miller named Turiff, and which lay stored at Fraserburgh. On the 29th January 1847, Begg wrote the pursuer, enclosing a delivery order on Mr Stephen of Fraserburgh, who held the keys of the

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store for the defender, and a cheque for the price. The price was paid that day, and on the following day the pursuer forwarded to Messrs Grapel and Co., Banff, the delivery order endorsed to them, with instructions to get delivery from Stephen, and to ship the meal by the *Ceres*, which vessel the pursuer had previously chartered. Grapel and Co. instructed Lovie of Fraserburgh to get the meal shipped accordingly; but the master of the *Ceres* refused to take it on board, being apprehensive of endangering the vessel, on account of the meal riots which were then going on.

On 4th March Lovie applied to Stephen for a sample of the meal. This he refused, but offered to deliver the keys on obtaining a receipt for the whole meal. A similar application for a sample of the meal was again made by Grapel and Co. on 9th April, but it was also refused. At last, on the 12th April, the keys were forwarded by the defender to Smart, and the meal was examined on the 17th. The result was, that the pursuer wrote the defender he would have nothing to do with it, in respect of its inferior quality, and demanded either re-payment of the price, or delivery of the same quantity of good meal.

The defender refused to accede to either of these demands, and the Sheriff of Aberdeen, on the application of the pursuer, remitted to qualified persons to examine the meal, and report. A report was returned on 6th August, that the meal was of bad quality, "and such as would not sell in any market as meal of good wholesome quality, the greater part being unfit for use, and the whole will continue to deteriorate daily, if allowed to remain where it now is." On this report being returned, the Sheriff granted warrant to sell. The price obtained was L.204.

Smart brought the present action for repayment of the price, under deduction of L.204, on the ground of breach of contract by the defender, in supplying meal of an inferior quality. The defender denied that the meal was inferior in quality when sold in January, and maintained that the pursuer was liable in the loss arising from any deterioration which might have since occurred. A proof was led, and the Sheriff found it not proved that the meal was unwholesome at the date of the sale; that subsequent to said date the safe custody of it devolved on the pursuer, and that the defender was not responsible for any deterioration which had taken place.

The pursuer advocated, and the Lord Ordinary (Rutherford) found, "in point of fact, that the sale had been completed in January, that the pursuer did not take delivery,

June 25. 1852 but allowed it to remain in store ; that it was not inspected till 17th April, and no application to have it judicially inspected was presented till July 1847, that the meal was not found to have been unmarketable at the date of said sale, from deficiency in quality, or in proper storage or otherwise. In point of law, finds that it was incumbent on the pursuer, especially after accepting the order of delivery, to have made timeous examination of the meal, in order to its rejection, if dissatisfied with the quality : Finds, that the pursuer having failed to do so, the meal thereafter lay at his risk ; Finds, that if afterwards entitled to reject the meal, on the ground of samples being refused, or otherwise, the *onus* of proving the meal to have been unmarketable at the date of the sale, lay with the pursuer ; and that the pursuer having failed to give clear and satisfactory proof of that fact, the defender is entitled to absolvitor. Therefore of new assoilzies the defender from the conclusions of the libel, and decerns, with expenses."

The pursuer reclaimed.

*Deas* and *H. Robertson* were for the pursuer, and  
*Moncreiff* and *Buchanan*, for the defender.

LORD JUSTICE-CLERK. If the question had been merely whether the meal was originally good or bad, I should have had no doubt that it was not such an article as the seller ought to have furnished. That is clear on the proof. But I do not go into that matter, because that is not the point on which I put my judgment. I hold it of the greatest importance, in all such cases as the present, to enforce most strictly the rule of law as to the obligation of the purchaser to examine his goods as soon as he gets them. The first duty of the purchaser of such an article as meal, is to make timeous examination. No doubt Smart intended it to be brought away at once, but this was not done. He learned that the *Ceres* would not bring it, and that for a cause which was likely to operate for a considerable period. Accordingly, we find he could not get another vessel to carry it off. These being the circumstances, I think he was bound, long before the 4th March, which was the date when application was first made to Stephen for samples, to have made an inspection of the meal. But it is not till long after the sale that he even asks for samples, and then, it would appear, it is not for the purpose of examination, but for sale. Then, when he comes to the examination, he has only a single witness present. In short, I do not think the purchaser discharged his obligation,

by a sufficiently timeous inspection of the article purchased, <sup>on June 25. 1852.</sup> obligation which lay on him all the more strongly, from the fact, <sup>Smart v.</sup> that he had already paid the price. We see from the result of <sup>Begg.</sup> the present case how important it is not to relax in the slightest degree the rules of law. It was clear that this was an inferior article at the time the judicial examination was made; but how much that deficiency is to be attributed to the meal having suffered from not being subjected to timeous examination, and properly taken care of, it is impossible to say. I at one time thought the difference might be divided, but that will not do. The purchaser was bound to examine without delay. What is delay, is another question. But he lost the services of one ship, and he could not get another. Therefore, I should say, that about the middle of February would have been within time. Again, when he heard, (as he did in the course of March) from Lovie, that the meal was in a situation in which it was likely to be deteriorated, it appears he was quite aware of his own responsibility. He warned his agents that he would not be liable for the loss, and yet no steps were taken by them, in regard to the matter, for six weeks. I hold, then, that one of the most important principles of the law of sale, the obligation of the purchaser to make timeous inspection of the article purchased, if he intends to reserve the right to return it, has, in the present case, not been complied with. Than this, there is no obligation more important in law—none to be more kept in view in all questions between buyer and seller. The pursuer had full opportunity to make the proper inspection—he has not made it—and therefore I consider he is not in a position now to raise an objection to the quality of the article purchased by him.

LORDS MEDWYN and COCKBURN expressed their concurrence in the view taken by the Lord Ordinary.

LORD MURRAY. I concur. The ground which your Lordship takes, is, I think, sufficient.

The COURT adhered.

*James Burness, S.S.C., Pursuer's Agent.  
John Cullen, W.S., Defender's Agent.*

## SECOND DIVISION.

SCOULLER *v.* GUNN.

No. 343.

*Issue—Slander—Jury Cause.—In an action of damages for slander,*

June 25. 1852. against the owner of a newspaper, on account of a statement published  
therein, which the pursuer alleged contained the inuendo "that he had been  
placed at the bar of the police-court, charged with receiving and retain-  
ing stolen goods, knowing them to be stolen, or under a criminal charge  
connected with or involving the dishonest receipt or retention of stolen  
goods"—The pursuer proposed an issue, stating the inuendo as that "of  
having been a prisoner at the bar of the police-court, charged with a  
criminal offence, and as having obtained possession of pledged goods by  
improper or unlawful means, or under circumstances inferring criminal  
conduct,"—*Held* that the pursuer would not be entitled under this issue  
to maintain to the jury an inuendo of receipt of the goods, knowing them  
to be stolen ; and proposed issue amended, so as to embody the precise  
words of the record.

This was an action of damages against the proprietor of the North British Daily Mail newspaper, on account of a statement which had appeared in the police reports of that newspaper in the following terms :—" William Scouller and Cooper and Company, pawnbrokers, were placed at the bar, charged with refusing to give up stolen property belonging to a respectable cabinet-maker in George Street, nearly the whole of whose wearing apparel had been abstracted on Monday morning. One of the prisoners was exceedingly contumacious, and seemed perfectly determined to resist the ends of justice as far as lay in his power. They were, however, obliged to disgorge their ill-gotten pledges."

The condescendence set forth that these words are, "in whole or in part, of and concerning the pursuer, and were intended to represent, and do falsely and calumniously represent, the pursuer as having been, on 19th December last, a prisoner or criminal, in the custody of the officers of police, and as having been placed at the bar of the court as a prisoner or criminal, on a charge of receiving, retaining, and refusing to give up stolen goods, knowing them to be stolen, or under a criminal charge connected with or involving the dishonest receipt and retention of stolen goods, and farther, as conducting himself contumaciously towards the Judge, and with a determination to resist the ends of justice, by refusing to give up pledges illegally and wrongfully obtained by him, meaning thereby pledges of stolen goods obtained by him, knowing that they were stolen ; and in having been ordained by the magistrate, in spite of his wrongful and criminal conduct, and contumacious resistance to the ends of justice, to deliver up his ill-gotton pledges, meaning thereby, as aforesaid, that they were pledges of stolen goods dishonestly received by the pursuer, he knowing them to be stolen,—to the injury and damage of the pursuer."

The pursuer proposed an issue, which, after quoting the words June 25. 1852. from the newspaper, goes on: "And whether the said words are, in whole or in part, of and concerning the pursuer, and falsely Scouller v. and calumniously represent the pursuer as having been a prisoner at the bar of the police-court, charged with a criminal offence, and as having obtained possession of pledges, or pledged goods, by improper or unlawful means, or under circumstances inferring criminal conduct on the part of the pursuer,—to the loss, injury, and damage of the pursuer."

To this issue the defender objected, and the Lord Ordinary (Robertson) reported the case to the Inner House. In his note he says: "Under the issue, it will be observed that the inuendo, as there laid, is changed from that stated in the condescendence. The defender objects to this change, both on the ground of there being a substantial difference betwixt the record and issue, and also, as he contends, that the inuendo, as stated in the issue, is insufficient."

The *Solicitor-General*, (with whom *Macfarlane*), for the defender. The pursuer must take an issue which will meet his statement on record. That statement is an inuendo of a charge of reset; but the inuendo, as put in the issue, is one of quite a different matter. No doubt he may pass from a part of his case; but where, as here, he makes a specific statement on record, he cannot take an issue wider than, or different from his record.

*Buchanan*, for pursuer. The only question is, whether the issue is supported by the summons. Of that there can be no doubt. The pursuer is not bound to put his whole summons in issue; all that is requisite is, that what is in the issue should be in the summons.

**LORD COCKBURN.** The words in the issue are very different from those in the record. The record states that the pursuer was charged with refusing to give up pledges of stolen goods obtained by him, knowing that they were stolen. That is left out in the issue. It bears that the goods were obtained, not by reset, but by some "improper or unlawful means." What the nature of that improper conduct on the part of the pursuer may be supposed to be, I do not know; but I think such a statement would make a very different impression on a jury from a simple statement of reset. If the pursuer says that the statement in the issue is the same as that in the record, why not put reset in the issue as is done in the record?

**LORD JUSTICE-CLERK.** It is not said that the two statements

June 25, 1852. are the same, but that the statement put in issue is on record; for the record does not stop at the statement, that the goods were obtained knowing them to be stolen, but goes on, "or under a criminal charge connected with, or involving the dishonest receipt and retention of stolen goods." But, under the issue as it stands, I could not allow the inuendo of receipt of the goods knowing them to be stolen, to be stated to the jury.

*Buchanan.* Under the issue as proposed, we did consider ourselves entitled to state the inuendo as one of reset.

**LORD JUSTICE-CLERK.** The issue as it stands cannot cover that. If you are to hold by both branches of your record, you must put both in issue. Why not transcribe your statement on record into the issue?

The issue was amended as follows:—

"And whether the said words are, in whole or in part, of and concerning the pursuer, and falsely and calumniously represent the pursuer as having been placed as a prisoner at the bar of the police-court, charged with a criminal offence, of receiving, retaining, or refusing to give up stolen goods, knowing them to have been stolen; or under a criminal charge connected with, or involving the dishonest possession, or retention of stolen goods; or as having been compelled, in spite of his contumacious resistance to the ends of justice, in that respect, to give up his ill-gotten pledges, meaning thereby pledges of stolen goods received or retained by him dishonestly, or in the knowledge of their having been stolen,—to the loss, injury, and damage of the pursuer."

*John Leishman, W.S., Pursuer's Agent.*

*Menzies and Maconochie, W.S., Defender's Agents.*

### FIRST DIVISON.

No. 344.

Petition, THE RIGHT HON. LORD WHARNCLIFFE.

*Entail Amendment Act (1848)—Process—Excambion—Petition, Amendment of.*—Part of entailed land proposed to be excambed by an heir of entail had been propelled to the heir by a disposition executed by his father, on which he was infest. The petition for leave to excamb did not set forth this infestment, in terms of the 33d section of the Entail Amendment Act:—*Held* that the Act is imperative, and not merely directory on this point; that it was competent to amend the narrative of the petition; and that the amended petition required to be intimated of new.

This was an application for authority to excamb a part of the June 26. 1852. entailed estate of Belmont, belonging to the petitioner, for a part <sup>of the estates of Drumkilbo, held by the petitioner in fee-simple.</sup> Pet. Lord Wharncliffe. The petition, after setting forth the deeds of entail applicable to the estate of Belmont, and the title-deeds of the estate of Drumkilbo, states that "the petitioner is in the course of completing feudal titles, both to the entailed estate of Belmont, and to the said lands and barony of Drumkilbo, and is in possession of both estates."

The application having been remitted in ordinary form, the attention of the Lord Ordinary was drawn by the reporter, to a non-compliance with the requirements of § 23 of the Entail Amendment Act. By that section it is enacted, that petitions under the act "shall set forth the tailzie under which such estate is held, and the date of the petitioner's infestment therein, if any be." The tailzies under which the estate is held, are correctly set forth in the petition. It appears, however, that the late Lord Wharncliffe, the father of the petitioner, on 10th November 1824, executed a disposition, by which he propelled the fee of a portion of the entailed estate, including a part of the lands now to be excambed, to the petitioner, and the heirs substituted to him by the entails. The petitioner was infest upon a charter which followed upon this disposition, and he has omitted to set forth this infestment in the petition, but the instrument of sasine is now produced in process.

To obviate the effect of this objection, the petitioner proposed to amend the prayer of the petition. The Lord Ordinary (Cowan) now reported the case, and stated that the statutory words requiring the date of the infestment to be set forth in the petition, are rather *imperative* than *directory* in their import; and it is to meet this possible view of their effect, that the present course has been adopted. These points require to be considered—(1.) The competency of the proposed amendment at all; and, (2.) Supposing it competent, whether any new notices or advertisements are required before proceeding with the application as amended.

*Mackenzie*, for the petitioner, referred to the cases of *Maxwell v. Stevenson*, April 1831, 5 W. and S. App. Cases, p. 276. *Lockhart*, 9th Feb. 1837, 15 S. and D. 498.

The COURT pronounced the following interlocutor:—

"Allow the petition to be amended as proposed: Appoint the petition, when so amended, to be intimated on the walls and in the minute-book for 14 days, and advertised once in the Edinburgh

June 26. 1852. Gazette, and once weekly, for six successive weeks, in the North British Advertiser, in terms of the statute : And farther, grant warrant for serving the same on the persons mentioned in the prayer thereof, in terms of the Acts of Sederunt ; and ordain them to lodge answers, if so advised, within 14 days from the date of service, if within Scotland, and 60 days if furth thereof."

*Hugh Tod, W.S., Petitioner's Agent.*

## SECOND DIVISION.

No. 345.

VASS and OTHERS v. METHUEN.

*Process—Expenses.*—The expense of copies of the minutes of debate in the Inferior Court, for the use of counsel before the Court of Session, in an advocation, will not be allowed to be charged under a finding of expenses ; but the expense of a memorial on the grounds of the Sheriff's judgment, will be allowed in some cases.

June 26. 1852. In this case, which was an advocation from the Sheriff-court of Edinburgh, the Court, adhering to the judgment of the Sheriff, had found for the pursuers, who were the respondents, with additional expenses.

The case now came before the Court on a report from the Auditor, who stated that he had reserved "for decision of the Court, an objection stated by the advocator to the charges, amounting to £10, for copies of the minutes of debate in the Inferior Court, to send to counsel previous to the discussion in the cause—reference being made on this point to the case of *Hall v. Whillis*, 6th March 1852.

"*Note*—The practice hitherto in taxing accounts of expenses in cases of advocation of final judgments, has been to allow no memorial to the agent for the discussion in the Court of Session ; but where argumentative papers have been lodged in the Inferior Court, copies of one such paper on each side have been allowed to the successful party for the use of his counsel at the debate. The Auditor is not sure whether the decision in the case referred to in his report was intended to alter the usual practice in this respect—the papers there disallowed having been pleadings in a relative possessory action, after a declarator had been brought."

*Tytler* and the *Solicitor-General* were for the pursuers and respondents, and

*Craufurd* for the defender and advocator.

LORD JUSTICE-CLERK. The decision in the case of *Hall* was

certainly intended to fix a general rule. After the Sheriff has June 26. 1852. pronounced his decision, a memorial to counsel may, in certain cases, be advisable in reference to the grounds of his judgment, <sup>Vass, &c.</sup> Methuen. and the expenses of such memorial may then be allowed. But the mere copying of the argument in the Inferior Court, prior to the decision of the Sheriff, and on which his judgment has been pronounced, can be of no use, and cannot be allowed.

Charge disallowed.

*William Lindsay*, S.S.S., Pursuers' Agent.

*James Peddie*, W.S., Defender's Agent.

## SECOND DIVISION.

### HASWELL v. FORTUNE.

No. 346.

*Poor Law—Contending Parishes—Process—Reduction—Acquiescence and Homologation, preliminary plea of, in bar.*

Fortune, as inspector of the poor for the parish of Ayton, brought June 26. 1852. an action before the Sheriff of Berwickshire in June 1846, against Haswell, as inspector of the poor for the parish of Foulden, con-<sup>Haswell v.</sup> cluding for relief of certain sums already paid by the parish of Ayton for the support of a pauper of the name of Millar, and for his future aliment, on the ground that he had acquired a settlement by residence in Foulden, and had become a proper object of parochial relief, prior to the passing of the Act 8 and 9 Victoria, c. 63. In this action Fortune obtained decree in April 1848, and expenses in July 1848. The parish of Foulden acquiesced in the judgment, and, before extract, made payment of the sums expended by the parish of Ayton, and continued to support the pauper till his death, and after his death, his widow and children, until April 1852. They then brought the present action to reduce the Sheriff's judgment, on the ground that the parish of Ayton was truly the settlement of Millar, and for repetition of the sums paid by them for the support of him and his family, and expense of the former action, &c.

The defenders pleaded, *inter alia*, that the pursuer and the parish for which he acted, having acquiesced in, homologated, and implemented the decree brought under challenge, are thereby excluded from prosecuting the present reduction.

The Lord Ordinary (Rutherford) "repels the defence, as preliminary and exclusive of the action, reserving its effects on the merits of the petitory conclusions of the libel," &c. He added this note:—"The Lord Ordinary sees no ground on which to hold the pursuer barred from bringing his present action. There has been no legal *mora* here on the part of the pursuer, and the emerging claims of the widow and children of the pauper have created an interest which might justify the pursuer in reviving the

June 26. 1852. question, even if the death of the pauper had rendered it not worth while to continue the litigation, in so far as his aliment was concerned. The pursuer has a material interest in reducing the decree, in respect of its findings, as well as of the decerniture in the petitory conclusions. In so far as the present action is declaratory, it cannot be barred by the decree of the Sheriff, unless the defender founded upon that decree a plea exclusive of the action; and such a plea on the part of the defender would at once raise in favour of the pursuer a title and interest to prosecute the reduction.

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Fortune.

"The Lord Ordinary, without in any degree prejudging the question, can understand that the pursuer's implement of the decree may raise an objection to the conclusion for repetition; but the reservation in the interlocutor will, in this respect, keep the case entire."

The defender reclaimed.

*Penney*, for the claimer, and

*Cleghorn*, and *Handyside*, for the respondent.

The COURT were of opinion that the preliminary plea of acquiescence and homologation should be considered with reference to the pursuer's whole case, and pronounced the following interlocutor, "recall the interlocutor so far as to reserve the effect of the preliminary defence on the merits of the whole conclusions of the libel, *quoad ultra* adhere to the said interlocutor, and remit to the Lord Ordinary to proceed in the cause as to his Lordship shall seem proper, reserving all questions of expenses."

*J. A. Campbell*, W.S., Pursuer's Agent.

*Grant and Wallace*, W.S., Defender's Agents.

## SECOND DIVISION.

No. 347.

*MACKENZIE v. ALEXANDER'S TRUSTEES, and OTHERS.*

*Trust—Competition—Widow of Truster—Children.*

June 26. 1852. The fund *in medio*, in this multiplepoinding, is the balance of a policy of L.499, 19s., effected on the life of Mrs Anderson, who died on the 16th of June 1844. She was the widow of Alexander, by whom she had one child, a daughter, surviving. Alexander left his property to trustees, with instructions to pay his widow, while she should continue his widow, the whole proceeds of the trust-estate, under an obligation, on her part, to maintain and educate the children of the marriage, but with power to the trustees, if she entered into a second marriage, to restrict her income to an annuity of L.10 sterling, and to apply the residue of the proceeds of the trust-estate to the maintenance and education of the children of the marriage, as they should think fit. Alexander died in 1837, and the widow, *intra annum*

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Trustees, &c.

*luctus*, married Anderson, said to have been a bankrupt, but who June 26. 1852. was one of the trustees. These parties executed an *ante-nuptial* marriage contract, by which the whole property then belonging to the spouses, or to be acquired during the marriage, was conveyed to trustees for purposes which, in the events which have occurred, bind the trustees to hold for Anderson in life-rent, and upon his death, to hold one-half of the fee for his heirs, and the other half for Mrs Anderson's.

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Alexander's trustees, upon this marriage, by minute of the 24th of May 1838, resolved to pay over to Mrs Anderson, in satisfaction of her annuity of £10, and for the maintenance of herself and her daughter, the whole produce of the trust-estate, under deduction of £8, to be accumulated each year, until her daughter should attain the age of twelve. The trustees, by the same minute, resolved to make an advance of £400 to her and her husband, at Martinmas 1838, upon condition of her effecting a policy of insurance for £500, in security of the loan, with interest. The policy was maintained by Alexander's trustees, who paid the premiums out of the income of the trust-estate. Mrs Anderson and her husband paid no interest on the loan, and they received, moreover, the whole proceeds of the trust-estate, except the premiums, as they were in needy circumstances. The trustees did not retain the £8 annually for the daughter, holding, in the meanwhile, the policy in security of the loan, with interest.

Upon Mrs Anderson's death, in June 1844, but after considerable delay, the sum under the policy was realised. No difficulty was, or is made, in regard to the application of £400 of that sum, but the balance, £99, 19s., forming the fund *in medio* in this action, was consigned in the hands of Mr J. O. Mackenzie, W.S., to abide the decision of the late Mr Alexander Douglas, W.S., under reference of a claim against Alexander's trustees, at the instance of the trustees under Mr and Mrs Anderson's marriage contract. Mr Douglas decided that Alexander's trustees were entitled to hold the balance for payment of the £8 reserved for Miss Alexander. Mr Douglas further expressed a doubt, whether the balance of the £99, 19s., after deducting the annual payments of £8, could be paid over to the trustees under the marriage contract, without the concurrence of the trustee on the bankrupt estate of Anderson, who had been sequestrated in the year 1841; or a guarantee that no claim would be brought in his name. He was no party to the reference to Mr Douglas.

It is in these circumstances that the present multiple poinding has been brought, the fund *in medio* being the £99, 19s., the

June 26. 1852. balance of the policy, the parties claiming being Alexander's trustees, the trustees under the marriage contract of Mr and Mrs Anderson, and the trustee on Anderson's sequestrated estate.  
Mackenzie v. Alexander's Trustees, &c.

The Lord Ordinary (Rutherford), by his interlocutor, ranks and prefers, *primo loco*, upon the fund *in medio*, the claimants, Alexander's trustees, for payment of the sum of £8 annually, from Whit-sunday 1839, to Whitsunday 1844, inclusive, with legal interest on such annual sum to this date, amounting, conform to state in process, to the sum of £71 : 17 : 7, for which sum decerns in the preference, and against the raiser, for payment accordingly. *Quoad ultra*, ranks and prefers, *secundo loco*, the claimants, the trustees under Mr and Mrs Anderson's marriage contract, for the purposes of their trust, to one half of the balance of said fund *in medio*, in so far as the same may be principal, and ranks and prefers, *tertio loco*, the claimant Green, the trustee on the sequestrated estate of Anderson, to the remainder of the fund *in medio*, and appoints him to lodge a state, giving effect to these findings: Finds the claimants, Mr and Mrs Anderson's trustees, and the claimant Green, conjunctly and severally liable in expenses to the claimants, Alexander's trustees, reserving to Anderson's trustees, and to Green, relief against each other, to the extent of one-half of the said expenses, but finds no expenses due to Anderson's trustees, or to Green."

In his note (from which the preceding statement of the case is taken), the Lord Ordinary says, "he has no doubt whatever, independently of Mr Douglas's award, that Alexander's trustees are entitled, out of the fund *in medio*, to payment of the £8 reserved for the daughter, with interest on each year's payment. He would have been inclined to support this claim in virtue of their assignation to the policy, though limited to the £400, with interest. The trustees, on the one hand, having maintained the policy by payments out of the trust-estate, and, on the other hand, being alone in right to recover the sum due, and to discharge it, were entitled to retain the amount realized, in security and compensation of any over-advance made to Mrs Anderson and her husband. But this right depends upon a still clearer ground, for the policy expressly covers the advance of £400, *with interest*. There was no payment, and no discharge of this interest, and the trustees were only the more entitled to hold Mr and Mrs Anderson liable for this interest, to the extent at least of £8 per annum; that they paid over the other proceeds of the trust-estate without retention of that sum. Even under the minute of 1838, Mr and Mrs Anderson could not have demanded a discharge of the inte-

rest of the loan, without making payment of the £8 per annum. June 26. 1852.  
 To that extent, therefore, the interest of the loan is due directly under the security. The Lord Ordinary does not think the <sup>Mackenzie v.</sup> Alexander's <sup>Trustees, &c.</sup> claim of Alexander's trustees, beyond the amount necessary to replace the £8 annually, can be sustained. They did nothing to alter the arrangement of 1838, and gave the whole proceeds of the trust-estate, including the interest of the loan, to Mr and Mrs Anderson, under deduction only of £8 per annum. This claim, according to a state in process, will leave comparatively a small balance of the fund *in medio* for the other claimants. The Lord Ordinary, in this process, must give effect to Mr and Mrs Anderson's contract of marriage, and the trustees under that contract are, in the first instance, entitled to the balance. The claim by the trustee on Anderson's sequestrated estate comes somewhat as a rider upon the claim of the marriage contract trustees. The Lord Ordinary, however, sees no relevant allegation against the claim of the trustee on the sequestrated estate, for the interest hitherto arising on the balance of the fund, after deducting the preferable claim of Alexander's trustees, and for one-half of that balance, belonging in fee to Anderson and his heirs. The marriage contract trustees take the other half of the balance, subject to Anderson's liferent."

Against this interlocutor, the trustees under the marriage-contract reclaimed.

*N. C. Campbell, Ogilvie, and Lorimer* were for the different parties.

The COURT pronounced the following interlocutor :—"Adhere to the Lord Ordinary's interlocutor reclaimed against, so far as it ranks and prefers, *primo loco*, Alexander's trustees, and decerns in their favour: *Quoad ultra*, recal the said interlocutor, and, in respect that the only interest of John Anderson under his marriage contract in the fund in question is that of a liferent, burdened with the maintenance and education of the child of the marriage, and not, as represented to the Lord Ordinary, a right of fee, repel *in toto* the claim of Green's trustee on the sequestrated estate of John Anderson; find that the remainder of the sum to be so liferented, and the fee of which is destined, by the marriage contract, to the child of the said John Anderson of that marriage, and to the daughter of Mrs Anderson by her former husband, must now be invested for behoof of all parties interested, and prefer Alexander's trustees, and the trustees of John and Mrs Anderson, jointly, to the said sum, and decern, and appoint a minute to be

June 26. 1852. given in as to the manner in which it is proposed to secure the  
 Mackenzie v. Alexander's Trustees, &c. said sum: Find the claimant, John Green, liable in expenses of process to John Anderson, and the said John Anderson and John Green, jointly and severally liable in additional expenses to Alexander's trustees.

*Charles Spence, S.S.C., Reclaimer's Agent.*

*Mackenzie and Baillie, W.S., Agents for Alexander's Trustees.*

*Junner and Stuart, S.S.C., Agents for Green.*

## SECOND DIVISION.

### No. 348. MILLER'S TRUSTEES v. MILLER OR GRIERSON, and OTHERS.

*Heritable and Moveable—Trust-Settlement—Clause—Construction.*—A., by trust-deed and settlement, directed his trustees to convert his whole means and estate into cash, and to invest in good heritable security, or in heritable or other property which they might deem safe and secure, the whole residue for behoof of his children equally, and declared that it should be in the power of the children to leave and bequeath, by a deed *mortis causa*, to any persons they might think proper, “the whole, or a portion of said fee; but failing such bequest, the destination above mentioned shall take effect.” Part of the residue of the estate was invested by the trustees on heritable securities, and part on moveable. One of the children died, leaving a testament, by which he appointed his wife his sole testamentary legatrix, leaving and bequeathing to her “the whole goods, gear, debts, sums of money, household-furniture, and whole other moveables whatsoever,” that might pertain to him at the time of his decease:—*Held*, 1. That it is not necessary for the effectual execution of a power of bequest, that the deed proceeding upon that power shall bear express reference to the deed conferring it; 2. That the testament carried that part of the testator's share in his father's estate which was heritably invested.

June 28. 1852. This case will be best stated in the words of the note to the Lord Ordinary's (Rutherford) interlocutor.

Miller's Trustees v. Miller, &c. Alexander Miller, by a trust-deed and settlement, dated 12th September 1844, directs his trustees to convert his whole means and estate into cash, and to invest in good heritable security, or in heritable or other property which they might deem safe and secure, the whole residue thereof, for behoof of his four children therein named, equally among them, share and share alike, but in liferent, for their liferent use alienarily, and excluding the diligence of creditors, and the *jus mariti* in the case of daughters and their heirs and successors in fee. He empowers the trustees to pay a third of each child's share of the residue to any one

of the children, if they think such payment beneficial for the child, and also to take the investments in their own names, as trustees for the children, or in the names of the children themselves; and then follows this important declaration:—“ Declaring farther, that notwithstanding the destination of the fee before written, it shall be in the power of my said children, or any of them, *to leave and bequeath*, by a deed or deeds *mortis causa*, to any persons they think proper, the whole, or a portion of said fee; but failing *such bequest*, the destination above mentioned shall take effect.”

Alexander Miller died 13th April 1845, survived by three daughters and his son William. William was twice married, the second time to Janet M'Leod, but died without issue by either wife. Prior to his second marriage he executed a testament in favour of Janet M'Leod, by which he appointed her his sole executrix and “universal legatory,” leaving and bequeathing to her the whole goods, gear, debts, sums of money, household furniture, and whole other moveables whatsoever, that might pertain to him at the time of his death. It contains the power of alteration, which, however, was never exercised. By a post-nuptial contract, dated 7th December 1850, executed by him and Janet M'Leod, “with the view of removing all doubts as to the validity of the said testament, and to avoid all after-questions of every kind, the said William Miller hereby, without prejudice to, but in direct corroboration of the said testament, of new assigns, dispenses and conveys to the said Janet M'Leod, in case she shall survive him, the whole goods, gear, debts, sums of money, household furniture, and whole other moveables whatsoever that may pertain to him at the time of his decease; and the said William Miller hereby expressly ratifies and confirms the nomination of the said Janet M'Leod, otherwise Miller, his spouse, as his sole executrix and universal legatory, with the powers, and under the conditions specified in the said testament.”

William Miller died on the 15th of July 1851. At his death, the residuary funds of Alexander Miller, (but including advances made in the interim to the family—for so the accounts are stated)—amounted to upwards of L.17,750, of which about L.10,000 is said to have been invested in heritable security. The investment of the rest of the residue was unquestionably personal.

In these circumstances, the present multiplepoinding has been brought by Alexander Miller's trustees. The fund *in medio* is the balance of William Miller's share of the residue of his father's

June 28. 1852. estate,—a portion of it having been paid during the trust, under <sup>the power given to the trustees of paying any of the beneficiaries</sup> Miller's Trustees v. Miller, a third of their share. The competing parties are Mrs M'Leod &c. or Miller, the widow of William Miller, on the one hand, and two of the daughters of Alexander Miller, and their husbands, on the other. No appearance is made for the third daughter.

Janet M'Leod or Miller, the widow, claims in respect of her husband's will, as carrying the whole of her husband's share in the residue of his father's succession, without reference to the character of the investment under which it was secured in the hands of the trustees.

William Miller's sisters, who have made appearance, not insisting in their claim for the portion of the residue remaining personal in the hands of the trustees, press their claim as heirs-portioners of their brother's share, so far as heritably invested, and not carried by his will or postnuptial contract.

The widow, founding upon these deeds, and upon the cases of *Milne or Smith*, 6th June 1826, and more particularly *Hyslop and others*, 11th February 1834, argues, that where property is left subject to a party's testamentary disposition, it is not necessary by the law of Scotland, for the effectual execution of the power, that the testator should have made express reference to the deed containing the power, or should have directly exercised it,—but that it is quite sufficient that the deed carried the property by general words, which, if he had expressly referred to the power, would have carried it. The daughters of Alexander Miller, in restricting their claim to the share of the residue heritably invested, seem to admit this principle; and, indeed, as the will and contract appoint Janet M'Leod or Miller, William Miller's sole executrix and universal legatory, and bequeaths by sufficient words William's whole personal property of every description, the case seems clearly to be within the rule laid down in the case of *Hyslop*, so far as regards William's share of the residue standing upon personal investment.

But they raise a question upon the part that is specially secured upon heritage, maintaining that such portion of the estate was *heritable* in the person of William, and that it could not be carried by any testamentary deed which could carry personal property only, nor otherwise than by a *mortis causa* deed conveying heritage.

The answer made to this is twofold. The widow contends, in the first place, that whatever was the form of investment in the trustee's hands, William's interest in the residue of his father's

funds was personal. The trustees are directed, in the first instance, to convert the whole property into *cash*,—though heritable security and heritable property are first mentioned; for subsequent investment, they are authorised to make the investment in any other property they deem safe and secure; and, *lastly*, the testator, as she contends, has clearly impressed upon the residue the character of personality, by providing that each child might *leave and bequeath* his or her share of the residue, by any deed or deeds, *mortis causa*, to any persons they might think proper; and failing only such *bequest*, the destination in the father's will should take effect. No investment by the trustees, she maintains, could alter this provision, more especially while the investment was in the name of the trustees.

The Lord Ordinary thinks this contention on her part is well founded. It might have been otherwise; at least there would have been very plausible ground for arguing that the residue had become heritage in the person of the children, if any heritable investment had been taken specially in the name of the children; but while it remained with the trustees, the character of the fund, as arising from *cash*, and subject ultimately to testamentary bequest, could scarcely be held to have been affected. The widow referred especially to Mr Bell's Principles, § 1482, and the authorities there quoted; and both parties founded upon the long series of cases, not perhaps easily reconcileable, and which involve the question, whether property left in trust is heritable or moveable in the beneficiary. The Lord Ordinary shall not go over those precedents in detail; the result, as applicable to this case, he thinks, supports the claim of the widow.

But there is another and a separate answer to the plea of the daughters. The *declaration* of Alexander Miller, as to his children's disposition of their separate shares of residue, must be read as *instructions* to his trustees. He authorises each child to *leave and bequeath* by a deed *mortis causa*, (and there are no words more expressive of a last will and testament,) his or her share of the residue; and makes effectual his own destination of the residue only on the failure of such *bequest*. In other words, he instructs his trustees to give effect to the children's bequest, just as much as if he had said, pay over to the party to whom they shall bequeath this fund. Then if, under the authority of the case of *Hyslop*, a general settlement of all personal property shall be held to be an exercise of the power, and to exclude the special bequest of any subject which the testator is entitled to leave by testament, the will and contract, in this instance, must operate as satisfying the

June 28. 1852. requirements of the trust. The Lord Ordinary here also holds the claim of the widow to be good, and that the answer of the trustees v. Miller, other claimants is unavailing, founded upon the investment being heritable in the trustees. In whatever manner they held the funds, they were bound to obey the directions of the deed under which they held. The Lord Ordinary, therefore, has preferred the widow. The case does not appear to be one for expenses.

By his interlocutor, the Lord Ordinary "repels the claim for Mrs Jessie Hyndman Miller, or Grierson, and Mrs Flora Thomson Miller, or Buchanan, and their husbands, and decerns: Ranks and prefers the claimant, Mrs Janet M'Leod, or Miller, in terms of her claim, to the whole fund *in medio*, under deduction of the expenses found due to the raisers, as the same shall be taxed and decerned for, and decerns against the raisers in her favour, in the preference, and for payment accordingly: Finds no expenses due to any of the claimants, and decerns."

Mrs Grierson and her sister reclaimed.

The *Dean of Faculty*, for the reclamer, referred to the cases of *Cathcart*, 26th May 1830; *Dick v. Gillies*, 4th July 1828; *Strachan v. Mowbray*, 21st Feb. 1843; *Williamson*, 15th Dec. 1849.

*J. Campbell and Penney* were for the widow.

LORD JUSTICE-CLERK. I concur with the Lord Ordinary.

*First*, It is true that the deeds of William Miller do in express terms refer to the power and faculty conferred on him by his father's deed. The argument, however, thence derived by the reclamer, is as applicable to the effect of William Miller's will on that part of the trust property which is admitted to be moveable, and with regard to which it is not disputed that the will is effectual, as it is to that part which is said to be heritable. It cannot be maintained, that by the law of Scotland a man must refer his own deed to the power and faculty conferred on him by the deed of a third party, although that power is sought to be exercised by him. Until a comparatively recent period, no such point ever occurred to a Scotch lawyer; but in consequence of discoveries as to the law of England, the question was at length raised in the case of *Hyslop*, and we have since had occasion to notice it in several recent cases, in which we pointed out that the principle of the law of England, viz., that a party cannot exercise a power without express reference to it, never was recognised in the law of Scotland.

*Second*, Though in a testament or disposition the maker says generally that he leaves his means and estate to so and so, that is

held to extend to everything, whether reduced into possession or June 28. 1852. not in the person of the testator. No man who leaves a general <sup>testament</sup> testament is held to die *pro parte testatus*, and *pro parte intestatus*. *Miller's Trustees v. Miller*, Every power is understood to be executed by him, and all that <sup>etc.</sup> the power could touch is held to be affected by his deed.

*Third*, This competition must be determined by the terms of Alexander Miller's deed. We have nothing to do with any question as to the effect of an investment of any part of the trust-estate, made under the provisions of Alexander Miller's trust-settlement, upon his children. Look, then, to the terms of Alexander Miller's trust-deed, and observe the directions to the trustees which it contains. Suppose the whole estate had been heritably invested by the trustees, or let it be held that they were bound so to invest it—what follows? Why the deed provides, that notwithstanding the destination of the fee before written, it shall be in the power "of my said children, or any of them, to leave and bequeath, by a deed or deeds *mortis causa*, to any person they think proper, the whole or a portion of said fee," &c. Notwithstanding the recommendation to invest the estate on heritage, and the power to invest a certain portion of the residue either in name of the children themselves, or in name of the trustees for the children, still the power of testing on the property falling to each of the children is expressly conferred on them, notwithstanding the destination and investiture before mentioned.

Again, the trustees were directed to give effect to the bequest notwithstanding the destination of the fee. I do not say, that if the titles had been taken to the several children *nominatum*, they might not have been bound to refer to the securities or titles in any settlement *mortis causa*—though, even in that case, I should have been loath to deny effect to a will in general terms like this. But here the funds are in the trustees, and it is admitted that the will of William Miller is a good direction to them, in so far as the trust-estate is moveable; and I think it is equally clear that it is effectual as to the remainder of the trust-estate, which is heritable. I must say, that while there are classes of cases not easily reconcileable with reference to the effect of investment upon trust-funds—such as *Strachan* and *Cathcart*—still these cases are not to be extended. At any rate, they have no application here, for there is a clear declaration and direction to the trustees, that any deed by the children legating and bequeathing their portion of the residue, shall be effectual notwithstanding an investment in heritage, and the destination which the trustee contemplated.

June 28, 1852. **LORD COCKBURN.** I concur. I rest my decision on the terms of the particular instrument before us. I do not ask whether the trustees v. Miller, trust-subjects are heritable or moveable in the person of the trustees &c. I do not think I am called on to give any opinion on that question. I shall assume that the whole is heritable. The testator, in reference to the possibility of its being so, ordains the trustees to pay it over, conform to the testaments of his children. In short, he says,—my son William shall leave and bequeath his property by deed *mortis causa*, if so disposed to do, although that property should be real in the person of the trustees. He might have directed the trustees to make payment to William Miller's order, in terms of a letter, or even of a verbal message from him. In short, the directions given to the trustees were within the power of Alexander Miller; and the general testament executed by William Miller was sufficient to affect the shares of the trust-funds left by his father, which he was empowered to legate and bequeath.

**LORD MURRAY.** I agree entirely with your Lordships. The deed of Alexander Miller is the *regula regulans*; and that deed provides, that although the share, or part of the share, of any one of his children, should be heritably invested, such child should have power to dispose of his shares, in whole or in part, by will or testament.

**LORD MEDWYN** absent.

The COURT adhered.

*D. J. Macbrair*, S.S.C., Agent for the Reclaimers.

*Campbell and Smith*, S.S.C., Agents for Mrs Miller.

### FIRST DIVISION.

#### No. 349.

#### SIMPSON v. SOMERS.

*Ejection—Violent Profits—Juratory Caution*—1555, c. 39; 1594, c. 217; 1 and 2 Vict. 119.—A minister, who had been deposed, retained possession of the manse and glebe. In a summary ejection at the instance of his successor—*Held*, that the defender must find sufficient caution for violent profits, unless he could “instantly verify a defence excluding the action.”

June 29, 1852. This was a suspension of a decree of the Sheriff of Forfarshire. **Simpson v. Somers.** The suspender, Simpson, was for several years minister of Barry, in Forfarshire, and was deposed by the General Assembly in May 1851. In September following, Somers was inducted into the charge, and Simpson still retaining possession of the manse, he

presented a petition to the Sheriff of Forfarshire for warrant to eject <sup>June 29, 1852.</sup> Simpson from the manse and glebe ; and in the event of his lodging answers to the petition, praying the Sheriff to refuse to admit <sup>Simpson v. Somers.</sup> the same, until he shall find caution for violent profits in common form. This petition was intimated, the suspender gave in answers, and a record was made up and closed, and sundry other steps of procedure were afterwards taken in the process. At length, on 30th January 1852, the Sheriff-substitute (Henderson) pronounced an interlocutor, by which, "in respect the defender has failed to find sufficient caution for violent profits . . . . grants warrant of ejection in terms of the prayer of the petition," &c. Against this interlocutor the complainer reclaimed, offering to find juratory caution, but the Sheriff adhered. Of these interlocutors this suspension was now brought, on the ground, *inter alia*, that no warning of removal was given to the complainer under the Act 1555, or relative Act of Sederunt 1756, under which alone, and not at common law, caution for violent profits could be demanded, and therefore, that he was not bound to find more than juratory caution.

The respondent lodged answers, founding on the Act of Sederunt 10th July 1839, cap. 7, sec. 34, which provides, "that in actions of removing, and in *summary applications for ejection*, the defender shall come prepared with a cautioner for violent profits at giving in his defences or answers, unless he instantly verify a defence excluding the action."

The Lord Ordinary on the Bills (Cowan) refused the note, holding that there was no specialty in this case to exclude the operation of the general rule, that sufficient caution for violent profits must be found by the complainer.

The suspender (Simpson) reclaimed.

*Pattison*, for the claimer. This is not a case of removing as between landlord and tenant, although it has been treated as such. My client was not a tenant ; a minister's right of possession of the manse and glebe is a right somewhat like that of a proprietor or liferenter. There could have been no precept of warning at the instance of the pursuer ; and that being so, he cannot have the privileges of the Act of Sederunt.

*Millar*, for the respondent, referred to Lord Fullerton's opinion in the case of *Marshall v. Gartshore*, 28th May 1850.

**LORD CUNINGHAME.** The Sheriff in adopting the course taken by him is entirely without blame, as he acted according to the form prescribed by the statute and usage in all cases of removing and

June 29. 1852 ejection. No doubt the Act 1555, cap. 39 respecting *removings*, seems to have been at first considered applicable only to rural, or proper agricultural subjects, but that mistake was corrected by the passing of the Act 1594, c. 221, respecting ejections from tene- ments of all descriptions, and which explicitly enacts that caution for violent profits shall be found immediately after defences are lodged, by all intenders and possessors cited in any ejection. The reclai- mer's objection to finding caution appears to me altogether ground- less. Caution was due both by statute and usage, and the rule is entitled, on every consideration of justice and propriety, to be strictly enforced. The note therefore must be refused with costs.

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Somers.

LORD IVORY. I agree; but after the record was closed, it seems strange that the Sheriff should not have dealt with the merits, and on these the complainer had no case. My doubt is, whether we cannot now do so, and so put an end to the whole case. I think the substance of the case is all with the respondent. I am not prepared to hold that the Act of Sederunt 1756 or 1839 applies to such a case as the present. I rather think that, fairly construed, the Act 1756 properly applies to removals of tenants. The Act of 10th July 1839 is an Act of Sederunt passed specially with reference to the Act 1 and 2 Vict c. 119; and I rather think upon the whole, that the safest ground of interpretation, is to confine their application to forms of removing. But that does not decide the case, for the Act 1594 expressly regulates the matter of caution, in cases of ejection. Now, it is true, that the expression of the statute applies to the case of intrusion; and there are words in it which speak of re- storing possession to the former proprietor. There is some ground therefore for holding that it is to the case of a party intruding him- self without a title, that it applies. But the difficulty here is, that we do not have the case before us on the merits; and as it only comes before us on the question of caution, we can only deal with the matter of caution; my inclination would be, to get the case disposed of on the merits, and I do not know that we might not do it ourselves, in respect that the party has not found caution in the Court below.

The LORD PRESIDENT. Though I regret that the Sheriff has not disposed of the merits, it is desirable to avoid sending back the case. I think that the case falls under the statute 1594, which was a remedial statute, and intended to apply to such a case as the present. We cannot decide on the merits, but I see no reason for holding that the Sheriff did wrong in requiring caution here, and therefore I am for refusing the note.

The COURT "adhere to the Lord Ordinary's interlocutor sub-June 29. 1852. mitted to review, and refuse the note : Find additional expenses <sup>June 29. 1852.</sup> *Simpson v. Somers.*" &c.

*James Bell, S.S.C., Reclaimer's Agent.*  
*Sang and Adam, W.S., Respondent's Agents.*

## SECOND DIVISION.

BALLINTEN and MANDATORY *v.* CONNON.

No. 350.

*Proof—Competency—Sequestration—Bankrupt—New Evidence Act, 15 Vict., c. 27.*—Under the new Evidence Act a bankrupt allowed to be examined as a witness in regard to the validity of the diligence on which he had been made bankrupt, and this although the question of his admissibility had been partly argued before the Act was passed.

See *supra*, p. 221.

This was a reduction of an alleged execution of charge upon a bill of exchange on which a person of the name of William Leask had been made bankrupt. Sequestration of Leask's estate had followed on said bankruptcy, and on the trustee (Connon) proceeding to challenge by reduction under the statute 1621, a vendition granted by Leask of a vessel named the "True Blue," in favour of his wife's grandfather (Ballinten), this counter action of reduction was raised by Ballinten to reduce the alleged bankruptcy, and all that followed thereon. The ground of objection to the charge was, that while the execution bore that the writ was left at Leask's "dwelling-house in Bannermill Street of Aberdeen," in point of fact Leask had no dwelling-house there at the time in question.

In the course of the proof Ballinten, the pursuer of the reduction of the charge, proposed to examine Leask, the alleged bankrupt. The defender, Connon, objected that the witness was incompetent.

*Shand*, in support of objection. This is an action plainly for the purpose of setting aside the sequestration. There is no precedent for admitting the bankrupt as a witness in such a case. This has been expressly ruled in analogous cases in England, (See Phillips on Evidence,) and that on reasons of general policy equally applicable in Scotland. Besides it is a general rule that no bankrupt shall be allowed to be examined as a witness in matters relating to his estate. There is no *penuria* here; for the pursuer has already adduced a very large number of wit-

*Ballinten, &c., v Connon.*

June 29. 1852. nesses, and looking at the allegations of fraudulent conveyance which he makes against the proposed witness, he is already inadmissible.  
Ballinten, &c. v. Connon.

*Moncreiff*, contra. Although the result may be, if he succeed in proving one objection to the validity of the execution of charge, that the sequestration must fall, the point the Court has to look at here is prior to, and out of the sequestration altogether. But were we here in a proper question of setting aside the sequestration, the practice in England could not be pressed against us, as the rule of evidence is now greatly modified there. The proposed witness has really no interest here.

LORD JUSTICE-CLERK. I should like the parties to look into the older cases. I think it is very probable that in discussions under the Bankrupt Acts 1621 and 1696, the question of the admissibility of the party as a witness against whom the writ was executed, or attempted to be executed, must have occurred.

The case was again put out for advising, and, in the meantime, the new Evidence Act, 15 Vict., c. 27, had been passed.

*Moncreiff*, for pursuer. The only ground of objection was really that of interest. Now, this objection is swept away by the first section of the new Act.

*Shand*, for defender. The statute, whatever its terms may be, cannot apply here. The objection was taken and argued before the Act passed, and parties had joined issue. Such a retroactive effect ought not to be given to new laws.

LORD JUSTICE-CLERK. The terms of this statute are very broad; besides there is no clause saving actions already in Court. We cannot refuse effect to the new law, but I beg it may be understood that in admitting Leask here a witness, we are not deciding any general point of the admissibility of bankrupts, as witnesses in cases connected with their estates. The present sequestration statute gives great facilities for the examination of the bankrupt on oath, in all matters connected with the estate, and we do not decide the general question of his admissibility as a witness in questions with the creditors.

The other Judges concurred.

*James Marshall, S.S.C., Agent for Pursuer.*

*Shand and Farquhar, W.S., Agent for Defender.*

## SECOND DIVISION.

ROBERT M'COWAN v. JOHN WRIGHT.

No. 351.

*Bankrupt—Insolvency—Statute 1621, c. 18—Issue—Jury Trial.*—A trustee on a sequestrated estate raised a reduction of deeds upon the Act 1621, c. 18, and at common law, as granted by the bankrupt, without value, to a conjunct and confident person, in contemplation of bankruptcy, and in defraud of creditors:—*Held* not necessary to put insolvency at the date of granting, into the issues; and form of issues approved of.

The pursuer was the trustee on a sequestrated estate, and the action was for the purpose of setting aside certain deeds and conveyances executed by the bankrupt, Howie, in favour of the defender, his brother-in-law. The deeds under reduction were dated in April, May, June, and July 1847. Howie was sequestrated on 4th March 1848. The reasons of reduction were, that the deeds (which consisted of bonds and dispositions in security, &c., over Howie's estate) “were granted by the said James Howie, and obtained by the said defender through fraud, and in contemplation of the bankruptcy of the said James Howie, or at least at a time when, as the said defender well knew, the said James Howie had contracted debts to various parties, and was insolvent, and for the purpose of defrauding the just and lawful creditors of the said James Howie, and of securing the said defender in a fraudulent and illegal preference over the estate and effects of the said James Howie, in security of debts previously contracted, or said to have been previously contracted by the said James Howie to the defender. Further, the deeds in question were granted by the said James Howie at a time when he was insolvent, to the said John Wright, defender, who is his brother-in-law, and a conjunct and confident person, without any true, just, or necessary cause, and without a just price really paid for the same, with a view to defraud the just and lawful creditors of the said James Howie; and such being the case, the said bonds and dispositions in security, assignations, conveyances, and transferences before specified, are void and null, in terms of the first clause of the Act of Parliament made in the year 1621, c. 18, by which “all alienations, &c. made by the debtor of any of his lands, &c. to any conjunct or confident person, without true, just, or necessary causes, and without a just price really paid, the same being done after contracting of lawful debts,” are declared “to have been from the

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M'Cowan v.  
Wright.

June 29. 1852. beginning, and to be in all times coming, null and of none avail,  
 M'Cowan v. force, nor effect, at the instance of the true and just creditor, by  
 Wright. way of action, exception, or reply, without farther declarator."

The pursuer proposed the following issues :—" It being admitted that the estates of the said James Howie were sequestered on or about the 4th March 1848—that the pursuer is trustee on the said sequestered estates—that the deeds and other writings libelled on were executed respectively about the dates libelled on—that the pursuer is now pursuing a reduction of the said deeds and others under the statute 1621, c. 18, and at common law—and that the defender is the brother-in-law of the said James Howie :—

' 1. Whether the said deeds and writings, or any of them, were granted by the said James Howie to and for behoof of the defender, his brother-in-law, a conjunct and confident person, without true, just, and necessary cause, and to the hurt and prejudice of the creditors of the said James Howie, the constituents of the pursuer ?

2. Whether the said deeds and others, or any of them, were granted by the said James Howie in favour of the said defender, fraudulently, to disappoint the legal rights of the said creditors ? "

The following issues were, on the other hand, proposed by the defender:—" It being admitted that the estates of the said James Howie were sequestered on or about 4th March 1848—that the pursuer is trustee on the said sequestered estates—that the defender is the brother-in-law of the said James Howie—and that the deeds and other writings libelled on were executed respectively on or about the dates libelled on :—

' 1. Whether the said deeds and others, or any of them, were granted by the said James Howie, *when insolvent*, to the defender, a conjunct and confident person, without true, just, and necessary cause, to the hurt and prejudice of prior creditors of him, the said James Howie, the pursuer's constituents, contrary to the statute 1621, c. 21 ?

2. Whether the said deeds and others were granted by the said James Howie, and obtained by the defender, his brother-in-law, through fraud and collusion, while the grantor thereof, as the defender knew, or had good reason to know, was in contemplation of bankruptcy, for the purpose of defrauding his said creditors, and without any just or lawful consideration therefor ? "

The issues were reported to the Court, by the Lord Ordinary, (Anderson).

*Broun, Moncreiff*, and the *Lord Advocate*, for the pursuer. It June 29. 1852. is not necessary as held on the other side, that insolvency should be set forth in our proposed issue. *Horne v. Hay*, 12th <sup>McCowan v.</sup> Wright. Feb. 1847; *Henderson v. Robb*, 21st Sept. 1838; Macfarlane's Jury Reports, p. 171, Bell's Com. II. 192.

*P. Fraser* and *Penney*, for the defender. In order to succeed in the reduction, it is necessary that the deed should be proved to be granted, 1<sup>st</sup>, to a conjunct and confident person; 2<sup>d</sup>, without a just and necessary cause; and, 3<sup>d</sup>, by an insolvent party. In *Horne's* case, insolvency was put into the issue; *Wood v. Dalrymple*, 4th Dec. 1823; *Erskine*, 4. 1. 32; Macfarlane on Issues, pp. 557, and 560; *Callon v. Blake*. The pursuer must shew that the deed was granted in insolvency. As to the *second* issue, it must be shewn; 1. That the granter is insolvent; 2. That the defender knew this,—and both these points should be in the issue. Bell's Com. II. 245; *Ross v. Hutton*, 15th June 1830.

LORD JUSTICE-CLERK. I think this discussion has been superfluous, and I hope that the matter will henceforth be considered as finally settled. It is an error to suppose that everything which must be proved at the trial must be in the issue. Here the first issue proceeds on the statute 1621; and it asks the question, in the words of the statute, whether the deeds were granted "by the said James Howie, to and for behoof of the defender, his brother-in-law, a conjunct and confident person, without true, just, and necessary cause." It is said by the defender, that in addition to this, the question must be put in the issue, as to the matter of solvency. But this is not in the statute at all; and it is a sufficient answer to say, that the issue raises the question, whether the deeds were granted to the prejudice of prior creditors. The sequestration creates a presumption of insolvency at the date of the deed said to have been granted to a conjunct and confident person. Another reason for not putting insolvency into the issue, is the difficulty of marking out the precise point of time at which the situation of the bankrupt's affairs became irretrievable. The best test of the matter is the object and purpose of the deed. I would not therefore alter the first issue proposed by the pursuers, which is substantially the same as that approved of in the case of *Horne*.

As to the *second* issue proposed by the pursuer, it is also substantially in the same terms as that adopted in the case of *Horne*. The term *fraud* embraces everything which the common law requires. If you make yourself insolvent by the very deed you

June 29, 1852. grant, so as not to leave enough for the payment of your other creditors, that may be a fraudulent deed. Fraud varies according to the nature of the case, and may be taken as a term covering the whole action. It is contended that the deed, in order to be set aside, must have been granted when the party was in the knowledge and contemplation of his own bankruptcy. That may be one proof of the fraud which is to be proved. But the actual contemplation of bankruptcy is not necessary to be proved. If the party thinks it likely that he will not be able to go on, and in case he should become bankrupt, grants this deed to a conjunct and confident person, that will be a fraud at common law. It is said further, that it must also be made out that the party taking the deed knew it to be granted in contemplation of bankruptcy. To this there are various answers. A party taking benefit under such a deed, and defending it when challenged, makes himself retrospectively an accomplice of the fraud. He may never have heard of the deed till it is put into his hand, and yet his taking under it may be fraudulent. If he takes under the deed and abide by it, then he takes advantage of that which is a fraud. "Collusion" is a word which is quite unnecessary. It is said this deed is granted on the application of the creditor. But such an application may be made in perfect *bona fides*. I think, therefore, that these two issues are rightly framed.

LORD MEDWYN concurred.

LORD COCKBURN. I quite agree. I thought the question here raised had been settled long ago. All that requires to be proved is, that the deed was granted, in prejudice of creditors, to a conjunct and confident person.

LORD MURRAY concurred.

The following were the issues adopted to try the cause, "It being admitted," &c., (as in the pursuer's issue:)

"1. Whether the said deeds and writings, or any of them, were granted by the said James Howie to and for behoof of the defender, his brother-in-law, a conjunct and confident person, without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of the said James Howie?

2. Whether the said deeds and others, or any of them, were granted by the said James Howie in favour of the said defender, fraudulently, to disappoint the legal rights of the said creditors."

*Thomas Sprot, W.S., Pursuer's Agent.*

*Andrew Howden, W.S., Defender's Agent.*

## FIRST DIVISION.

JOHN and ELIZABETH ANNE GATHERER or DEANS, *Petitioners*; No. 352.  
CHARLES GATHERER and MARGARET GATHERER, *Respondents*.

*Judicial Factor—Lunatic—Curator Bonis—Party eligible.*

The petitioners in this case stated that their brother consan-<sup>June 30. 1852.</sup>guinean had for some time been labouring under mental derange-<sup>Gatherers v.</sup>ment, and that in consequence, he had been sent to a lunatic <sup>Gatherers.</sup>asylum, where he still remained. That his property consisted of a dwelling-house, with piece of ground attached, and certain moveable means, derived from different sources, which were stated. That it was accordingly necessary that a *curator bonis* should be appointed; and they suggested a professional gentleman, the treasurer of the asylum in which the lunatic was confined, as a fit and proper person. The respondents, the brother and sister by the full blood, put in answers, in which they denied the statements of the petitioners as to the alleged property of the lunatic, and the necessity of appointing a *curator*. They stated that his means were very limited; that they had all along shewn him the greatest attention; that the interference of the petitioners was quite uncalled for, and was attributable to no good motives, or desire of benefiting the interests of the lunatic, but to a wish to annoy the respondents.

*Duff* for the petitioner. We aver that the lunatic has considerable property, and that the respondent, his brother, has taken the whole control of it. One of the petitioners is about to emigrate, and as failing the respondents, the petitioners would succeed to the property of the lunatic, he has a direct interest to get a *curator* appointed. The respondent, Mr Gatherer, has, without any legal right, assumed the whole charge of the lunatic and his property.

*Shand* for respondents. There is no allegation here of any neglect of duty by the respondents, or of improper interference with the lunatic's funds. In fact, the respondents have been unremitting in their attentions to him, and he has little to depend upon except an annuity of L.60 per annum, procured for him by his brother, the respondent. The petitioners are only related to him by the half-blood; and while he is carefully attended to by the respondents, his full brother and sister, the petitioners have no right to interfere, more particularly as they are actuated by a

June 30. 1852. wish to annoy the respondents, with whom they have had disputes  
 ↗ about money matters, and by no desire to serve the interests of  
 Gatherets v. Gatherers. the lunatic. Sanctioning their interference would be an invasion  
 of the privacy of family affairs, and exposing domestic afflictions  
 to unnecessary publicity.

LORD PRESIDENT. There may be such cases as those just referred to, where the Court would not willingly interfere; but in my opinion this is not one of them. The statement in the answers in regard to the property of the lunatic, is vague in the extreme. This is a matter quite within the respondent's knowledge.

*Shand* for respondents. We thought it unnecessary to be more specific, as we disputed the necessity of appointing a *curator* altogether. We are ready, if allowed time, to answer the petitioners' statements on this subject.

LORD IVORY. I take the same view as your Lordship. The respondent has been intromitting all along without a title. I think we must appoint a *curator*.

LORD PRESIDENT. The suggestion of a party connected with the asylum where the lunatic is confined, as factor, is new to me.

LORD IVORY. Besides, if I mistake not, this gentleman is one of the agents for the petitioners. If the counsel for the parties cannot agree on a suitable person, we will remit to the Sheriff of the county to make a selection.

The LORD PRESIDENT and LORD CUNINGHAME concurred, and ultimately a remit was made to the Sheriff to name a factor.

*Scott and Gillespie*, W.S., Agents for Petitioners.  
*L. Mackintosh*, S.S.C., Agent for Respondents.

## SECOND DIVISION.

No. 353. MACKINTOSH v. M'LEAN and OTHERS, (Mackintosh's Trustees).

*Trust—Title to Sue*.—A. bequeathed a fund for the education of boys belonging to certain families. The magistrates of a burgh, who were the sole trustees of the fund, applied to Parliament for an Act to authorise, *inter alia*, the application of the trust-funds to purposes other than those in the deed. Persons connected with the families favoured by the testator opposed this bill, which was ultimately thrown out. Some of the parties whose opposition had thus been effectual having become trustees of the fund in consequence of their subsequent election as magistrates of the burgh, proposed to charge against the fund their expenses

and trouble in opposing the bill, on the ground that the opposition had been beneficial to the trust. In a suspension and interdict at the instance of the heir and representative of the testator; held, 1. That the complainer had a good title to make the application; 2. That the expenses could not be charged against the fund.

This case came by advocation from the Sheriff-Court of Inverness. It originated in an application for interdict, to prevent the respondents, who were trustees of a fund established in 1797 by Captain Mackintosh of Farr, and known as the Mackintosh Fund, from applying money belonging to the trust in payment of expenses incurred in the successful opposition to a bill which had been brought into Parliament in reference to the fund.

By his will, Captain Mackintosh provided, "That L.5000 be vested in trust with the magistrates of Inverness for the time being, the interest of which sum is to be appropriated to the education of five boys in succession, to be selected, first, from the descendants of the family of *Farr*; next, to those of *Dalmigavie*; and, thirdly, to those of the house of *Kylachy*, or their nearest relatives, in the above order of consanguinity, but always of the name of Mackintosh; and it may be hoped that some of these boys, if they succeed in life (which this gives them a fair chance for), will follow the example to keep up a respectable, though declining clan. It is to be remembered, that they are to be educated at the academy lately established in that town; but if the trustees think it advisable, on discovering marks of genius, to send any of the boys to an university, they are not restricted from doing it."

Afterwards, by a note added to the will, the testator desired, that, "in the selection of the boys for education, my mother's family of *Holm* is to be preferred next to my father's, and in succession before that of *Dalmigavie*."

Captain Mackintosh afterwards increased the grant to L.10,000.

In 1850, the magistrates of Inverness, as trustees of the fund, presented a petition to Parliament, for leave to bring in a bill "for more effectually carrying into effect the will of Captain William Mackintosh, and for better regulating the Royal Academy of Inverness." The object of the bill was to set aside L.12,000 of the fund, which at that time amounted to L.20,000, for the benefit of the boys who might be selected under the will; and to amalgamate the remaining L.8000 with the funds of the academy.

In January 1850, a meeting attended by upwards of sixty persons  
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June 30, 1852. of the name of Mackintosh, was held in Inverness in reference to the bill, at which a resolution was passed, pledging the meeting to oppose the bill, and organizing such measures as might be necessary and advisable to protect the rights of the Mackintosh Fund beneficiaries. Funds for this purpose were collected by subscription. The respondents, along with other parties, strangers to the trust, conducted the opposition to the bill, and in consequence of a decision of a committee of the House of Lords, to whom the matter was remitted, that no sum of money should be contributed out of the Fund for the purposes of the academy, and that the clauses relating to the management, audit, and supervision of the Farr Fund, and the admission of bursars, "except in as far as such clauses direct any sum of money to be annually paid to the directors of the academy, shall be allowed,"—the bill was withdrawn.

In November 1850, the respondents were elected magistrates of Inverness, and became, as such, trustees of the Mackintosh Fund. They, in that capacity, passed a resolution, to the effect "that the opposition made to the bill was proper and indispensable for the protection of the trust-property;" and that as the opposition had been successful in the preservation of the fund, "they considered it just and reasonable that the expenses, which amounted to about L.600, unavoidably incurred in effecting that important object, should be borne by the trust." In consequence of the above resolutions, the complainant, who was the heir and representative of the family of Farr, presented a petition to the Sheriff of Inverness-shire, praying him "to interdict, prohibit, and discharge the said parties complained of, from appropriating or applying any sum or sums of money in their hands, or within their power, and under their control, belonging to the said fund, towards payment of the expenses, and, generally, from applying any sum or sums of money belonging to the said fund towards the expenses incurred by any party or parties, in relation to the said bill, in any manner of way."

The respondents declined the jurisdiction of the Sheriff and the Sheriff-substitute, who were *ex officio* directors of the Inverness Academy, and had, as such, taken an active part in the promotion of the measure. This declinature was sustained by the Sheriff, who granted interim-interdict, in order that the question might be tried by advocation.

The respondents accordingly advocated, and the Lord Ordinary (Robertson) pronounced an interlocutor, by which, "in re-

spect the opposition to the bill in Parliament was reasonable and proper, and the committee of the House of Lords determined that no portion of the Farr Fund should be applied for the purposes of the academy, by which resolution the said fund was saved from dilapidation or diversion from the purposes of the testator, and that the rest of the bill was withdrawn, finds that the said opposition was successful, and was *in rem versus* of the trust; and in respect no specific objections are stated on the record to any portion of the expense incurred in the said opposition, but a general interdict against payment of any portion of the expense was craved in the original application, and the cause having been already advocated of consent, by interlocutor of 13th June 1851, recalls the interdict already granted, dismisses the original application, and decerns: Finds the advocates entitled to the expenses incurred by them, both in this Court and in the Inferior Court.

*Note.*—The respondent, as heir of the testator, may have a title to complain of any dilapidation of the trust-fund, and even to apply by interdict on that account. But it must be a very palpable case of misappropriation to warrant a summary application of this kind. Such was the case of *Balfour's Trustees v. Edinburgh and Northern Railway Co.*, 8th June 1848. If there be a fair and equitable administration of the trust, and apparently a proper disposal of the fund, the Court will not interpose in this form.—See *Blackburn v. Stewart*, 27th June 1851. See also Law Jour. vol. xxvii., p. 396. But in this case, not only was the opposition to the bill, by which a large portion of the Farr Fund was to be transferred to the academy, fair and reasonable,—it was successful, and the fund was saved from the proposed amalgamation. The expenses fairly and properly incurred to the agents and witnesses, form, it is humbly thought, a proper charge on the fund."

The complainer reclaimed.

*E. S. Gordon and Deas* were for the reclamer; and  
The *Solicitor-General* for the respondent.

LORD JUSTICE-CLERK. I cannot concur in this interlocutor. One point is clear—the testator's heir has a good title to make this application. No good objection to his title can be taken. The trustees appointed to manage this fund were the magistrates of Inverness. Therefore, by its constitution, this trust was a fluctuating body. This being the case, the trustees who are in office at a particular

June 30. 1852. period, bring a bill into Parliament with reference to the management of the fund; and while these trustees are in office, doing their utmost to promote this bill, an opposition gets up—several members of the clan Mackintosh assemble—resolutions condemnatory of the measure are carried—and, aided by various parties, among others by those who are now the trustees of the fund, they plunge into Parliamentary opposition. That opposition proves successful, and the bill is thrown out. At the time the bill was thrown out, the trustees who promoted it were still in office. But they have been succeeded by the parties who promoted the opposition, and these last being now in office, propose that the expense of the opposition should come out of the fund. It is said that the opposition was a benefit to the fund, and that this must be held as proved by the fact that the bill was thrown out. But is there any instance of a claim for extrajudicial expenses like these being made a charge upon a fund administered by trustees? Where the expenses are judicially incurred, then the question comes before the Court, whether the fund should pay them, or whether the trustees should be found personally liable. There have been cases where trustees under a private trust have been found personally liable. I cannot allow this extrajudicial expense to be made a charge upon the trust, and I am, therefore, for altering this interlocutor.

**LORD MEDWYN.** I am afraid I must agree with your Lordship. The opposition of these parties may have been quite proper and right; but I do not see how we can make the expense of that opposition a charge on the fund.

**LORD COCKBURN.** I am of the same opinion, and that very clearly. These parties, at that time strangers to the trust, oppose a measure promoted by the parties at that time in the administration of the trust. They may have been quite right in their opposition, but they opposed the bill at their own expense. No one is entitled to promote the advantage of another person against the will of that other person. These parties, strangers to the trust, having resisted the bill on pure grounds of patriotism, get into the administration in their turn through their election as magistrates, and they now seek to reimburse themselves for the expense of their patriotic exertions. To allow this would be a precedent fraught with danger to the management of all similar institutions. When this expense was incurred, these parties had no right to rely on the trust-funds; and I therefore think that that expense cannot be made a charge against these funds.

**LORD MURRAY.** I am constrained to differ from your Lord—<sup>June 30. 1852.</sup> ships. The question before us is, whether, at the instance of <sup>the heir of the</sup> Mackintosh v. trustee, we are to interdict the managers of the M'Lean, &c. fund from paying out of the fund the expense of opposing what must now be taken to have been an unjust bill. The only point for us to consider is, I think, whether what was done was *utiliter gestum* for the trust. Has good been done? Is there any good ground for interfering, at the instance of this party, with the payment of these as reasonable and necessary expenses? Suppose that an hospital had been constructed near the sea, and that expense had been incurred in saving it from encroachment, would not such expense be justly chargeable against the fund? I think that this case is not unlike that; and at all events, that the present managers are as much entitled to respect as the former managers. In these circumstances, no malversation being alleged against these trustees, I am not for interfering with the proposed payment.

The COURT “alter the interlocutor of the Lord Ordinary: Find that no objection has been stated to the Court against the title of the claimant to follow out the petition to the Sheriff, or the competency of such application: Find that the funds under the management of the respondents cannot legally be applied to pay the expenses incurred in opposing in Parliament the bill referred to on record, promoted by the trustees in the management of the fund: Therefore, grant interdict as craved, in terms of the petition to the Sheriff: Find the respondents liable in expenses, and remit the account,” &c.

*Sang and Adam, S.S.C., Agents for the Respondents.*

*John A. Macrae, W.S., Agent for the Complainant.*

### FIRST DIVISION.

**SOLOMON ARNOLD v. M'CUBBIN and OTHERS.**

No. 354.

*Sequestration—Petition to Recal—Intimation—Interim Factor—Trustee.*—Where a trustee on a sequestered estate had been elected, but not confirmed: *Held* that a petition for recal of the sequestration was properly directed against and intimated to the interim factor.

*Process—Revised Condescendence.*—Failure to lodge a revised condescendence is not a good ground for dismissing a petition for recal of sequestration.

July 2. 1852.

This was a petition presented to the Lord Ordinary on the Bills, <sup>Arnold v.</sup> M'Cubbin, &c.

July 2. 1852. (*Cowan*, by Solomon Arnold, a manufacturer in the county of York, *Arnold v. M'Cubbin, &c.* in Manchester,) for the recal of the sequestration of "James Atkinson, merchant in various grounds specified in the petition, and praying the Court to appoint a copy of the petition to be served *inter alios* "on the said Alexander Winter, the interim factor appointed under the sequestration." Intimation was made accordingly, and answers were lodged by various parties, and also by David M'Cubbin, "trustee on the sequestered estate of James Atkinson," who pleaded, *inter alia*, that the petition for recal of the sequestration not having been directed against the trustee, nor a copy of it ordered to be served on him, as enjoined by statute, although he had been appointed eight days before the petition was presented, and no warrant having been obtained for intimating the same to him till after the expiry of forty days, the petition was incompetent, and ought to be dismissed.

On 3d February the following interlocutor was pronounced : "The Lord Ordinary, in respect the respondents have now lodged answers to the petition, holds the petition as a condescendence, and the answers now lodged as answers thereto ; appoints the petitioner to revise his condescendence within ten days, and the respondent to answer the same within ten days thereafter ; further, in respect the petitioner is resident in England, appoints him to lodge a mandate with his revised condescendence ;" and, on 21st Feb., "The Lord Ordinary, in respect the petitioner has failed to lodge his revised condescendence, and also, in respect he has failed to sist a mandatory, as directed by the preceding interlocutor, dismisses the petition, finds the petitioner liable in expenses," &c.

The petitioner reclaimed.

*T. Mackenzie*, for the respondent, objected to the competency of the petition, on the ground above stated.

*Pattison*, for reclaimer. All that the statute requires to make the petition competent is, that it should be presented within forty days. This petition was so presented, and it was for the Lord Ordinary to order intimation. At the date of the present petition, the trustee, although elected, had not been confirmed, and, therefore, the petition was properly directed against and intimated to the interim factor, who, under § 55 of the statute, continued to act until the trustee was finally confirmed.

Objection as to incompetency repelled.

*Pattison* for reclaimer, on the merits. Under § 21 of the

statute, the Lord Ordinary has no power or authority to dismiss a *July 2. 1852.*  
petition for failure to lodge revised condescendence. But he should <sup>Arnold v.</sup> have pronounced judgment upon the case, either by allowing McCubbin, &c.  
proof, or otherwise ; and it is still competent for the Court to do so.

The COURT remitted to the Lord Ordinary to allow a revised  
descendence to be received, on payment of ten guineas of ex-  
penses.

*James Bell, S.S.C., Reclaimer's Agent.*

*Thomas Dunn, S.S.C., Respondents' Agent.*

### FIRST DIVISION.

Petition—H. J. ROLLO, W.S.

No. 355.

*Curatory—Approval of Accounts—Exoneration and Discharge—Bond of  
Caution.*

This was a petition for approval of accounts under a curatory, *July 2. 1852.*  
and for exoneration and discharge. The petition set forth that <sup>John Sutherland of Forse, and Robert Rollo, writer in Edinburgh,</sup> Pet. Rollo.  
were nominated curators by Francis Sutherland, youngest son of  
the deceased John Campbell Sutherland of Forse, now Lieutenant  
in the 2d Dragoons. That Francis Sutherland being now of age,  
had granted a discharge, which was produced, of the whole actings  
and intromissions of his curators, during their respective lives.  
That both the curators being dead, and Robert Rollo, who was  
the last survivor, having continued till his death to act as the agent  
of the said Francis Sutherland, who had previously become of age,  
the petitioners, Hugh James Rollo, as the heir-at-law of the said  
Robert Rollo, and Robert Lewis, as cautioner for the said John  
Sutherland and Robert Rollo, as curators aforesaid, now made  
this application for a judicial discharge of the intromissions of the  
said curators, and for delivery of the bond of caution, "or to do  
otherwise in the premises" as the Court might see proper.

*Walker* was for the petitioner.

The COURT held that they could not depart from the usual  
form of remitting the accounts to the accountant of Court; but  
they agreed, on a minute being put in restricting the prayer of  
the petition to grant warrant for giving up the bond of caution, to  
do so ; which was accordingly done, and the bond of caution  
delivered up.

*H. J. Rollo, W.S., Agent.*

## FIRST DIVISION.

No. 356. Petition, JAMES SINCLAIR LOCKHART, Esq. of Castlehill.

10 Geo. III. c. 51, sec. 26—*Montgomery Act—Improvements—Apparency.*—*Held* that improvements executed by an heir of entail possessing upon apparency, form a good charge upon the estate against succeeding heirs of entail.

July 2. 1852. This was a petition for authority to uplift and apply consigned money, and charge entailed estates with improvement debts, and was reported by the Lord Ordinary (Cowan).

*Pet. Lockhart.* The entail had been duly feudalized in the person of the institute in 1731. The late Mr Lockhart was infest in the estates, upon a title under the entail completed by him as heir of his father, Captain James Lockhart, in 1808. In September 1847, an action of reduction and declarator of irritancy of the title was instituted by the petitioner against his father, concluding to have the titles of the latter set aside, in respect of disconformity with the entail, and other defects, and an irritancy declared against him. In this action, decree of reduction was pronounced, 26th Feb. 1850. Thereafter Mr Lockhart, by leave of the Lord Ordinary, lodged a minute stating that he was ready to purge the irritancy, by making up a new and correct title in his person, as heir of his father. He proceeded accordingly to make up a new title, but died before it was completed. No irritancy was declared against him. The petitioner has since made up his own title by special service as heir of his grandfather, passing by his father.

The improvement claims are contained in decrees of declarator, obtained by the late Mr Lockhart before the Court of Session, of which the last is dated 4th July 1848. The question therefore arose, (1.) Whether, under the Montgomery Act, improvements made by an heir who is in possession on apparency are effectual to constitute a claim against the succeeding heirs. (2.) Whether the 26th section of the Montgomery Act applies to the present case, so as to protect the debts contained in the decrees of declarator from challenge, on the ground stated above, in respect of the lapse of the period after which, by the said section, such decrees are declared to be final; *Macdonald v. Maadonald*, 26th May 1840, D. 2, p. 889. (3.) The petitioner having made up his title by special service as heir of his grandfather, passing by his father—whether the Act 1695, c. 24 applies to the present case, so as to render the petitioner liable for the improvement claim, in

respect of his having made up a title to a more remote ancestor, July 2. 1852.  
passing by his father, who was upwards of three years in possession.

*Pat Lockhart.*

*Ross* was for the petitioner.

A minute was allowed to be put in by the petitioner in regard to these matters; and in that minute, after explaining that the case of *Macdonald* was the case of an entail not recorded, it was stated that the case more nearly resembling the present case is that of *Kennedy v. Kennedy*, 11th February 1829. In that case, bonds of provision over one entailed estate by an heir-apparent of entail, but who had possessed the estate for more than three years, were held good against the estate, on the principle that the provisions were to be considered onerous, and that the heir passing by was bound by them under the Act 1695.

The COURT sustained the improvements as a claim against the estate, and authorized the petitioner to apply the consigned money mentioned in the petition, in payment *pro tanto*, of the improvement claim.

*John Phin*, S.S.C., Petitioner's Agent.

## SECOND DIVISION.

WEBSTER and MANDATORIES *v.* M'LELLAN.

No. 357.

*Process—Parties to be called—Triennial Prescription.*—A., as acting for a number of proprietors in a town, employed B., solicitor in London, to conduct an opposition to a bill in Parliament, in reference to the poor's rates of the town. B. raised action against A. for the expenses incurred in the opposition :—1. *Held* that it was not necessary that he should call the other parties whom A. had represented in giving him the employment. 2. Circumstances in which *held* that a sufficient acknowledgment of the debt had been given by the debtor so as to defeat the plea of triennial prescription.

This was an advocation from the Sheriff Court of Lanarkshire. July 2. 1852.  
The action was brought for the recovery of the sum of L.307,  
4s. 9d., being the balance of an account due to the pursuer Webster, &c.  
v. M'Lellan. Webster, &c.

The statement set forth that the late firm of G. and T. W. Webster, solicitors, London, of which the pursuer, and George Webster, who has since retired from the firm, were the sole partners, were employed and instructed by the defender, and Messrs

July 2, 1852. Mack and Thomson, writers in Glasgow, as his Glasgow solicitors or agents, to oppose, on behalf of the proprietors of houses in Webster, &c. v. M'LELLAN. Glasgow, a bill introduced into Parliament in the session of 1840, for "explaining, altering, and amending the mode of assessments for the maintenance of the poor within the city of Glasgow." That the defender was in London during a portion of session 1840, and was in personal communication with the firm, or one or other of the partners, in reference to said bill, gave them instructions, and actively promoted and assisted in the opposition; and, in particular, addressed to Mr George Webster different letters in relation to the business. In one, dated 11th Feb. 1840, he says, after speaking of other matters, "would you be kind enough also to give me some information of the present position of the River and Poors' Rates Bills in the Commons, and of the time when it will be necessary to send up petitions against the latter; also, in case of a deputation being necessary, when that deputation must be in London. Now, my dear Sir, fortify me in course of post, and believe me to be yours ever." (Signed) "ARCHD. M'LELLAN."

In another letter, dated "Glasgow, 19th Feb. 1840," the defender says, "I send you a memorial drawn by me for the landlords of Glasgow. It will shew you our grounds of objection to the poor-rate bill. Although I kept the whole case open to opposition, I only object to the landlords paying for their tenants. I do not now oppose the change from means and substance. Thomson has called and shewn me your letter. You will be so kind as to give up as much time as possible, to get your petition numerously signed," &c. (Signed) "ARCHD. M'LELLAN.—George Webster, Esq."

In a third letter, addressed to Mr George Webster, and dated, "Glasgow, 12th March 1840," he says, "permit me to introduce to you Mr Thomson, our law agent in the poor-rate opposition, with whom you have already been in communication on that subject. Mr Thomson is fully possessed of my views, and the views of the other parties who are united with me in opposing this measure, and I have to request that you will devote as much of your time to this matter as its great importance demands," &c. (Signed) "ARCHD. M'LELLAN.—George Webster, Esq."

The pursuer, in consequence of this employment, ran up a bill of costs to the amount of L.507 : 4 : 9, of which L.200 had been paid to account, and for the balance, George Webster drew a bill, dated 7th December 1840, for L.300, upon Mack and Thom-

son, payable four months after date, which was accepted by July 2. 1862. them. The bill, when it became due, was not paid by Mack and <sup>Webster, &c.</sup> Thomson, who did not hold themselves personally liable in pay-*v.* M'LELLAN. ment of the costs, and it was accordingly taken up by the pur-  
suers' firm.

In these circumstances, payment was demanded from the defender, who, the pursuer alleged, besides being liable for the account, had promised payment by two letters, the first being dated "Glasgow, 23d Dec. 1841." In it he says, "I regret exceedingly that you have lain so long out of your account, and the more, that I find that we are to have some trouble to get the parties interested to pay. You are aware it was not so much for any interest I held in the question, as at the urgent request of others, that I came to London on the matter, at my own cost, and at great personal inconvenience. That does not, however, lessen *my responsibility for payment* of the expense, and I have been doing what I can to get the subscribers to pay up. In this state of matters, would you limit the sum to you to L.250, although I am quite sensible that this account, like all former ones, is moderately charged, and we shall, by fair means or foul, endeavour to get the money?" (Signed) "ARCHD. M'LELLAN." Again, in a letter dated "Glasgow, 29th April 1846," he says, "I am coming to London, I am afraid, on a forlorn hope; but one thing I trust, I shall succeed in assuring you, that it was from no want of anxiety to procure a settlement to your account on the poor-rate bill, that has hung it up so long, and nothing but sheer shame that kept me from answering your letters. We shall, I trust, when I see you, permanently come to some settlement on this *questio vexata.*" (Signed) "ARCHD. M'LELLAN."

The defender, in defence, stated that the account claimed had not been incurred on his individual employment, but that the real employers were a number of proprietors in Glasgow, for whom he had acted as chairman or convener of committee only, and as the mere medium of communication with the pursuer, and he pleaded *inter alia*, 1. That he was not the employer, at least not the *sole* employer, of the advicator's house, and the action was incompetent and untenable as directed against the respondent exclusively. 2. The alleged claim for L.300, as due by bill, had incurred prescription, and could not be established, except, both as to constitution and resting-owing, by writ or oath, which it was not.

It was pleaded in answer by the pursuer, 1. That as the defender individually employed the advicator's firm, and as they

July 2. 1852. undertook the business at his request, and upon his responsibility, he is liable for the whole costs incurred to them. 2. Even supposing the firm had been employed to oppose the bill, not by the defender individually, but by him in conjunction with other parties, he is liable personally for the whole expenses incurred, under a reservation of any right of relief competent to him against these parties, if such exist; and, 3. The plea of the triennial prescription is obviated, not only by the judicial admissions on the record, but by his letters produced in process, and particularly by his letters of 23d December 1841, and 29th April 1846, which established the constitution and subsistence of the debt.

The Sheriff, (Alison) reversing the judgment of the Sheriff-substitute, (Skene) sustained the defence, and dismissed the action.

The pursuer advocated, and the Lord Ordinary, (Robertson,) pronounced an interlocutor, by which, in respect, 1st, That although the claim fell within the statute 1579, c. 83, it was competent for the advovator to prove the constitution and subsistence of the debt by the writ or oath of the respondent; and, in respect, "the original employment is sufficiently established by the letters of the respondent, dated 11th February, 19th February, and 12th March 1840, and the subsistence of the debt by the letters of 23d December 1841, and 29th April 1846, and admissions on record, Finds that the advovator is entitled to decree against the respondent for the true amount of the debt sought to be recovered; 2d, In respect of the decision of the Court in the case of *Walker v. Brown*, 23d November 1803, Morrison App. *voce solidum et pro rata*, No. 1, Finds, that even although other parties, on whose behoof, along with the respondent, the business was done, might have been liable, yet that his individual liability extended to the whole amount of the just claim of the advovator; and in respect no evidence is referred to to shew that other parties were originally liable, or that the claim subsists against them notwithstanding the lapse of the period of prescription, or that any satisfactory reason has been stated for calling any such parties, Finds that the objection of all parties not having been called, is unfounded; and therefore advocates the cause."

The defender reclaimed.

*Macfarlane and Penney*, referred to *Hamilton*, 11th March 1830, and *Ross*, 18th July 1848.

*Moncreiff and T. Mackenzie* were for the pursuers.

**LORD JUSTICE-CLERK.** I concur in the judgment of the Lord Ordinary. In regard to the dilatory plea that all parties have not been called, as they are not associated here as a body, either by statute, nor as a corporation, it is not necessary to call them. The action is founded on employment by a body of individuals who said they had a common cause. In every such case, some individuals put themselves forward and take charge of the measure. It lies with them to get the funds and see if they have sufficient relief against others. But if among these any one conduct himself as the defender has done in regard to the pursuers, I think it perfectly competent to proceed against that individual, unless there is some limitations of his liability intimated to the pursuer. It was the duty of McLellan to raise his action of relief. He should have given the other parties liable notice of the action, and have called on them either to pay their share, or intimated, that as he meant to resist, they would be responsible for the result, or the omission of any plea. The action, therefore, is quite competent. As to the question of prescription, the letters of 11th and 19th Feb. and 12th March 1840, sufficiently establish the employing, and the letters of 23d Dec. 1841, and 29th April 1846, the resting-owing.

The other Judges concurred.

The COURT adhered, and found the defender liable in additional expenses.

*John Forrester, W.S., Agent for Pursuers.*

*Gibson-Craigs, Dalziel & Brodie, W.S., Agents for Defender.*

### FIRST DIVISION.

PETITION, SIR JOHN MARJORIBANKS of Lees, Bart.

No. 358.

11 and 12 Vict. c. 86, sec. 33—*Entail Amendment Act*—Under an application for excambion of part of certain lands, forming part of an entailed estate lying in more than one county, deed of consent sustained which described the lands proposed to be excambied as part of the lands of A. and B., situated in the county of C.

This was a petition for excambion of part of the estates of Newton of Eccles, and Birgham, in the county of Berwick, and was reported verbally by the Lord Ordinary (Cowan) on the following point:—The deed of entail executed by the trustees of Sir John Marjoribanks contains, besides the estates above men-

July 8. 1852. tioned, some houses in Edinburgh, situated in the county of Edinburgh. In the deed of consent, the deed of entail is described as an entail of, "inter alia, all and whole the said lands and estate of Eccles, and Birgham, and others, lying within the parish of Eccles, and sheriffdom of Berwick." This seems not to be in strict conformity with the form in the schedule,—inasmuch as reference is not made to the whole subjects contained in the deed of entail, but only to those which are situated in the county of Berwick; and it is not specified that a part of the entailed estate is situated in the county of Edinburgh. The petition relates exclusively to the lands in the county of Berwick; and the deed of entail gives power to the heir in possession to sell the houses in Edinburgh, with a provision that the price shall be invested in the purchase of lands, to be entailed along with the remainder of the estate. Reference was made to the case of the *Earl of Stair*, March 6. 1852, in which, with reference to the enactment in sec. 33 of the Entail Amendment Act, that the petition shall set forth "the date of the petitioner's infestment" in the entailed estate, if any be, it was found that it was necessary only to set forth the date of the petitioner's infestment in that part of the estate to which the petition relates, and not the dates of his infestments in the other parts of the estate.

*Duff*, for the petitioner, supported the relevancy of the consent.

The COURT sustained the deed of consent, and remitted to the Lord Ordinary to proceed farther.

*Bell and M·Lean, W.S., Petitioner's Agents.*

### FIRST DIVISON.

No. 359.

RAE v. M'LAY.

*Slander—Malice—Issue—Privilege.*—1. *Held* that it is not necessary in order to entitle a defender to have malice inserted in the pursuer's issue, in an action of damages for defamation, that he should admit the use of the words libelled, or state specifically what words he did use. 2. Circumstances in which *held* that the statement or admission of the pursuer did not shew a case of privilege on the part of the defender so as to entitle him to have malice put in the pursuer's issue.

July 8. 1852. This case, which was an action of damages for defamation, came before the Court for the adjustment of issues. The question was, *Rae v. M'Lay.* whether malice should be put in the issue? The defender con-

tended, that from the admissions of the pursuer on record, the July 8. 1852.  
case was one of privilege.

The pursuer is the minister of the parish of Avondale, and the  
defender is minister of the United Presbyterian Church at Strath-  
aven. Both of them were members of the parochial board of Avon-  
dale.

Rae v. Mc' Lay.

The condescendence set forth, that on 18th November 1851, at a meeting of the said parochial board, the defender, "after asking the pursuer, through the chairman, a question regarding a certain sum allowed for communion elements for the said parish, and hearing the pursuer's answer, falsely, calumniously, and maliciously, or, at least, falsely and calumniously, alleged, in the presence and hearing of [certain parties named,] that the pursuer had acted a part mean, dishonest, and despicable, in reference to the said money, and that the defender would take his own time and way in exposing it; or used words of that import, to the loss and damage of the pursuer in his character and feelings, and in his reputation and usefulness as a minister." And the pursuer proposed to put in issue, whether on the occasion mentioned the "defender did falsely, calumniously, and wrongfully," say the words men-  
tioned?

The defender denied the use of the words imputed to him. He averred, 1. That at the parochial board a question "sometime ago arose regarding the allowance for communion elements payable by the heritors, which was undisposed of in consequence of the sacrament not having been dispensed in the parish church during the vacancy that occurred between the death of the pursuer's predecessor, the Rev. Mr Proudfoot, in November 1849, and the induction of the pursuer, as his successor, in the charge in August 1850." 2. That at a meeting of a committee of the parochial board, held on 4th March 1851, it was resolved that this money should be appplied to the use of the poor; and that the treasurer was accordingly instructed to obtain it and apply it as stated. 3. Thereafter, at a meeting of the board held on 26th May 1851, Mr Rae moved, "that as it has not been shewn, nor cannot be shewn, that the order given in last minute relative to the allowance for communion elements is a matter with which this board has any right to interfere, and as it is plainly the duty of the board to confine itself strictly to its own province," that said order be expunged from the minutes; which motion was rejected by a majority of 9 to 3.

In answer to these averments, the pursuer admitted that the

July 8. 1852. question, as to the disposal of the money, had been before the  
Rae v. M'LAY. board, and made reference to the minutes from which the aver-  
ments were quoted.

The defender further stated, 4. The treasurer of the parochial board, the late Thomas Fleming, who was also collector of minister's stipend from the heritors of the parish, intended to follow the advice which he had obtained from a professional man in Edinburgh, in regard to the competing claims of Mr Rae and the board, namely, "that until the Rev. Mr Rae (the pursuer), the parochial board, and the heritors, settled to whom it belongs, you cannot part with the money;" and that it should be put into bank till a multiplepoinding should be brought, if found necessary; but 5. That having died, the pursuer, within a few days of his death, called on Mrs Fleming, and induced her to part with the receipts which remained in the possession of her husband uncollected, and to pay him a sum of £7, or thereby, which he had received, and had not paid over to the pursuer, in consequence of the dispute between the pursuer and the parochial board; and this fact was soon afterwards communicated by Mrs Fleming to the defender, who, 7. Accordingly, at a meeting of the board, held on 18th November 1851, brought the matter under notice of the board. Reference was made to the minutes of the meeting for their terms. The defender, 8. denied that he had imputed dishonesty to the pursuer, and disclaimed all intention to do so.

The pursuer acknowledged that he had received the sum of £7 from Mrs Fleming, but denied that it was all for communion elements, but chiefly a balance of stipend; and in answer to stat. 7, he answered, "Reference is made to the minutes for their terms."

The defender pleaded, that on the occasion libelled he had spoken only in the *bona fide* exercise of his right as a member of the parochial board, and on a question in which the board was interested; and that even according to the pursuer's own statement or admission, any statement made by him was of a privileged nature. And he proposed that the word "maliciously" should be put in the issue.

The question was reported to the Court by Lord Ordinary (Anderson). In his note he says, "if the views that prevailed in the case of *Fraser v. Wilson*, 10th December 1850, namely, that the defender shall not be allowed an issue of privilege, unless he admits the use of the words libelled, or sets forth the words which he did use, are to be held as settling the law, there is an end of the present discussion. The words used by the defender are

neither admitted nor set forth, and hence he is excluded from July 3, 1852.  
pleading privilege.

Rae v. M' Lay.

*W. Peddie*, and *Solicitor-General*, for the defender. The question is, is there enough in the allegations or *admissions* of the pursuer to shew a case of privilege. *Fenton v. Currie*, 5 D., 705. If so, malice must be in the issue. The Lord Ordinary, indeed, is of opinion, on the authority of *Fraser v. Wilson*, that the defender cannot have malice put in the pursuer's issue, unless he admits the words libelled, or sets forth what he did use. But *Fraser* was never intended to fix such a doctrine. There it was clear, that there was no case of privilege, as appearing from the statement or admission of the pursuer. The defender did not contend there was, but he wished to take a *separate* issue of privilege. This the Court would not allow unless he stated specifically what it was he held to be privileged. Besides, in many of the cases in the books in which malice has been put in the pursuer's issue, there was a denial by the defender of the words libelled.

[The COURT intimated that it was not necessary further to argue this question.]

The only question then is, whether the statement or admissions of the pursuer shew a case of privilege. Now these shew, that the board had discussed the question as to the disposal of this money, to which they claimed a right, on the authority of *Dunlop's Parochial Law*, c. 5, § 1, No. 109. True, their right was *disputed*, and the pursuer had a rival claim. Still they were entitled to make their claim, and having made it—and the question being one with which the board had dealt,—they were entitled to notice the conduct of any of their number in reference to the matter. In *Dunbar v. Stoddart*, 15th Feb. 1849, 11 D. 587, the conduct of the person slandered was in no manner under the notice of the meeting. The present case is stronger than those of *Hamilton v. Hope*, v. S. and D., 569; and *Newland v. Shaw*, 2d Dec. 1833, xii. S. and D., 550, in which the occasions of the slander were a meeting of a *senatus academicus*, and a board of *heritors*. Possibly, the words libelled, supposing them to have been used, may be too strong. If so, their over severity will be taken as a proof by the jury of actual malice, so as to destroy privilege. But the only question for the Court now is, was the defender entitled to notice the conduct of the pursuer? If so, his case is privileged, and malice must be in the issue.

*Monro*, and the *Lord Advocate*, for the pursuer. There is no ad-

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July 3. 1852. mission by the pursuer, of any right in the board to discuss his conduct. He all along denied their right to the money which he himself claimed; as a rival claimant, his conduct was not under their review.

**LORD PRESIDENT.** The case of *Fraser v. Wilson* differs from this, in that there the defender proposed taking a separate issue of privilege, while it was apparent, that there was no privilege as appearing from the pursuer's statement or admissions. In the present case, I don't think the pursuer admits what entitles the defender to an issue of malice. The observations made by the defender must be pertinent to the matter before the board, before they can be held to be privileged. Now, there was no pertinency here, in commenting on the pursuer's conduct. The defender himself says, he does not mean to impute dishonesty to the pursuer. Therefore on his own shewing, there was no pertinency in imputing it. A case of privilege may indeed appear on trial. Meantime, there is none on the pursuer's shewing.

**LORDS CUNINGHAM, and IVORY,** concurred.

**LORD PRESIDENT.** I see no use of the word "wrongfully" in the issue.

Issue approved of as proposed by the pursuer, with word "wrongfully" delete.

*John Ronald, S.S.C., Pursuer's Agent.*

*James Peddie, W.S., Defender's Agent.*

### FIRST DIVISION.

No. 360.

*Poor DAVID PHILLIP v. DIXON.*

**Process—Issues—Master and Servant—Contractor—Damages.**—In an action of damages at the instance of a collier against the proprietor of a coal-pit for bodily injury sustained by him, there having been put in issue the fact of his being employed by the proprietor, it is not necessary for the pursuer to take a separate issue as to the defence that the pit was in the hands of a contractor at the time the injury was received.

*Observed,* that the word "engine" would cover the whole machinery used for raising workmen from a coal-pit.

July 6. 1852.

*Phillip v.  
Dixon.*

This case was reported by Lord Anderson for the adjustment of issues. The pursuer is a collier, and while being drawn up the pit in which he had been working, he was precipitated to the bottom, and sustained severe injury. He raised this action of damages against the coal-master and his trustee, concluding for

damages on the ground that the injuries he had received were caused, (1.) By the insufficiency of the engine or machinery used at the pit; or, (2.) Through the unskilfulness, carelessness, or negligence of the defenders, or others for whom they are responsible, in working the said engine. Separate issues were put in on each of these heads.

*Patton*, for the defenders, objected, that as the defence was that the works were in the occupation of a contractor at the time of the injury, another issue should be put in to the effect that the works were then in the hands of the proprietor.

*Wilson* and *Craufurd*, for the pursuer. All we want is, to get a proof of the facts from which we allege that the legal responsibility of the defenders arise. The issue in the case of *Brydone v. Stewart*, 14 D., 596, was similar to that now proposed.

The LORD PRESIDENT. It may be a difficult question as to who was in occupation. Is it necessary for the pursuer's case to aver and prove the occupation by the proprietor? and can it be said that he has not a relevant case unless he do so, no matter how responsible the proprietor may be for the machinery? Is he obliged to prove more than that the injury was caused by the defenders, or others for whom they were responsible? I do not think so.

Objection repelled. No counter issue was proposed.

*Patton*. In the summons, the injury is said to have arisen from a defect in the engine. In the revised condescendence it is expanded to the engine and machinery. It would be incompetent at the trial to prove that the injury arose from some latent defect in the chains or hatch, there being no specification of such defect.

*Craufurd*. In speaking of the sufficiency of a draw-well, the ropes and buckets are considered as part of the draw-well; and so in a coal mine, the hatch and chains are properly part of the engine. The addition of the word machinery to the issue can do no harm to the defenders.

The LORD PRESIDENT. I think that the word engine here may be held to cover the machinery and appurtenances connected with it.

LORD IVORY suggested that the words, "for drawing up the workmen to the surface" should be inserted in the issue.

The following issues were approved of; 1. Whether the pursuer, while in the employment of the defenders or of the said William Dixon, as a collier or workman, at the coal-pit known by the name

July 6. 1852. of the "Store Pit Carfin," was on the 7th day of May 1849, while being drawn up in a hatch or cage from the bottom of said pit, suddenly precipitated to, and dashed against, the bottom of said pit, whereby he sustained severe bodily injuries, and was placed in danger of his life: And whether the said injuries were caused by the engine or machinery used at the said pit for drawing up the workmen to the surface, being in an unsafe and insufficient state, from causes for which the defenders are responsible, to the loss, injury, and damage of the pursuer?

2. Whether the pursuer, &c. (as in preceding issue): And whether the said injuries were caused by and through the unskillfulness, carelessness, or negligence of the defenders, or others for whom they are responsible, to the loss, injury, and damage of the pursuer?

Damages L.400.

*Hew H. Crichton, W.S., Pursuer's Agent.*

*Walker and Melville, W.S., Defender's Agents.*

## FIRST DIVISION.

### No. 361.

#### SIMPSON v. YOUNG.

*Process—Sheriff-Court—Extracted Decree—Suspension—1 and 2 Vict., c. 84—Act of Sederunt, 24th September 1838.*—An extracted decree of absolvitor with expenses in the Sheriff-court cannot competently be brought under review by suspension.

July 6. 1852.

*Simpson v. Young.*

This was a suspension of a Sheriff-court decree for expenses, which had been extracted, and upon which the suspender, Simpson, had received a charge. In a summary application for interdict, presented by Simpson to the Sheriff of Forfarshire against Young, the Sheriff had found that the suspender was bound to find caution for expenses. Simpson failed to do so, and the Sheriff accordingly dismissed the action, and found the suspender liable in expenses. The suspender presented a note of advocation on juratory caution. This note was not proceeded with; and protestation was put up and allowed to become final. A process of count and reckoning at the instance of Simpson against Young was also dismissed, and the suspender found liable in expenses, in respect of his failure to find caution: and thereafter a note of advocation, on juratory caution, was dismissed, on the ground of there being no *probabilis causa litigandi*.

The Lord Ordinary on the Bills (Cowan) now refused this pre-

sent note of suspension, and found the suspender liable in expenses, July 6. 1852. on the grounds stated in the following note appended to his interlocutor : " Had the Lord Ordinary considered that he could have competently gone into the merits of the decree, dismissing the action, and finding expenses due, he would have passed the note, being of opinion that there is room for doubting the soundness of the views acted on by the Sheriff in requiring the suspender to find caution, having regard to the relative position of the parties in this case, and the nature of the question at issue between them. But no reduction has been brought of the extracted decree ; and moreover it is shewn by the statement in the answers and the productions therewith, that the merits had been attempted to be brought under review by advocation on two occasions, but in both unsuccessfully. In this situation there appears to the Lord Ordinary no other course open to be followed by him but to refuse the note, in conformity with the decision of the Court in the case of *Whyte v. Vallance*, 14th February 1835, and the other cases therein referred to."

Against this interlocutor the suspender reclaimed.

*Pattison*, for the reclaimer. The late statute changes the nature of a suspension, and makes it identical with a reduction, in respect it brings up the whole decree and warrants, 1 and 2 Vict., c. 86, § 4, and the form of schedule in the Act of Sederunt, 24th September 1838.

*Goodall*, for the respondent, argued, that it was now incompetent to enter into a consideration of the merits. *Martin and Sibbald v. Wilson*, 27th November 1851; *Douglas*, 26th January 1828.

**The LORD PRESIDENT.** We need not inquire whether the Sheriff was right or wrong ; nor do I think that juratory caution has anything to do with this case. The question now before us comes to this,—holding that the judgment in the case of *Vallance* clearly expresses what was the law and practice at that date, whether there has been such an alteration of the law by the 1 and 2 Vict. c. 86, as to make that case no longer applicable where a party wishes to get review of a decree of absolvitor in the Inferior Court, with expenses. It does not appear to me that, on a fair consideration of that Act, it was intended to make a suspension a mode of review in cases in which it was not a known mode of review before. In the case of *Vallance* and the other cases there referred to, it was settled that a judgment of absolvitor, with expenses, was one of those cases which could not be so brought

July 6. 1852. under review by suspension. If this reading of the statute be correct, that it was not intended to render competent to review by suspension what was not considered competent before, I do not feel moved at all by the argument founded on the terms of the schedule in the Act of Sederunt; for the suspending the grounds of warrants is a very proper form in the ordinary class of suspensions; but this rather gives strength to the observation, that the Act of Sederunt was only intended to apply to those acts and warrants in which the grounds were fairly before the Court. This case is not in that situation; therefore I do not think that the schedule applies to cases of this kind.

**LORD CUNINGHAME** concurred.

**LORD IVORY.** I am of the same opinion. It is our safe course to confine our judgment to this single ground. There was no intention, by the statute of Victoria, to introduce a different kind of suspension from that which was previously competent under the old form; and I am the more satisfied that this is a sound construction, upon looking to the Parliamentary Report of the Commissioners on which the statute of Victoria was obtained; for it appears from that report that the only remedy intended to be introduced was in regard to the form of the suspension, and the removal of certain formal proceedings, so as to get greater facilities on coming up here. It was not meant to alter the nature of the suspension in any way.

The COURT "adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the note: Find additional expenses due," &c.

*James Bell, S.S.C., Reclaimer's Agent.*

*Graham Binny, W.S., Respondent's Agent.*

## FIRST DIVISION.

No. 362.

**NORTON v. STIRLING.**

*Entail—Defects in Recording—Petition to Record—Mis-description of Heirs—Resolutive Clauses—inaccuracy in Engrossing—Deed of Revocation—Failure to Record.*—Objections were taken to the recording of an entail. 1. That the petition for leave to record did not necessarily apply to the entail, inasmuch as there is a variation in the description of the heirs called to the succession. 2. That the irritant clause is erroneously engrossed, inasmuch as the words "that is, shall fail or neglect to obey or perform,"

have been transcribed "that is, shall fail *to* neglect, *or* obey, or perform." 3. That a certain deed of revocation as regards one of the postponed substitute heirs which formed part of the entail, had not been recorded in the Register of Tailzies :—*Held* (1.) That there being evidence otherwise of the identity of the deed, the mis-description was not such as to prove fatal. (2.) That the inaccuracy in recording was not destructive of the import of the clause as riding over the whole of the previous conditions of the entail. (3.) But the recording of the first deed was not essential to make the first deed effectual.

This was an action of declarator and adjudication at the in- July 6. 1852.  
stance of the Honourable Miss Mary Ellen Norton against Sir <sup>Norton v.</sup> Samuel Stirling of Renton and Glorat, Bart. The action was <sup>Stirling.</sup> brought by Miss Stirling as a creditor, to the extent of £600, of Sir Samuel. The conclusions for adjudication proceeded on the allegation that the entail was ineffectual to protect the estate from the diligence of creditors, in respect of certain errors committed in or connected with the recording of the deed of tailzie. Captain George Stirling, younger brother and heir-presumptive of Sir Samuel Stirling, and his son, were also sisted as parties to the action.

The entail was not alleged to be in any respect defective; but it was set forth, in support of the action,—

I. That the Register of Tailzies contains no warrant for recording any such deed of entail as that executed by the entaller, Sir Alexander Stirling, upon 28th June 1788, inasmuch as the narrative of the petition to the Court for authority to register the entail set forth the deed then produced as a tailzie in favour of the entaller, and the heirs-male of his body, whom failing, of other heirs; while the entail registered was in favour of his only son, John Stirling, as institute; whom failing, of Alexander Home Stirling, his grandson, eldest son of John, and the heirs whomsoever of his body, and his other grandsons and grand-daughters, and the heirs whomsoever of their bodies respectively, in their order. It was admitted that the deed of entail is *de facto* recorded in the Register of Tailzies.

II. That the irritant clause has been erroneously engrossed in the Register of Tailzies, inasmuch as that portion of it which contains the words, "that is, shall fail *or* neglect *to* obey or perform the said conditions and provisions," and so forth, has been transcribed thus—"that is, shall fail *to* neglect *or* obey or perform the said conditions and provisions," and so forth. It was averred that the recorded deed is, in consequence, essentially different from

July 6. 1862.  
 Norton v. Stirling.

the deed of entail ; and further, that the recorded deed does not contain, in consequence of the error, all the clauses essential for protecting the estate from the diligence of creditors ; and,

III. That a certain deed of revocation, as regards one of the postponed substitute heirs, Mary Stirling, which formed a part of the entail, had not been recorded in the Register of Tailzies.

In defence it was pleaded that the first objection raises a question merely of identity, and that it is not reasonably doubtful that the deed of entail actually presented to the Court, and for the recording of which their warrant was obtained, was the deed of entail executed by Sir Alexander Stirling, and actually recorded in terms of said warrant : that the second objection relates to a palpable clerical error ; and that the discrepancy thereby created between the recorded deed and the entail itself is altogether immaterial and unessential : and that, as to the third objection, founded on the non-registration of the deed of revocation, the registration of this revocation was not necessary to protect the estate against the diligence of creditors, supposing the deed of entail itself to be otherwise duly recorded in terms of the Act 1685.

The Lord Ordinary (Ivory) sustained the defences, with expenses. In a note his Lordship remarked—“ 1. The *first* objection stated in the summons, the Lord Ordinary looks upon as involving a mere question of *identity*, which is very different from a question of *fetter*s, and does not turn upon the same principle of strict and rigorous construction.” . . . As to the identity, his Lordship thought there could be no doubt ; “ and as to compliance with the requirements of the Entail Act 1685, it is surely enough (the question of identity being settled) that whatever misrecital there may be in the mere introductory preamble to the act of registration, the register itself does *de facto* contain, *verbatim et literatim*, the actual deed of entail under challenge, full and entire in its whole clauses.” 2. The discrepancy upon which the second objection was founded, his Lordship held to be a “ clerical error, and palpably demonstrated to be so by the whole context of the very clause in which the blunder occurs.” The clause, as registered, after “as clear a *general* proviso against contravention as could be desired,” goes on—but by way of explanation only—“ *That is,*” &c. . . . But the “*failing to neglect*” the conditions of entail would not be a *contravention*, while the “*failing to obey or perform,*” (in the second branch of the *alternative*,) would ; and these two things are inseparably combined, as being both and each of them equivalent to contravention by the very structure of the sentence.

It would seem, therefore, not to be strict construction, but absolute perversion, and *reductio ad absurdum* of the plain, palpable, and necessary meaning implied in the supposed alternatives, were the pursuer's objection to be given effect to." . . . 3. And with regard to the third objection, "the requirements of the Act 1685 have been completely followed out as regards the *only* entail which is at present in dispute, for that entail has been duly registered in all and each of its clauses. Suppose that that entail had been registered *before* the date of the deed of alteration, the failure to record the latter deed, even though it might have tended, in some respects, to create a different entail, however much it might have rendered ineffectual the alterations so made, would hardly have affected the primary entail, as an entail which had itself been duly registered."

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Against this interlocutor the pursuer reclaimed.

*Patton*, the *Dean of Faculty*, and the *Lord Advocate (Inglis)*, for the claimer—I. There is no judicial evidence of the authority of the Court having been interposed to register this deed. There is a fatal blunder in the description of the deed. II. The statute imperatively requires the clauses in the deed itself, and not the mere substance of them to be recorded, and also repeated in the investiture; and if an expression be recorded capable of a different construction, then the deed is not recorded; *Lumsden*, Bell's Ap. Cases, ii. p. 114, *dictum* of Lord Campbell; *Sharpe*, 1 Shaw and Maclaine, p. 594; *Cathcart*, 8 D. 970; *Holmes*, 13 D. 689. III. The destination must be recorded to obey the statute, and every alteration on it, that the public may know the terms of the entail. Where even the omission to register the name and arms is accompanied with a forfeiture, that also the creditor has an interest to see recorded, to know his own risk in dealing with the debtor; *Broomfield*, Dict. 15680; *Drummond Stewart*, 23d May 1844, 6 D. 1073.

*Duff*, *T. Mackenzie Deas*, and the *Solicitor-General (Neaves)*, for the respondents. I. No misdescription is fatal which does not go to destroy the evidence of the identity of the deed. II. An error either in recording the entail, or transcribing the clauses into the deeds forming the investiture, must be material. Here the blunder is a clerical error; and, besides, the clause as recorded is in substance the resolutive clause of the entail, and contains enough to be operative; *Graham*, 12th June 1835, 13 S. 905; *Moray Stirling*, 28th May 1845, 7 D. 640; *Lockhart*, 20th May 1841, 3 D. 904. III. The principal deed is the basis of

July 6. 1852. the entail. Because the latent alteration of a part of the destination that does not come into operation for years is not recorded, that will not affect the whole entail. It is not necessary that all the modifications which the testator makes on an entail must be recorded, in order to give validity to that which is recorded; *Porterfield*, 18th November 1829, 8 S. 16; 2 W. S. 269; 5 W. S. 515.

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The LORD PRESIDENT. The objections which are raised to the entail are not objections to the original deed of entail itself, but to the measures which have been taken towards giving it full effect, and three questions have been raised in reference to it.

I. The first of these has reference to the procedure for recording the deed of entail—the want of evidence of compliance with the regulations of the Act 1685 as to interponing the authority of the Court to recording the entail. Now we have before us the procedure which took place on that occasion. The point that has been raised is, that this petition does not necessarily apply to the entail on which the defenders take their stand; inasmuch as there is a variation in the description of the heirs called to the succession. Now the statute requires that the entail shall be produced, and authority given to record it. The authority to record the entail is therefore a statutory matter, and must be given by the Court; but the machinery for obtaining that authority is not statutory. The question here, therefore, is, was the entail so produced and the authority so given? It appears to me that there is evidence that it was so, and even if the petition were statutory, I think that the misdescription was not such as to raise any reasonable doubt on the subject. Let us see in what respects the deed is correctly described. It is a deed of a certain date, recorded of a certain date, a deed of which an extract from the books of Council and Session was produced, a deed for the transmission of which warrant was granted and put into execution, and in reference to which a writing was attached to the deed, all of which seem to me to be conclusive as to the identity of the deed. The expression in the petition is not altogether false and erroneous, and not so clearly indicative of another deed as to come into competition with the evidence of identity furnished by the other circumstances to which I have referred. Therefore in this part of the case I think there is evidence that authority was given to the recording of this entail.

II. Then we come to the second objection here raised, as to

the error in recording the resolutive clause. Now that part of July 6. 1852.  
the case appears to me to be the part of the case which requires  
most consideration ; and I must say that it requires the more con- Norton v.  
sideration and attention, in respect of the views which are reported  
to be entertained by the other Division of the Court in the cases  
of *Lochbuy and Craigneds*, (*Cathcart v. Cunningham*.) In the  
way in which some of these opinions are expressed, I am not  
quite certain whether their Lordships intended to abide by the  
doctrine I understood at one time to prevail, that in order to found  
an objection, there must be a substantial difference, and not mere  
discrepancy of expression between the clauses of the entail and  
those clauses as engrossed in the Register, or the deeds forming  
the investiture.

The recent statute in regard to entails imperfect as respects  
any of the three cardinal points of the entail, the prohibitions  
against alteration of the succession, alienation and contraction of  
debt, seems to make it the more necessary to guard against giving  
undue weight to such objections as are here in question. It pro-  
ceeds on this reasonable view of matters, that when a party has  
the power to defeat the entail, being an imperfect one, such as  
where a prohibition is not properly fenced, he should be allowed  
to do directly what he could do indirectly ; and it is therefore of  
importance that we should see that a particular clause which is  
thus essential to the entail, should not be annulled on slight grounds.  
Now the cases of *Macaine* and *Cunninghame* appear to decide,  
that in regard to recording a deed or engrossing the conditions  
in the investiture, great strictness is necessary as to identity of  
terms. This is laid down apparently in very broad terms in these  
cases, at least in expressions which might be carried that length,  
in the opinions of the Lord Justice-Clerk and Lord Moncreiff ;  
but whether it was intended to go beyond such kinds of omission  
and difference as occurred in that particular case, I do not know.  
Perhaps the safer way to deal with such judgments is, to take  
them as applicable to the particular case before the Court. And  
if it was not intended that every discrepancy, however small, being  
a variance from the original, even a more minute discrepancy than  
would vitiate an indictment, shall prove fatal to the whole entail  
—I can hardly think it would be so—then every case comes to  
be considered on its own circumstances, and it must now be deter-  
mined whether the error in question is of such importance as to  
render this an unrecorded entail as regards the resolutive clause.

The variance here occurs in what is an essential clause, but

July 6, 1852. the entail. Because the latent alteration of a part of the destination that does not come into operation for years is not recorded, that will not affect the whole entail. It is not necessary that all the modifications which the testator makes on an entail must be recorded, in order to give validity to that which is recorded; *Porterfield*, 18th November 1829, 8 S. 16; 2 W. S. 269; 5 W. S. 515.

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II. Then we come to the second objection here raised, as to

the error in recording the resolute clause. Now that part of July 6, 1852.  
the case appears to me to be the part of the case which requires most consideration ; and I must say that it requires the more consideration and attention, in respect of the views which are reported to be entertained by the other Division of the Court in the cases of *Lochbuy* and *Craigends*, (*Cathcart v. Cunningham.*) In the way in which some of these opinions are expressed, I am not quite certain whether their Lordships intended to abide by the doctrine I understood at one time to prevail, that in order to found an objection, there must be a substantial difference, and not mere discrepancy of expression between the clauses of the entail and those clauses as engrossed in the Register, or the deeds forming the investiture.

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The recent statute in regard to entails imperfect as respects any of the three cardinal points of the entail, the prohibitions against alteration of the succession, alienation and contraction of debt, seems to make it the more necessary to guard against giving undue weight to such objections as are here in question. It proceeds on this reasonable view of matters, that when a party has the power to defeat the entail, being an imperfect one, such as where a prohibition is not properly fenced, he should be allowed to do directly what he could do indirectly ; and it is therefore of importance that we should see that a particular clause which is thus essential to the entail, should not be annulled on slight grounds. Now the cases of *Macaine* and *Cunninghame* appear to decide, that in regard to recording a deed or engrossing the conditions in the investiture, great strictness is necessary as to identity of terms. This is laid down apparently in very broad terms in these cases, at least in expressions which might be carried that length, in the opinions of the Lord Justice-Clerk and Lord Moncreiff ; but whether it was intended to go beyond such kinds of omission and difference as occurred in that particular case, I do not know. Perhaps the safer way to deal with such judgments is, to take them as applicable to the particular case before the Court. And if it was not intended that every discrepancy, however small, being a variance from the original, even a more minute discrepancy than would vitiate an indictment, shall prove fatal to the whole entail —I can hardly think it would be so—then every case comes to be considered on its own circumstances, and it must now be determined whether the error in question is of such importance as to render this an unrecorded entail as regards the resolute clause.

The variance here occurs in what is an essential clause, but

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even in the resolute clause it does not follow that every word is essential. The clause is essential to the deed; but every word is not essential to the clause. Although the objection in this case arises in the resolute clause, I think it could hardly be contended,—at least, I do not so construe the opinions in the cases of *Lochbuy* and *Craigends*,—that every word was essential, so that the omission of it would destroy the record. I think that would be a construction even going beyond that in criminal cases. Now it has been argued, that throughout this deed there is a distinction drawn between conditions and provisions on the one hand, and restrictions and limitations on the other, as things altogether different. I am not disposed to adopt that reading; although I think that there may be a distinction between failure to perform and active contravention.

The inaccuracy in recording here, however, is not destructive of the import of this resolute clause, as riding over the whole of the previous conditions of this entail. It is at best repeating in an unintelligible manner, what has been already stated in a way which it would be difficult to make more clear. But further, it appears to me, that this is a matter so plainly of a clerical nature, and so ineffectual to produce an opposite reading of the deed, that it cannot be given effect to. If it was plainly the introduction to that which followed, then it might be said that the interpretation which the party had himself given by a subsequent portion of the deed, was destructive of it. But it is not of that character, and therefore I am not disposed to give effect to it. To do so, would be pushing the abstract doctrine in the case of *Lochbuy* farther than I am at present prepared to carry it, and farther than the case itself requires.

III. The third objection must also depend on circumstances affecting the particular entail. I think the cases that have been referred to of new deeds conveying the estate, raise the question whether the prior or subsequent entail was the true entail. Cases have occurred in which both deeds have been held to be the entail; but where the party executes a deed reserving power to alter the succession, I cannot think that the recording of the subsequent deed is essential to make the first deed available. The question might arise as to the right and title to the estate, but it could never be held that the first entail was not well recorded at the time the subsequent deed was executed. Then when does the good recording become a bad one, in respect of the not recording of a subsequent deed. I think that the Lord Ordinary's interlocutor must be adhered to.

LORD CUNINGHAME. My opinion coincides entirely with that of your Lordship, and the Lord Ordinary. The present action is raised on the plea that the entail was not recorded in the Register of tailzies, and therefore is not effectual against creditors. The circumstances under which this plea is urged are novel, and, in my opinion, are not sufficient to afford even a plausible support to the action. I am not satisfied that there was any mis-recital in the petition for authority to record this entail; and even if there had been a clerical mistake in the description of the deed in the petition, the registration of the actual deed of entail as granted would not have been annulled. For the deed on the register was the material document, and it would have corrected any mistake in the narrative of the petition, if there was any. There was abundance of collateral evidence to identify this tailzie as the one produced to the Court, and which their Lordships specially authorised to be recorded in the register of tailzies.

II. There is no doubt that there is a slight clerical error in the copy of two words in the register; but it is of no consequence, as the words miscopied may be rejected, and the terms entered in the record both in the preceding and subsequent branches of *the same* clause, compared with the principal deed; and they, of themselves, import a complete and effectual resolutive clause.

Besides, I cannot hold a visible clerical error by the copyist in the register to have the same fatal effect as has been attached to some literal errors in *principal deeds*. No case on record has gone this length. If 999 words out of every 1000 have been rightly copied in the register, the import of the deed is clearly discovered, and no one can be misled by a palpable clerical error—perhaps of two or three letters (it may be of surplusage as here) in the whole deed.

III. The third objection is equally new and untenable. It has never been found or understood that deeds of recall, or even of new and additional nomination, subsequently executed by an entailer, in virtue of a reserved power, must be recorded, to bring the principal tailzie when recorded within the operation of the Act 1685. In the anxiously discussed question between Sir M. Shaw Stewart and Mr Corbet Porterfield, (which was twice in the House of Lords,) the deed of nomination on which the right of the successful party depended—executed long after the original tailzie, never was recorded in the Register of Tailzies; but no plea on that ground was urged by the able and experienced

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counsel for the losing party. By the same rule, an entail of existing or special substitutes duly recorded, can never be affected by the subsequent recall of the destination in favour of a remote substitute. It is enough that the entail has been recorded as first completed and executed by the maker; and this has been carried so far, that in a petition for recording an entail, the Court refused to leave out of the record lands sold after the date of the entail. *Moore*, Fac. Coll. 28th November 1821.

**LORD IVORY.** I have seen no reason to change the grounds on which the interlocutor was pronounced. With regard to the extent to which the reasoning was carried in the cases of *Lochbury* and *Craigends*, I ventured, in the last case, to enter my protest that certain of the opinions contained an abstract doctrine not called for in that case. Having had occasion since to study the matter, I have seen no reason to alter my opinion, and I cannot too strenuously protest against those doctrines, if carried to the extent they have been in this discussion. I have satisfied my duty, as I consider it to be, in stating thus strongly and implicitly, that, in my opinion, there is no authority for giving to a blunder in recording, or the investiture, of the nature of that now before the Court, the extreme effect here contended for.

The other point, as to the division of the deed as regards its conditions, is one of no importance at all.

The COURT "adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the note: Find additional expenses due," &c.

*Pearson and Robertson*, W.S., Reclaimer's Agents.  
*John Martin*, W.S., Respondent's Agent.

## FIRST DIVISION.

### No. 363.

July 8. 1852.  
 Nisbet v.  
 Dixon.

*Contract—Master and Servant—Liability.*—A company having contracted to work ironstone, entered into a written agreement with a third party, by which the third party undertook to calcine the iron:—*Held*, that calcining iron is not an independent trade, and that the principal contractors are liable for the operation of the sub-contractors.

This action was directed against the defenders, William Dixon and Company, as tenants of the ironstone in the pursuer's lands of Dykehead, and concludes against them for repetition, and payment of certain sums said to have been expended in extinguishing a fire in the coal workings on the farm of Dykehead, then in the

occupation of the pursuer's coal tenants, and also for expenses July 8. 1852.  
which may yet require to be laid out in order to restore the ground of the pursuer's property, to the state it was in prior to the occurrence of the fire. The ground of action was, that the fire was occasioned and allowed to gain a formidable height by the culpable negligence of the defenders, who are to be held liable in all the consequences thereof.

The defenders denied their liability, pleading that the fire was occasioned by the proceedings of the tenants of the coal. The minute of lease under which the defenders worked the ironstone, entitles them to carry away the ironstone, and calcine it on the ground, and binds them "not to interfere with or interrupt any present or after workings of the coal situated in the said lands, whether above or under the said ironstone, through which the proprietor reserves a right to sink pits at pleasure, without any compensation." The place where the fire originated, was below the ground on which ironstone was laid to be calcined. The effect of excavating the coal, was to occasion a sit under the hearth on which the ironstone had been laid; and the fire originated owing to some portion of burning iron ore falling through the sit into the coal workings below. A record was made up, and the following issue laid before the jury: Whether in the course of the years 1840 and 1841, a fire took place in one of the coal pits within the said lands of Dykehead aforesaid, in consequence of the fault or negligence of the defenders, William Dixon and Company, or of some person or persons for whom the said defenders were and are responsible, and whether the pursuer expended, in measures reasonable and proper in the circumstances, for extinguishing the said fire, the sum of £1828 : 4 : 8 $\frac{1}{2}$ , as contained in the schedule hereto annexed, or any part thereof; and whether the defenders are indebted, and resting-owing to the pursuer in the said sum, or any part thereof, with interest, conform to said schedule.

The jury found, "First, that John Watson was guilty of fault and negligence in setting fire to the bin under the then existing circumstances;" that a certain sum was expended injudiciously, and must therefore be deducted from the amount claimed; that interest was due on the balance: "reserving to the Court to determine, whether in the circumstances disclosed in the evidence, the defenders are liable for the fault or negligence of Watson; and to enter up the verdict for the pursuer or defenders, according as that question may be determined in favour of the pursuer or defenders."

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The case came now to be considered first on a motion for a new trial, on the ground of the verdict being contrary to evidence. And the defenders also pleaded non-liability, in respect they did not calcine the iron themselves, but contracted with another party, namely Watson, to do so ; and that it is now an ascertained point, that a party is not liable for the acts of any one exercising an independent calling, when he has engaged to perform works in the way of his calling. The contract between the defenders and Watson was produced.

*Mure, the Solicitor-General, and the Lord Advocate, for the pursuers, referred to the cases of Rankine v. Dixon, 9 D. 1048, 19th March 1847 ; M'Lean v. Russell and Macnee, 14th March 1849, 11 D. 1035 ; M'Lean v. Russell and Macnee, 9 March 1850, 12 D. 887 ; Randleson v. Murray, 8 Adolph and Ellis, (1st series), 109 ; Milligan v. Wedge, (1840), 12 Adolph and Ellis, (Q. B.), 737 ; Rapson v. Cubbit, 28th April 1842, 9 M. and W., p. 710 ; Laugher v. Pointer, 5 Barn. and Cressw. p. 547-560 ; Readdie, (1849), 6 Railway Cases, p. 184 ; Mack v. Allan, 17th Feb. 1832, 10 S. 349 ; Chapman v. Parlance, 28th June 1825 ; Binnie, 4 S. 122.*

*Marshall, Jun., Macfarlane, and Deas, for the defenders, referred to the cases of Rankine, M'Lean, Milligan, Rapson, Randleson, Readdie, all supra.*

**THE LORD PRESIDENT.** After having heard the argument for the defenders, and gone through the evidence, I cannot say that I have come to a different conclusion from the jury.

The next question is, whether the defenders are liable for the fault and negligence of Watson. In dealing with this case, it is important to observe the relation which subsisted between the defenders and Watson, and also between the defenders and the pursuer, and the nature of the subject. It appears that the calcining of the iron at that place was part of the understanding as to the operations to be carried on by the defenders. Now, the ironstone and the coal were let to separate tenants ; and it may be, that as between these tenants, there was a mutual duty on the part of the workers of the coal, not to come too near the surface, and also of the calciners, not to expose the under tenants to risk. There certainly was implied a certain amount of caution on the part of the defenders, not negligently or carelessly to expose the property adjacent to the surface to risk. Now, the injury complained of here, is damage done to the real property of the landlord, in regard to which, the defenders were under an implied obligation to

use care. This is in some respects different from a casual injury <sup>July 8, 1852.</sup> to a bystander, by the careless or reckless throwing of a stone, &c.; and from the terms of the agreement between Watson and Dixon. the defenders, it is clear that these parties were contractors, and not persons employed merely as the servants of the defenders. No doubt the word contractor is a proper enough expression in one sense of it, to use to any one who engages to give his services in the way Watson had done, but that will not settle the question of liability. Was this contract one by which the Dixons could devolve on those who were to do the work, the responsibilities they themselves had undertaken? This is a service, a mixed transaction, partly a contract, partly employment, which has not taken the shape of a distinct calling. Callings of this mixed description are arising every day, which must modify the general rule founded on by the defenders. *Rankin's* case comes very near this. I do not think, however, that the mere use of writing in the engagement will transfer liability; nor will the view taken by the Court in *Russell v. Macnee* affect this case. Here the injury is done by a person bound under a sub-agreement to perform work of a description which has not acquired such an independent position that we should be safe in holding that Dixon and Company can shake themselves free of their responsibility, for the consequences of the act of Watson.

LORD CUNINGHAME. I concur. I should deem it a precedent altogether novel in law, and most dangerous in point of example, if tenants under a mutual contract between them and the landlord were not liable for the negligence and unskilfulness of the men employed under them, whether employed on *day's wages*, or on a *special contract*. Watson himself expressly swears that he was employed in taking out and calcining ironstone at Dykehead for Dixon and Co. I am not aware that the defender's liability for Watson can be denied on any relevant or plausible ground. The defenders plead that they wrought the ironstone not by labourers paid by the day, but by Watson as a *contractor*, who is solely liable for his own negligence and wrong. It appears to me that this plea rests on a palpable fallacy, inconsistent with sound principles of the law, and with any right precedent applicable to the case. The landlord contracted with the Messrs Dixon alone; they were, *ex contractu*, liable to him for every damage improperly sustained in working the ironstone; and as the tacksmen could not assign their lease, they could not transfer the obligation to repair damage wrongfully sustained to another, whom the landlord neither knew

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nor accepted, and was not asked to accept as an obligant. The cases relied on by the defenders were totally dissimilar from the present. It would be a serious doctrine to promulgate that a trading or manufacturing company is not liable for serious and gross injury, committed by negligence and unskilfulness in works going on for their benefit, because they did parts of their work by *contracts*, with humble and often irresponsible parties. No such plea has ever been recognised, but the reverse. It is sufficient to answer, that parties in the situation of the defenders are bound to have *overseers* of vigilance and skill to superintend and check the contractor. There was a specific right given to the defender's overseer to superintend the contractor here; and if he failed in his duty, or was too ignorant to control what was necessary, the defenders are surely liable for his gross mistake and fault. The law, as immemorially understood and enforced, renders all employers liable for the negligence of subordinates in whatever way they are hired and paid, when not constantly and strictly superintended and controlled by the chief employers or their overseers. In the present case, the obligation of the principal tenants, is broader and more direct than in most cases of injury complained of by third parties and strangers from common obstructions and casualties occurring in places of public resort.

LORD IVORY expressed an opinion to the same effect as that of the Lord President, and Lord Cuninghame.

The COURT refused to grant a new trial, and "having heard counsel on the import and application of the verdict: Find that in the circumstances disclosed in the evidence, the defenders, William Dixon and Company, are liable for the fault and negligence of John Watson, in setting fire to the bin of ironstone referred to in the record under the circumstances which existed, therefore enter up the verdict for the pursuer, and apply the same, 'decern against the defenders,' for the amount specified in the verdict: Find the defenders liable in the expenses incurred by the pursuer," &c.

*Hay and Pringle, W.S., Pursuer's Agents.*

*Walker and Melville, W.S., Defenders' Agents.*

## FIRST DIVISION.

BAIRD and OTHERS v. Ross and OTHERS.

No. 364.

*Railway—Accounting with Shareholders—Expense of Applications to Parliament.*—A line of railway was projected by certain parties, and two unsuccessful applications were made to Parliament for a bill:—*Held* under an accounting, in a process of multiplepoinding and exoneration with shareholders who had been parties to the first but not to the second company's contract, that the committee of management were entitled to make deduction from the fund *in medio* accordingly, and that, therefore, they were entitled to deduct the expenses of the first but not of the second application to Parliament; also circumstances in which a sum offered for giving up the project and winding up the concern was held not a proper item of deduction in such accounting.

This was a multiplepoinding and exoneration arising out of a July 8. 1852. railway undertaking, arising under the following circumstances. In the year 1845, certain parties projected an undertaking for the <sup>Baird, &c. v.</sup> <sub>Ross, &c.</sub> formation of a railway from Kilmarnock to Ayr, to be called the Kilmarnock and Ayr Direct Railway, and to be made and maintained by a joint stock company. A prospectus was issued, and the shares of the proposed company were all applied for and allocated, and, with few exceptions, a deposit of L.2, 10s., per share paid thereon. The allottees thereafter signed the company's contract, dated the 7th and 8th days of April 1845, and received scrip for the number of shares for which they had paid a deposit. The capital of the concern was declared by the contract to be L.130,000, to be raised in shares of L.25 each. But under a power to that effect, the committee of management, (pursuers and raisers,) increased the capital to L.180,000. Of this capital, shares were taken in, scrip issued to the extent, as it appeared, of 5,985 shares.

Under the contract the pursuers constituted the committee of management for carrying out the railway, until an Act of Parliament should be obtained, when their power would devolve on directors to be thereby named. The committee were to have power to cause surveys to be made, to obtain estimates, and make arrangements with land-owners, railway companies, and others, to make calls upon the subscribers, to apply the money to the objects of the railway, and to invest the same, until required, in Government stock and other security, and generally to adopt all such measures as the committee of management might consider expedient for

July 8. 1852. carrying the undertaking into effect, and obtaining an Act or Acts of Parliament for that purpose. The contract further provided that, in the event of an application being made to Parliament and not being successful, or in the event of no such application being made, all the expense so incurred should be borne by the several subscribers, rateably and proportionally, according to the number of shares taken by each. The committee of management had power to do everything necessary in order to obtain the Act. A bill was accordingly brought into Parliament during the session of 1846, but in consequence of the opposition that was made, it was not proceeded with. Thereafter, another application was made to Parliament for a bill, and, agreeably to the standing orders, a new subscription contract was entered into. To this contract it appeared that the defenders were not parties. The case was opened by counsel for and against the bill, and various witnesses were examined on the part of the promoters, but at an adjourned meeting of the Parliamentary select committee it was resolved, that no sufficient *prima facie* case had been made out, and it was, therefore, reported that the preamble was not proved. The bill was consequently lost. It was stated in the record, that at a meeting of shareholders, held in 1846, a proposal was submitted to wind up the concern in consequence of an offer which had been made by the Ayrshire Railway Company to pay L.1500 to meet the expenses which had been incurred. This resolution appeared to have been agreed to, but no arrangement to that effect was carried out, and the bill was simply withdrawn.

The present process was now brought, the fund *in medio* being stated by the pursuer to be the balance remaining in their hands, after deduction of the expenses connected with the first application to Parliament, and also the expenses of the subsequent application, to which, as stated, the defenders were not parties. The pursuers pleaded that they are only bound to account for the deposits received, under deduction of the proper and necessary expenses of the undertaking.

The defenders objected that the proper fund for distribution was the whole amount of the funds originally paid up, and not a mere balance thereof, and pleaded that in accounting with them and the other parties who were subscribers only to the first undertaking, the pursuers were not entitled to take credit for, or to deduct the expenses incurred in the second undertaking, in respect, it was carried on in virtue of a contract to which the objectors

were not parties, and in behalf of a company of which they were <sup>July 8. 1852.</sup>  
not shareholders.

The Lord Ordinary, (Wood,) pronounced an interlocutor, by <sup>Baird, &c. v.</sup> Ross, &c. which he "Finds, with reference to the terms of the subscription contract, dated the 7th and 8th days of April 1845, (No. 411 of process,) and in the circumstances of the case, as instructed by the minutes of the provisional committees or committee of management of the proposed Kilmarnock and Ayr Direct Railway, and of the shareholders thereof, and by the letters and other documents in process, that in accounting for the deposits received by them, the raisers are entitled to take credit for the expenses attending the first application to Parliament, without deduction of the £1500 mentioned in the record, but not to take credit for or deduct any portion of the expenses attending, or incident to, or created by the second application made to Parliament, founded on in the record, and decerns."

To this interlocutor the COURT adhered.

*Penney*, and the *Solicitor-General*, were for the pursuers, raisers.  
*Wood*, and the *Lord Advocate*, for the defenders and objectors.

*Campbell & Smith*, S.S.C., Agents for the Raisers.  
*Patrick Graham*, W.S., Agent for the Defenders.

## SECOND DIVISION.

KERMACK v. CADELL.

No. 365.

*Procedure under Entail Amendment Act, 11 and 12 Vict. c. 36—Infest-  
ment—Statute directory or imperative.*—Held that "the date of infestment" in the Entail Amendment Act, sec. 33, means the date of the instrument of sasine, and not that of its registration, in all infestments prior to the Infestment Act 8 and 9 Vict. c. 35 ; and that a petition of disentail under that section, setting forth the date of the recording of the sasine only, was incorrect, and all the procedure following thereon invalid.

This was a suspension of a threatened charge for the price of <sup>July 9. 1852.</sup> certain lands sold by Cadell to Kermack, being part of an en-  
tailed estate belonging to the respondent, but of which an instru-  
ment of disentail, under 11 and 12 Vict., c. 36, had been executed  
by him, to which the authority of the Court had been interposed,  
in terms of the statute, duly recorded. In examining the pro-  
cedure, however, the suspender subsequently found that in the  
petition for disentail, the date of the registration of the respon-  
dent's sasine in the lands had been alone set forth, and the present

July 9, 1852. suspension was brought for the purpose of having it tried whether  
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Cadell. this was a sufficient compliance with the 33d sec. of the statute,  
requiring that the petition "shall set forth the date of the petitioner's infestment therein, if any be."

At the desire of the parties, the Lord Ordinary reported the case to the Second Division, by whom it was ordered to be heard before both Divisions.

*E. F. Maitland* and the *Dean of Faculty*, for the respondent. In this petition, the ordinary procedure of intimation, &c., was regularly carried through, and whether a flaw discovered in the course of it might have been ordered to have been amended, it is too late to object to it now, after the authority of the Court has been duly interposed. Besides, the words of the clause are directory only, and not imperative, and, therefore, neglect of them, by a well-known rule in the construction of statutes, does not invalidate the proceedings. But, in truth, the words of the statute have been actually as well as virtually complied with. Infestment is a wide word, consisting of several distinct acts,—the delivery of the symbols, the executing of the instrument of sasine, and the recording it. To the validity of all the former the latter is absolutely essential ; it is necessary to complete the infestment ; and therefore, as the most important date of the whole, as well as the most useful for discovering the deed, it is the most proper date to be given. *Kibbles v. Stevenson*, 5 W. and S. Appeals, 553 ; *Mag. of Brechin*, 11th Dec. 1840, 3 D. 216 ; *Young*, 11th March 1847, 9 D. 932. In 1845, by 819 Vict., c. 35, the Legislature declared that the date of the recording was to be held as the date of the sasine in all time coming, and not merely in the case of sasines made after that act. And even though it should be held entirely prospective, it shews, that at that time it was considered that infestment was a word comprehending the act of registration, as well as that of the delivery of the symbols.

*Donaldson*, and the *Solicitor-General*, for the suspender. No distinction exists betwixt the provision in question and the others required by the statute, which are obviously imperative. This matter is solely regulated by the statute, which must therefore be specifically followed, any departure from it being incurable. Infestment may include, in its widest sense, all acts that flow from the superior, but recording is not one of them, and no authority has been adduced for holding the date of it as the date of the act recorded. The publication of the act is required by statute, but the date of publication is not made, and cannot be

called the date of the act published. If a man under the old law had died after sasine had been taken, but before it was recorded, would it have been held, supposing it to have been afterwards recorded within sixty days after its being taken, that he died uninfest. There is no authority to that effect. By the recent Act, for the first time recording is made to be the date of infestment, which bears then no other; but this relates only to infestments to be taken subsequently to the passing of the Act.

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**LORD PRESIDENT.** I must hold this objection to be well-founded. The statute provides a method to be followed, and if it is not followed, we have no jurisdiction under the statute. I cannot distinguish between the language employed in one clause, and that employed in another clause of this section, as in part imperative and in part directory. The requirement to set forth the tailzie is imperative, and the requirement which follows to set forth the date of infestment is governed by the same word "shall," and is no less imperative. A failure to do so must invalidate the whole. The question is, therefore, as to the meaning of the word "infestment." It is sometimes more or less extensive, but I think here it means the instrument of sasine, or the giving of sasine—of both of which the date is one. According to the petitioner, the whole act of infestment has two dates; but the statute requires only one, and I think that one is the date of the instrument. The Act of 1845 supports this view strongly; for if the date of recording had always been held to be that of the infestment, it would not have needed that Act to make it so.

**LORD JUSTICE-CLERK.** I concur. All the requirements of the statute are imperative. No equipollent can be admitted in a modern statute. It was not on that point that we requested the assistance of our brethren. As to the question of the meaning of infestment, I hold it, in this statute, to be obviously that of the sasine, not of that which may be subsequently done to it.

**LORD MEDWYN.** I have some doubts. I think the object of the Legislature was to give the means of examining the documents referred to, which is more fully accomplished by giving the date of their registration than of themselves.

**LORD COCKBURN** concurred with the Lord President.

**LORD CUNINGHAME** agreed with Lord Medwyn. Holding "infestment" to be a word of wide signification, including more acts than one, he was disposed, where only one date was required, to select that date which would be most serviceable in fulfilling the intentions of the Legislature regarding it.

July 9. 1852. LORDS MURRAY and IVORY concurred with the Lord President.

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J. & W. R. Kermack, W.S. Suspender's Agents.

Hughes and Mylne, W.S., Respondent's Agents.

*Note.*—In a subsequent case in the Second Division, the LORD JUSTICE-CLERK remarked, that the proper way to set forth a sasine under the Infestation Act of 1845 is as “of date and recorded the      day of      .”

### FIRST DIVISION.

No. 366. CALEDONIAN and DUMBERTONSHIRE RAILWAY COMPANY v.  
COLQUHOUN.

*Process—Amendment of Libel.*—An action was raised to compel the formation of a railway under a specified statute,—which statute, however, had been partially repealed by a subsequent statute. Defences having been lodged, the libel was allowed to be amended, to the effect of introducing a reference to the second statute in the summons as a ground of action.

July 10. 1852. This case came before the Court on the competency of an amendment of the libel. It was an action of declarator, implement, and damages, at the instance of Colquhoun against the Caledonian and Dumbartonshire Railway Company. The summons contained a declaratory conclusion to have the railway company ordained to make a railway between certain specified points, “all in terms of the Act of Parliament passed in the 9th and 10th years of our reign, entitled,” &c.; and in case of failure, to make reparation to the pursuer for the loss, injury, and damage which he may sustain in consequence. The Act 9 and 10 Vict. had been partially repealed by a subsequent statute. To this summons defences were lodged, and the pursuer now proposed to amend the libel, by inserting after the reference to the Act 9 and 10 Vict. the following words:—“And also of the Act passed in the year 1847, intituled, ‘The Caledonian and Dumbartonshire Junction Railway (Deviation and Branches) Act, 1847, in so far as the same varies or modifies the said first mentioned Act.”

The Lord Ordinary (Wood) having sustained the amendment, the defenders reclaimed.

*N. C. Campbell* and the *Lord Advocate*, for the reclaimers. This amendment is incompetent, being a material alteration of the con-

clusions of the action. The first statute was partially repealed by <sup>July 10, 1852.</sup>  
 a subsequent statute. Now this summons asks us to make a rail-  
 way according to a particular line, and to particular places. Our  
 answer is, we cannot do so, for the statute founded on as author-  
 ising us to do so is repealed to a certain extent by a subsequent  
 statute; and the line under this last statute is not the same line  
 as under the first. The pursuer now founding on this repealing  
 statute, asks us to make the railway, not according to the first  
 Act, but according to the first Act as varied, altered, and modified  
 by the second.

*T. Mackenzie and Penney, for the respondent (pursuer.)*

**THE LORD PRESIDENT.** The important interest the defenders have in excluding this amendment is very clear, for their answer to the summons is, our powers under the first Act have expired; and if you had asked us in 1841 to do what you now ask us to do in 1852, we would have been in a condition to do so. But it does not appear to me to be going beyond what has been done in other cases to grant this amendment of the libel, and I do not think it precludes what is stated to be the main defence of this action.

**LORD CUNINGHAME.** I concur. There is here no proposed alteration of the conclusions of the summons; but the pursuer proposes to add an amendment, setting forth his claim as conform, not only to the first Act, "but also to an Act continuing the preceding," or to the same effect in 1847. If, as the defenders say, this is introducing a new and different railway, they will have a conclusive plea on the merits. I think that the pursuer might have founded on the statute, without any amendment of the libel. I have rarely seen one proposed more competently, or under more reasonable circumstances.

**LORD IVORY.** I am glad that the Court has been able to come to a conclusion which relieves me of all responsibility in the opinion which I am to deliver; for the amendment goes farther than any amendment I have ever seen. If the Act of 1847 only extended the powers of the previous Act, I would not differ; but here are two Acts and two railways. The Act of 1847 prohibits the railway under the previous Act. Now I think the party when he proposes to amend his summons, must bring his case in such a way that there can be no difficulty in knowing what he intends. Is it the railway under the Act 1847, or the previous Act, that he wishes made? What is it that he proposes to do? It is not a modification of one thing or another. It is a new ground of action,

July 10, 1852. and which the party may be or not entitled to insist in, according to circumstances. Now it is not clear to my mind, that as the Caledonian & Dumbarton Railway Co. v. Colquhoun. action was originally brought, the party would not have a good ground of defence, to the effect of having the action thrown out, as concluding for the performance of what could not be done; and if that be so, are we to deprive them of that defence by the change in the libelling of the action, which is now attempted? If they would have been entitled to throw the action out at first, it was because it was ill laid; and therefore if so, is it within the course which the Court has usually followed, to allow the party to make an incompetent action a good action? If I am right in thinking that the defence of the party as to the original action was good enough to throw it out, then the pursuer is not entitled to amend that position by the introduction of another statute, as he now proposes to do.

The COURT, therefore, (Lord Ivory dissenting,) "refuse the desire of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary, in so far as it sustains the amendment of the libel, and finds the pursuers liable in the expenses incurred in consequence thereof. Remit to the Lord Ordinary, in order that he may allow an amendment of the defences, with power to his Lordship to dispose of all questions of expenses incurred under this discussion upon the reclaiming note, and other expenses not hitherto disposed of."

*Gibson-Craigs, Dalziel, and Brodie, W.S., Reclaimers' Agents.  
Gibson and Fraser, W.S., Respondent's Agents.*

## SECOND DIVISION.

No. 367.

ROBERTSON OR RENNIE v. BLACKWOOD'S TRUSTEES.

*Title Deeds—Law Agent's Hypothec—Heritable Creditor.*—An heritable proprietor is not entitled to stop a sale of the property in course of being carried through by the creditor in a common bond and disposition in security, on the ground that he is willing to pay the debt on delivery of the titles—he not alleging that the titles ever were delivered to the creditor, at least in that character, and the creditor's agent holding them in security for a separate debt due to him from the estate.

July 10, 1852. Certain property in Edinburgh was conveyed to trustees for benefit of Mrs Robertson or Rennie, and her children. An heritable debt existed over the property, in which Blackwood's trustees were creditors. It was constituted by an ordinary bond and disposition in security, containing the usual clause of delivery of the

titles, but it did not appear, and was denied by the respondents, July 10. 1852. that they ever obtained possession of them. Robertson's trust having failed, Mr Crawford was appointed *curator bonis* on the <sup>Robertson, &c.</sup> ~~v.~~ Blackwood's estate, and in that capacity obtained custody of the title-deeds, <sup>Trustees.</sup> which he continued, after exoneration from the curatary, to hold in security of a debt the estate had incurred to himself. He had, in the meantime, become a partner of Mr Fraser, W.S., the agent for Blackwood's trustees. The trustees having called up the debt, and not receiving payment, proceeded to exercise their powers under the bond, of exposing the estate to sale. Mrs Rennie offered payment on delivery of the titles, which was refused by Messrs Fraser and Crawford, the agents for Blackwood's trustees, on the ground that they were not in their hands in that capacity. Mrs Rennie then presented a note of suspension and interdict against the sale proceeding.

Lord Anderson, Ordinary on the Bills, refused the note, and against this interlocutor Mrs Rennie reclaimed.

*Maidment*, for reclaimer. The creditors having been entitled to obtain the title-deeds from the debtor, in virtue of the bond in security, must be held to have them now. They were bound to obtain possession of them before advertising a sale, since it could not be carried through without delivering them to the purchaser. They were equally bound to deliver them to the reclaimer, on her offer to pay up the debt.

*T. Mackenzie*, for the respondents, was not called upon.

LORD JUSTICE-CLERK. The reclaimers have entirely mistaken their remedy, and brought the wrong parties into Court. The proper course would have been to have presented a petition to this Court, or to the Sheriff, for delivery of the titles. The whole statement made is an allegation of collusive and improper conduct on the part of Crawford, the *curator bonis*, and Fraser. If that be true, it may be corrected by complaint to this Court. But though bondholders may be entitled, they are not bound to obtain possession of the title-deeds of the estate over which their security extends, and if they have them not, they are under no obligation to make them forthcoming to the debtor. They are perfectly entitled to carry through a sale without them, if they can find a purchaser.

The other Judges concurred, and the Court adhered.

*John Cosens*, W.S., Agent for Reclaimer.

*John Auld*, W.S., Agent for Respondents.

## SECOND DIVISION.

No. 368.

**MILLER and PATERSON v. M'NAIR.**

*Principal and Agent—Factor's Lien—Compensation—Retention—Bankrupt—Competition.*—A commission-agent, in whose hands goods had been placed for sale, sold them without disclosing his principal. Afterwards he went to the purchaser, along with the principal, whom he then disclosed, and desired a bill for the price to be granted in favour of the principal. Before the bill was delivered the agent interposed, desiring it not to be delivered, but that it and the price should be held for be-hoof of himself. The principal having become bankrupt, a multiple-pointing was raised by the purchaser to settle whether the agent or the trustee on the principal's estate was entitled to the price. The agent claimed to be preferred, in respect that the bankrupt had been indebted to him in the price of certain goods purchased from him previous to the sale on account of which the bill was granted:—*Held*, in the circumstances, that the claim of the agent was unfounded.

July 10. 1852. **Miller and Paterson**, commission-agents in Glasgow, were employed by Clarke and Co. to sell certain goods. The goods were sold to Smith and Co. before Clarke and Co. had acquired them, or were in possession, but Clarke and Co. purchased the goods from another house to make good the sale by Miller and Paterson, and forwarded them to Smith and Co., who had been reported as purchasers, under charge of a porter of Smith and Paterson. In the meantime, none of the principals were disclosed. Smith and Co., the purchasers, inspected the goods—and, finding a considerable lot deficient in quality, returned them to Miller and Paterson, whom alone they then knew in the transaction.. Miller and Paterson, with the knowledge of Clarke and Co., sent them to the house which had furnished them, by whom they were replaced, and the goods selected for that purpose were transmitted to Miller and Paterson, in whose warehouse they were again examined, and by them ultimately forwarded to Smith and Co. The transaction with Smith and Co. was concluded upon the 8th of February 1850, the condition of the sale being, that Smith and Co. were to pay by bill at four months' date. A few days afterwards, namely, on the 11th of February 1850, Miller, of the firm of Miller and Paterson, along with Mr M'Lellan, a partner of Clarke and Co., came to the office of Smith and Co., and, disclosing Clarke and Company to Smith and Company as the sellers, authorised them to draw a bill in favour of Clarke and Co. for the price. The bill was accordingly made out by

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(Rankin) the clerk of Smith and Co., (signed by M'Lellan, per July 10, 1852.  
pro. Clarke and Co.), and was by him sent to London for the sig-  
nature of Mr Smith, who was there at that time, without having v. M'Nair.  
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left any power to accept bills or grant promissory-notes in the  
name of the firm. Before the bill came down from London to  
Smith and Co's clerk, Miller and Paterson interposed, instructing  
Smith and Co. not to grant the bill or note to Clarke and Co.,  
but to hold it and the price of the goods for behoof of them,  
Miller and Paterson.

Clarke and Co. soon after became bankrupt, and the claimant  
M'Nair has since been confirmed as trustee on their estate.  
Smith and Co. raised the present process of multiplepoinding.  
The object of the competition was the bill or note, and now the  
price of the goods. The competing parties are M'Nair, as  
trustee on Clarke and Co.'s estate, and Miller and Paterson,  
who contend that they, as factors and commission-agents, had  
a lien over the goods—that this lien had not been effectually  
waived by the disclosure of Clarke and Co. as principals in  
the sale, or by the direction to make out in their name the  
bill or note for the price, such direction being recalled be-  
fore delivery of the bill or note—and that, in consequence of  
the bankruptcy of Clarke and Co., they are entitled to enforce  
their right of lien or retention over the price, in security of *any*  
debt due to them by Clarke and Co. The specific debt on which  
they claim retention is the price of certain goods which they sold  
to Clarke and Co., by a separate transaction, in January and  
February 1850, in their own name and on their own account,  
although their general business was that of commission-agents.

The Lord Ordinary (Rutherford) found that any right of lien  
arising from the custody or possession of the goods was not waived  
or relinquished by Miller and Paterson; and in point of law,  
“that the debt consisting of the prices of the parcels furnished  
by Miller and Paterson to Clarke and Co., is not covered  
by any right of retention or lien competent to Miller and  
Paterson—and that there is no room for compensation: There-  
fore, ranks and prefers the claimant M'Nair, trustee on the  
sequestered estate of Clarke and Co., in terms of his claim, and  
decerns; reserving to Miller and Paterson to claim on the seque-  
stated estate of Clarke and Co. as accords.” In his note he says,  
that he is of opinion that Miller and Paterson had sufficient pos-  
session to create a right of lien, and that this lien attached to  
the price in the hands of Smith and Co., nor was it destroyed by

July 10. 1852. merely disclosing the principals, or even by the direction to make out the bill in their name ; because, *before the bill was delivered*, Miller and Paterson interfered to prevent any alteration in the possession by which their security might be affected. But he conceives that all this discussion is useless, because he cannot hold that the debt is one which falls under, or is covered by, the lien of a factor. The debt for which retention is sought, is not for advances by Miller and Paterson as factors, nor for anything that can properly be considered as falling under the factor's lien, whether special or general. The price due to Clarke and Co. never was in the hands of Miller and Paterson, *so as to create a direct debt between them and Clarke and Co.*, and so effect a proper *concurrus debiti et crediti*. Miller and Paterson had nothing but their lien over the price, in consequence of having transacted as factors. The bankruptcy will not enlarge that security, nor convert the case into one of compensation. And the question comes just to be, whether Miller and Paterson can retain, not for advances made by them on this specific parcel of goods, not for their general advances as factors, but for the price of goods which they had sold in their own name. The Lord Ordinary thought not.

Miller and Paterson reclaimed.

*Mackenzie and Deas*, for the reclaimers. The reclaimers sold goods consigned to them for sale, not as factors, but principals. The price, therefore, was payable to themselves, and they could have refused delivery of the goods until it was paid. So again, against the principals, their right was, that the price should pass through them ; and against the demand for payment, they were entitled to set off debts due to them by the principal. It is a mistake to say the only debts which a factor can so set off against his principal are proper factorial debts. The factor's right is good in regard to all claims against his principal. For the right, though called the factor's lien, is not properly lien or retention, but rather compensation, and is based on the principle of *concurrus debiti et crediti*. The fact that Clarke and Co. had become insolvent could make no difference on the rights of the factors. Then if the factors had this right, the question remains, if they had waived it. They have not. The bill in name of Clarke and Co. was countermanded the very day after it was consented to ; and the original consent that it should be so drawn was a mere gratuitous promise, which was undoubtedly revocable. *Drinkwater*, 1 Cooper's Rep. 251 ; 2 Bell's Com. 114-116 ; Ersk. 3, 4, 21 ; *Johnson*, 14th Nov. 1818, F. C.

*White and Sandford*, for M'Nair. It is said that the factors' right July 10, 1852, is not so much lien as compensation, and therefore acts as a set off against all debts by the principal. But compensation is impossible *v. M'Nair*.  
Miller, &c.  
without possession. Whatever might have been the rights of parties had the price actually got into the hands of the factors, that is not the state of matters here, and there is no room for the plea of compensation. The only possible plea, therefore, is one of lien. Now the moment the principals in the sale were disclosed, it was to them the price fell to be paid, and it could only be claimed by the factors on the ground that they had a lien over it. But they could not plead lien in the present case, since the debt on which their claim is founded was not a factorial but a general one. At any rate, any right they had must be held to have been waived by the direction given to draw the bill in name of the principals; Russell on Factory, p. 245; *Humphrey*, 2 Carr and Kirw., 152; Bell's Prin., §§ 205, 1446, 1448; Cross on Lien, 15, 16, 47; *Houghton*, 3 Bos. and Pull., 485; 1 Bell's Com. 478; 2 Bell's Com. 93, 117; *Jacob*, 5 Bing. 130; *Stewarts and Fletcher v. M'Gregor*, 19th May 1829.

LORD JUSTICE-CLERK. I concur with the Lord Ordinary in holding, that the trustee on the estate of Clarke and Co. must be preferred. But I proceed on a different view of the case. A factor acting, as Miller and Paterson did, for the owner of goods which he is commissioned to sell, may be in three different situations on the bankruptcy of the owner, if the transaction has not been settled by payment to the latter. 1. He may still have possession of the goods, and in that case he has a lien. In the law of Scotland, *lien*, to be effectual, implies continued possession of the goods or article in question, unless by contract the possession has been given up under the reservation of the right of lien. 2. The factor may have received the price. In that case, he has the benefit of retention when called upon to make payment,—a right which is only available when the party has the sum actually in his hands. In the cases of balancing accounts in bankruptcy, the factor is supposed to have the price in his hands, or in his control, by possession of the bills. If he has only a personal claim, I am not prepared to admit that the factor's claim is the same. 3. The third situation is that of a right to demand payment of the goods which the factor has sold in his own name. Now, I am not aware that the law has ever placed that right on the same footing with a lien over the goods. No doubt, if the special contract on which the factor acted had appropriated, by

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the act of the owner of the goods, their price to a special purpose in which the factor was interested and on which he relied, in another onerous transaction—as in the case of *Drinkwater*—the trustee on the bankruptcy of the owner may be subject to that equity, and cannot demand the price so as to defeat a right created by the contract of the owner. But that is the result of special contract. If there is no such contract as to the appropriation of the price, then the personal right to demand the price from the buyer may be defeated, like most other personal claims, by the trustee on bankruptcy. On the one hand, I am not prepared to hold that the factor has any lien over the price which he has not received, nor the benefit of the doctrine of retention; and, on the other hand, if he has a lien over the price, or the benefit of the right of retention, I am not prepared to hold that, on bankruptcy, and on the balancing of accounts which that event requires, the price held to be in his hands can be taken out of his hands when the bankrupt owes him a sum of money for goods which he had bought from him, whether that purchase was properly within the actual factorial employment or not. But on these two points, especially on the latter, I reserve my opinion;—on the former, I certainly at present entertain little doubt. But I do not think that the case as it stands on the actual facts proved, raises either of these questions. Immediately after the sale, one of the reclaimers goes along with one of the owners, to the purchasers, discloses the name of the owners as the principals on whose account and for whose behoof the factors sold, and desires the purchasers to settle the account with the owners by payment to them, and with their knowledge and consent, a bill is drawn by the owners, and sent to the leading member of the house which bought (then in London), for acceptance. The result of this proceeding is conclusive. The bill is the property of Clarke and Co., and cannot be withheld from them. By the desire of the factors, the price is put into this form, and under that document, and the bill must have its course. The factor may or may not, in transacting with his principal, stand on his right to demand payment of the price. But if at the time he gave up his claim, and allowed the principal to demand a settlement for himself, he must abide the result. In this case he desires the purchasers to account to the owners. The result is, that the factor is withdrawn as an interposed party between the owner and buyer. Not only is the owner made known by the act of the partner, but by the direction of the factor to the buyer to account

for the price to the owner, there remain only owner and buyer; July 10. 1852. the right of the seller is then direct and unqualified against the buyer, and the obligation of the latter to the seller, direct, unqualified, and peremptory. Then the settlement *does* take place—for granting a bill is complete settlement in terms of the sale—which was by bill at four months. The attempt of the factor, after such settlement, to revive the personal claim which he gave up, is wholly incompetent.

LORD MEDWYN. I have not often found more difficulty in arriving at an opinion in any case than I have done in this. I think there is no state of facts here similar to what arose in the case of *Harper and Faulds*, which presents the first original form of a factor's lien—that is, a right of retaining the goods put into the factor's hands, till some expense incurred to him or by him to another, on account of the principal, shall be repaid by the principal. It is only then that the extent of that retention comes into discussion, whether it is limited to the expense on the special article of goods, or covers a general balance arising out of a course of such dealings. But the case arises out of an extension of this lien, which partakes rather of compensation, or, as Mr Bell expresses it, balancing of accounts in bankruptcy, which he explains at 2 Bell, 124. When a party being indebted to a commission-agent employs the same agent to sell goods for him, not in his own name, but in the agent's name, with power, of course to receive payment of the price and discharge it, as if he had been the owner of the goods—and then, while the price is unpaid, the principal becomes bankrupt, he or his creditors cannot demand payment from the agent, if the money has been paid to him, or a bill given to him for the price, without allowing the agent to set off the debt which the bankrupt owes to him; nor will he or his creditors, who are in no better position than the bankrupt, but stand in his right, be entitled to claim directly against the purchaser, without allowing the agent such balancing of accounts. Now, Clarke and Co., while they knew they were indebted to Miller and Paterson, placed goods in their hands to be sold in their own name for them, which, if they became insolvent while the price was unsettled and not paid over to Clarke and Co., might confer a right upon Miller and Paterson to balance against it the debt which they previously owed Miller and Paterson. I say, while the price was unsettled by not having previously reached Clarke and Co., and whether it was in Miller and Paterson's hands or not, provided they were still entitled to receive and discharge it in their own

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name. For in such a state of matters, the factor's lien, and this extension of it, applies not merely to the goods themselves, but extends over the price of them, till the price reach the principal, or he is entitled to exact payment; Bell, ii. 116. Now, apart from the permission to allow the bill for the purchase of Clarke's goods to be made by Smith and Co. in their favour, what would have been the position of the parties upon Clarke and Co. becoming bankrupt? Their trustee could not have claimed payment of their goods sold to Smith and Co., the price of which was in Miller and Paterson's hands; nor would he be entitled to receive it without setting off the debt due by Clarke and Co. to Miller and Paterson; Bell, ii. 124, *et seq.*; nor if unpaid, could he claim the price from Smith and Co., but must leave the claim with Miller and Paterson, with all the privileges they have of a balancing of accounts in bankruptcy, so as to enable them to set it off against the debt due to them by Clarke and Co. Now, I cannot think that the lien thus attaching was destroyed by merely disclosing the principals, or even by the direction to make out the bill in their name, because, *before the bill was delivered*, Miller and Paterson interfered to prevent any alteration in the possession by which their security might be affected. I do not say that an agent who discloses his principal is entitled in all cases to recall this disclosure. If, in the course of a sale, and before the transaction is completed, the agent discloses the principal for whom he is dealing, shewing that he never intended to hold himself out as dealing on his own account, he could not recall this; but here he had sold the goods in his own name, delivered and invoiced them to the purchaser in his own name, with the consent of the owner of the goods; if he yielded to the pressing solicitation of a person who had no legal right to obtain the advantage he was seeking, and agreed that the obligation for the price should be made out in name of the principal, and having almost immediately repented of this, and recalled it before anything had followed upon it,—I think, on the same principle as a stoppage *in transitu* of goods is permitted, the law ought to interpose to prevent delivery to the bankrupt. As, then, I agree with the Lord Ordinary that the permission to draw this note in Clarke and Co.'s name was recalled in due time, I am for giving decree in favour of Miller and Paterson, and preferring them in the multiplepoinding.

LORD COCKBURN. I agree with your Lordship in thinking that the direction given to the purchasers by Clarke and Co., and by Miller and Paterson jointly, to make out the bill for the price in

favour of Clarke and Co., is sufficient to decide the case. Assum-July 10. 1852.  
ing the lien now contended for by the factors to have existed; this  
direction, concurred in by the factors, amounted to a discharge of <sup>Miller, &c.</sup> M'Nair.  
it. It was an order by them to the buyers to make payment to  
Clarke and Co., their constituents. No doubt the factors endeavoured, after this, to withdraw from this arrangement before the  
bill was delivered. But I can see no right that they had to do so.  
They had no more right than they would have had to recal a written  
order giving up their lien, after they had communicated this  
order to their employers. But, lest I be wrong in this view, I  
must add, that I agree with the Lord Ordinary in thinking that no  
lien existed. Not that its existence was excluded by the fact that  
the price was still in the hands of purchasers, and consequently  
not in the actual possession of the factors; because I conceive it  
to be settled that a factor's lien covers prices still unpaid and held  
by buyers. But the objection is, that this lien is not claimed on  
account of a debt arising out of this particular sale, nor out of any  
factorial transactions. It is on account of a debt due to these factors  
on a sale of goods for themselves, that retention is now claimed.  
I do not think that a factor's lien, or his right of retention, can  
be stretched, in this way, into dealings extrinsic to his factorial  
position.

LORD MURRAY. This is a difficult case, but I agree with the  
Lord Ordinary entirely.

The COURT pronounced an interlocutor:—which, after certain findings in fact agreeing with the above statement, and particularly that Clarke and Co. “being desirous to obtain a settlement of the price directly in their own favour, one of the partners thereof, along with Miller on the part of the factors, went to the premises of the buyers, and that Miller then stated Clarke and Co. to be the sellers and the principals in the transaction, and desired the buyers to account for and settle the price with Clarke and Co., as the owners of the goods to whom the price was due and to be paid, and that a bill was accordingly drawn by the owners on Smith and Co., and, with the knowledge of Miller and Paterson, was sent to Smith, then in London, and was accepted there by the leading partner of Smith and Co.:” goes on, “Further, find in point of fact, that after this communication by the factors to the buyers, and after the bill for the price was drawn on the sellers by the real owners, and sent off to Smith for acceptance, the factors, Miller and Paterson desired the bill not to be delivered, and demanded from the buyers payment of the price for themselves; and that, as Smith and Co.

July 10. 1852. did not wish to involve themselves in any difficulty, this demand alone prevented delivery of the bill so drawn on Smith and Co. to the owners, in whose favour Smith and Co. had accepted it, and to whom they were ready to deliver and pay the same, if in safety to do so: Find in point of law, that thereafter Miller and Paterson could not recover the price as in competition with the trustee on the sequestrated estate of Clark and Co., not having any lien or right of retention in the circumstances, or any right of compensation, or ground of stating either: Therefore, refuse the reclaiming note, and adhere to the interlocutor reclaimed against: Find the reclaimers liable in additional expenses; appoint an account," &c.

*Campbell and Smith, S.S.C. Agents for M'Nair.*

*Wight and Livingston, W.S. Agents for Miller and Paterson.*

#### HOUSE OF LORDS.

BROWN and ANOTHER, *Plaintiffs in error*; HER MAJESTY'S ADVOCATE-GENERAL, *Defendant in error.*

*Legacy Duty*—48 Geo. III. c. 149, sec. 38—*Deed or Testamentary Disposition.*—Five sisters executed a deed, by which, for the love they bore to each other, they conveyed and made over to and in favour of each other, and to the heirs and assignees of the last survivor, all the whole heritable and moveable, real and personal property belonging to them, or either of them, or to which they or either of them should have a right at the period of their or either of their deaths, with full power to the survivors and survivor of them to intromit with the subjects thereby conveyed, and with an express proviso that the survivors and survivor of them should be bound to pay off and discharge the whole debts, sickbed and funeral charges of the predecessor and predecessors, and a warranty by themselves and their heirs to each other, and to the survivors and survivor of them, from all facts and deeds done and granted by them severally prejudicial thereto:—*Held in error*, reversing the decision of the Court of Exchequer, that this deed did not operate as a *mortis causa* deed, or as a testament, but as a deed only, and that therefore upon the death of one of the sisters, the survivors were not liable to pay the legacy duty.

June 28. 1852. Error from the Court of Exchequer in Scotland. The judgment below proceeded on an information filed for the recovery of the sum of L.240, for double the amount of stamp duty, payable on the inventory of the personal estate and effects of Grace Brown of Craighead, Lanarkshire, who died the 7th day of June 1841, which the defendants neglected and refused to

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exhibit in the proper Commissary Court, as required by the statute 48 Geo. III., c. 139, s. 38. A special verdict finding the facts was taken, which set forth :—

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That Grace Brown, and her sisters Agnes Brown and Mary Brown, (the plaintiffs in error), and two other sisters, did, (of dates the 26th January and 2d March 1825,) duly execute a mutual instrument in the words following :—

“ We, Grace Brown, Agnes Brown, Euphemia Brown, Mary Brown, and Jessy Brown, lawful daughters of the deceased James Brown of Auchlochan, in the county of Lanark, do, for the love, favour, and affection we have and bear to each other, hereby assign, dispone, convey, and make over, from us and our heirs, severally, to and in favour of *each other*, and to the heirs and assignees of the last survivor, all lands, heritages, tacks, steadings, rooms, possessions, heritable bonds, wadsett rights, decrets, and abbreviates of adjudication, and grounds and warrants thereof, together with all and sundry goods, gear, debts, sums of money, body clothes, wearing apparel, rings, jewels, and other paraphernalia, and in general, the whole heritable and moveable, real and personal subjects, effects, means and estate, of whatever kind or denomination, now pertaining, belonging, indebted, or resting owing to us, or either of us, or to which we or either of us shall have right in any manner of way at the period of our or either of our deaths, with the wris, title-deeds, evidents, and securities of the said heritable subjects and bonds, bills, and other vouchers, instructions and documents of the said personal subjects, with all that may then have followed, or may be competent to follow upon the same, dispensing with the generality hereof, and declaring these presents to be as valid, effectual, and sufficient, as if every particular of our and each of our subjects, effects, means, and estate, had been herein specially enumerated and set down ; turning and transferring the whole premises from us, severally, and from the predeceasor and predeceasors, to and in favour of ourselves jointly, and the survivors and survivor of us, whom we hereby surrogate and substitute in the full right, title, and place of us, severally, and of the predeceasor and predeceasors, with full power to us, and to the survivor and survivors of us, to intromit with, sell, use, and dispose of the subjects, effects, means, and estate, heritable and moveable, real and personal, hereby conveyed, and to uplift and discharge the debts and sums of money that may be owing to us separately, or to either of us, at present or during our joint lives, or at the period of our or either of our

June 28. 1852. deceased ; declaring, however, as it is hereby expressly provided  
 and declared, that the survivors and survivor of us shall be bound  
 Brown, &c. v. H. M. Advocate-General. and obliged, as, by acceptance hereof, we bind and oblige our-  
 selves, and survivors and survivor of us, to pay off and discharge  
 the whole debts, sick-bed and funeral charges of the predeceasor  
 and predeceasors ; which mutual agreement and conveyance be-  
 fore written, we bind and oblige ourselves, severally, and our res-  
 pective heirs, to warrant to each other, and to the survivors and  
 survivor of us, from all facts and deeds done and granted, or that  
 can be done and granted by us severally prejudicial hereto : And  
 we consent to the registration," &c.

The special verdict further set forth, that on the 21st day of February 1831, 5th day of July 1840, and the 11th day of November 1840, certain heritable bonds and landed property were acquired by the Misses Brown, destined by the titles to the survivors and survivor of them, and the heirs and assignees of the survivor, and then proceeded :—

The special verdict also found several kinds of personal property in Scotland and England, which, at the period of the death of Grace Brown, were standing in the joint right of the parties, to the said mutual instrument, and it also found, that at the period of the said death, there was further personal estate, (consisting chiefly of wearing apparel), in the separate possession of the said Grace Brown. Further, that the said Grace Brown died on the 7th day of June 1841. And further, that whatever inventory duty may have been by law payable, in respect of personal estate in Scotland, of the said deceased Grace Brown, was chargeable upon and payable by the said Agnes Brown, and Mary Brown ; and if such inventory as in the said information mentioned ought to have been exhibited, that such inventory ought to have been exhibited by the said Agnes Brown, and Mary Brown, as in the said information mentioned ; and that no such duty had been paid to Her said Majesty, nor was such inventory exhibited. But whether, upon the whole matter aforesaid, there was any personal estate in Scotland, of the said Grace Brown, by law liable to inventory duty, the said jurors were ignorant, and prayed the advice of the Court.

The case was argued on the 29th January 1849. The Court of Exchequer took time to consider, and on the 3d February 1849, gave judgment for the Crown.

A writ of error having been brought thereon, the same was argued by *Bethell*, Q.C., and *Anderson*, Q.C., for the plaintiffs in

error, who cited the following authorities—*Attorney-General v. June 28. 1852. Jones*, (3 Price, 38), Ersk. 3, 2, 44; 6 *Thomson v. Thinn's creditors*, (Morrison, 3, 593); *Grant v. Grant*, Morr. 3, 596, *Braidwood v. Brown, &c. v. H. M. Advocate-General. Braidwood*, 14 B. and M. 64.

The *Lord Advocate* and the *Solicitor-General of England*, (with *Phinn*), for the respondent, referred to the 48 Geo. III., c. 149, sec. 38; *Curdey v. Boyd* (Mor. 15,946); 1 Bell's Com., 63 and 64, and 3 Ersk., tit. 8, sec. 35.

*Bethell*, Q.C., replied.

LORD CHANCELLOR. My Lords, in this case the question arises as to the liability of the property of Miss Grace Brown to legacy-duty, that liability entirely depending upon a very short instrument in the Scotch form, to which I must now call your Lordships' attention. (His Lordship, after stating the document, said)—My Lords, upon the face of this instrument, it is a deed, and would *prima facie* be considered to operate as such. I do not see, in any part of the deed, any change of language. Nothing can be more simple than it is, looking at it as a disposition independently of the particular construction which your Lordships may be compelled to put upon it by the rule of law, if there be such a construction. We have here, on the part of each, a separate interest, not in a fifth part, as seems to have been supposed, but in the whole of that property. They say “there are five of us, and we agree to throw our property into a common fund, and it shall be for ourselves, and the survivors and survivor of us, and the heirs and assignees of the survivor.” What does that mean? It imports that all of them are to have a joint interest in the common fund, and that there is to be a survivorship in that fund, which survivorship cannot be but for life, as against the ultimate limitation, because the ultimate limitation is to the survivor, and the heirs and assignees of such survivor. In those words, therefore, there is no difficulty, but then there is a power to them, and the survivors and survivor of them, to intrust with the property, and sell and dispose of it. Is that inconsistent with the plain construction which I have suggested, which the document admits of? Very far from it; because having all joined in the act, all the interest, and every limitation, is vested in them all—that is to say, one party must be the survivor—every one of them has an interest during her life—the entire interest being represented by the five; it is equally, and so, by four; and so by the three; and so by the two. Therefore, the power to all or any of them to dispose of the property is not to

June 28. 1852. any of them severally to dispose of a portion, but to the whole of  
Brown, &c. v. them to dispose of the whole joint property, which is altogether  
H. M. Advocate-General. consistent with the construction to which I am drawing your  
Lordships' attention.

Then, with respect to the onerous clause, the consideration is perfectly sufficient. It is not simply their love and affection for each other, but it is that each gives up her property to be thrown into the common fund, in consideration of the share which she takes in the property of the others, also thrown into that common fund. There is therefore abundant consideration. It is therefore a deed for onerous causes. Then the warranty prevents the deed from being revoked—it is therefore irrevocable. It is a deed for good consideration, and a binding deed.

Now, supposing your Lordships were to hold that this instrument would operate throughout as a deed only, what would then be the effect of that? Why, that every intention of these parties would be effected, and all that would happen would be, that these ladies' share would not be subject to legacy-duty. There certainly ought to be some powerful rule of law—there ought to be some overpowering construction—which should compel your Lordships to treat this instrument not as a deed.

My Lords, this case was decided in the Court below, the decision being accompanied by very elaborate reasons, and very ingenious reasons, and I should wish to speak with all possible respect of the very learned Judges by whom those reasons were delivered, but they are reasons in which I feel it impossible to concur. The effect of what the learned Judges stated was, that the parties had only changed the property, but that they had not changed their interest, in point of fact. They admitted that these ladies had no longer any interest in the divided property, but they considered them to take exactly the same interest in the joint property as they had in the divided property. Now, that to begin with, can hardly be said to be accurate; for one to have a separate property, consisting of three fields, is one thing, and to throw that into the surrounding estate, and to have a fifth part in common with other persons, is quite another thing. The learned Judges then speak of this deed operating during the lifetime of the parties, for the purpose of regulating the property, and then they speak of it as in case of death, proceeding to give the property from the dead to the living; and the learned Judges seem to me to place great reliance upon that circumstance, as shewing that it is a deed *mortis causa*, because the property is to pass from

the dead to the living. But, my Lords, what distinction is there between such a case and an ordinary settlement which has nothing upon the face of it distinct from a regular disposition? Take the case of a marriage-settlement to the father for life, to the mother for life, and then to the children, it is from the dead to the living, and, in many cases, it is not, as here, confined to the living, but it passes the property from the dead to those who are not yet living; but that does not give it a testamentary character.

Now, my Lords, one of the learned Judges admits that the deed operated to divest each of these ladies of all her property, he thought new rights were conferred, and that the common fund was held by each as limited; he then says, that this could not be a different; that is one of the questions which your Lordships have to consider. In making that statement, the learned Judge certainly seems to have forgotten for the moment the nature of the limitations; he says, "In the first place, it says nothing whatever about trust, or livery, or aliment, and contains no words that can, by any possibility, be held to imply a purpose to create any such limited right; on the contrary, it expressly, and in the most ample terms, assigns, disposes, conveys, and makes over from us and our heirs and assignees, to and in favour of each other, all that the parties may severally possess or afterwards acquire, with full power to us and the survivors or survivor of us, to intromit with, to sell, use, and dispose of the whole subjects so conveyed, without restriction or limitation of any kind or degree." Now that is not the limitation; the limitation is not to these parties and their heirs, to and in favour of each other, but it is, "in favour of each other, and the survivors and survivor, and the heirs or assignees of the survivor," and, therefore, that power which is put in juxtaposition, and as if it immediately followed upon that curtailed statement, in no respect breaks in upon the real limitation. But it would be a very different thing if the limitations were, as the learned Judge here stated them to be. Then the learned Judge observes, that some of the ladies were "divested of any property by this arrangement. A change was merely made in the specific form or description of that property. But their new shares of it were as fully vested in each of them as the old had ever been, and were, consequently, it would seem, as open to attachment by their creditors." This really puts all the limitations of the deed out of the question. In point of fact, and in point of law, every one of them was divested of her property by this arrangement, and she took a new property in the common fund created by the several

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June 28, 1852. properties brought in by every one of the five. With respect to  
the creditors, I will at once relieve the case of the question of  
debts, as far as it strikes my mind. The debts provided for by  
this instrument, I think, clearly are whatever debts may be con-  
tracted by any of the sisters during their lives; and I think it  
equally clear, that those debts were a charge, not upon the share  
of each only, but a charge upon the whole fund. It was argued  
at the Bar, that that would lead to a great absurdity and incon-  
venience. It might do so, but we must put a construction upon  
the deed—it is not an illegal provision. It is the act of the  
parties, and your Lordships have no power to refuse to give  
the effect which the law allows to be given to such a disposi-  
tion, although it may be an unwise disposition. Then as re-  
spects the legal liability to debts. It is not necessary to say  
this deed would have an operation against the existing credi-  
tors at the time it was made. It may be that creditors in Scot-  
land, as well as creditors in England, may have the power to im-  
peach the deed as a fraud upon them, but that would not prevent  
a *bona fide* conveyance, which is subject to the payment of the  
debts, from being operative between the parties to the deed, and  
therefore the liability to the debts would, in no respect, affect the  
validity of this instrument. With regard to the liability to debts,  
upon which great reliance was placed in the Court below, after  
the execution of the deed, no difficulty can arise upon that. As  
far as the deed is operative, I take it to be clear that the credi-  
tors could not impeach it. It is a deed for onerous causes, and  
as far as the limitations are to take effect, the creditors could not  
impeach that deed. But it is a totally different thing to say that  
the creditors could not attach the property of each under that  
deed. Why should they not? Supposing an estate were given  
to them all for their lives, each has a joint estate which is attach-  
able by the creditors, and it is, therefore, not the slightest objec-  
tion to the true construction of this instrument, that the property  
which they take under this deed would be attachable by the cre-  
ditors. But, then, I deny that the creditors could attach this pro-  
perty, so as to affect the ultimate limitations. They may take  
the property during their lives, if your Lordships should be of  
opinion that that is the true construction, and if the party indebted  
should be the survivor, they may take it as against the deed, but  
they could not take it after the execution of the deed as against  
the limitations of that deed. That I apprehend to be the dis-  
tinction. The learned Judges proceeded to shew the absurdity of  
  
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making this a joint fund. They say that no one of them might give part, without immediately calling together the whole of the others to know if she might do so. That is an absurdity which they must forgive me for saying does not exist, because if the absurdity exists here, then in every joint-tenancy in England, and every tenancy in common, in some measure, in Scotland, the same thing would exist. There is nothing absurd in five ladies having an estate in common or in joint-tenancy ; the fund would be received, and would be enjoyed according to the rights of the parties under this deed. They then show, in the same manner, that each of them might have renounced the succession of liability to the debts. I utterly deny that, because they are bound by the acceptance to the debts, and they never could relieve themselves from the liability—the deed says expressly that they bind themselves to the debts by the acceptance. Now, the learned Judges in the Court below, in their very elaborate reasoning, rely upon the authorities. It will be my practice, my Lords, in advising your Lordships upon Scotch cases, never to introduce without necessity any English law. I desire to see how the authorities stand upon the Scotch law, and that this case should be decided simply and only upon Scotch law, and not upon English law. There are different forms of conveyancing in the two countries. If this case were to be decided upon English law, it would not occupy a second of your Lordships' time, because, though our rules of conveyancing would not admit of a deed being framed in the same way, yet a deed framed to carry out the same purposes would not admit of the slightest argument. The question is, how this deed stands with reference to the Scotch law. One case which was very much relied upon, which is in Morrison, page 15,976, was *Curdy v. Boyd*. It was said in that case, and it was also said in the argument at your Lordships' bar, that that deed conferred the office of executor, and therefore was a testamentary instrument. That was so stated at your Lordships' bar; but in point of fact it was not so, for Boyd had obtained the office of executor before there was an attempt to set aside the deed. [After going minutely into the facts of that case, his Lordship said]—The fact therefore that Boyd had obtained the office of executor, before the attempt to set aside the deed, proves nothing at all, except that he had done an act which was altogether unnecessary. The case of *Braidwood v. Braidwood*, in Shaw and Dunlop, which was decided at your Lordships' bar, is very much to the same effect. It differs from the case of *Curdy v. Boyd*.

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June 28. 1852. The whole of the argument upon the limitations turned upon what is stated in Erskine, and in Bell, and it is singular enough, but it was owing to the necessity of doing so, that the quotations from both those books by the learned Judge in his judgment, stopped short in each case of and just excluded that very statement which I will call your Lordships' attention to, which proves that no dicta exist as regards this case in point of law. Erskine, in dealing with this subject in book 3, title 8, section 35, makes these observations; "If the right be taken to two jointly, and their heirs without any mentioning of life-rent, the conjunct fairs enjoy the subject equally while both are alive as in the former case. But on the death of the first, neither the fee, nor even the life-rent of his half, accrues to the survivor, but descends to his own heir." Now your Lordships will see that there being no words of survivorship, there is no survivorship, and by the law of Scotland you must have a limitation. It is not like the law of England, where the very limitation to two jointly, where there is not a several clause, carries it to the survivor. That is all it proves. The words "their heirs," are therefore used distributively. That is the whole of that passage, "where a right is taken to two (or more) jointly, and the longest liver," that is what was so much relied upon, "(or survivor) and their heirs, the words 'their heirs,' are understood to denote (what is expressed in the present case,) the heirs of the longest liver, and consequently, though the several shares belonging to the conjunct fairs are affectable by their several creditors, while both are alive, yet upon the death of any one of them, the survivor has the fee of the whole," exclusively of the heirs and their fees, "not only of his own share, but of the share belonging to predecessor, in so far as it is not exhausted by his debts." Now it was said that that was the same as this case, that as the words "their heirs" meant the heirs of the survivor, it was precisely the same as the limitation in this case, which is to the survivors and survivor, and the heirs and assignees of the survivor. Now the words here are "to them and the survivors of them and their heirs," and the question really there was this. There can be no doubt that the words "their heirs" refer to the two, and the question was really whether "their neirs" also extended to the survivors, and as there is a limitation to the two and to the survivor of them, the words "their heirs" by the natural construction of them, seem to extend both to the two and to the survivor, and then all that follows is quite a matter of course. Then comes this passage, which was not referred to by

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either of the learned Judges, and is not referred to in the reasons given by the respondents, "If the right be taken to two strangers, and to the heirs of one of them, he to whose heirs the fee is taken is the only faiar, the right of the other resolves into a naked life-rent." Now, my Lords, I press the words which follow upon your Lordships' attention, "all these rules arise naturally from the import of the several expressions." There is no magic in it. The question simply is, what is the meaning of the parties? and they have told you what their meaning is. Erskine tells you distinctly that where there is a limitation to two, and to one of them, one takes the fee and the other takes the liferent only. If there be a limitation to five, and the survivors and survivor, and the heirs and the assignees of the survivor, what is there to distinguish between the two cases? In the one case the person is known and designated, in the other case the person is unknown,—you do not know who will be the survivor. But the law allows of such a limitation, and when the person is ascertained, he then takes in precisely the same way as if he had been named in the instrument. It is therefore clear, that according to the very passage here referred to in Erskine, this is a good limitation to the survivor in fee, and cannot be shaken by the rules of Scotch law. Then, my Lords, Bell's Commentaries on the Law of Scotland page 49, chapter 1, sec. 2, is referred to. The passage which is relied on is this, "where it is to two jointly, and the survivor and their heirs" which is the same case as is put by Erskine, "each has a fee which his debts will affect. The survivor, indeed, will become sole faiar, but the right thus bestowed seems to be of the nature of a mere destination, for either of the parties may onerously dispose of, or grant securities over the subject, which will be effectual, notwithstanding the destination to the other; or his creditors may adjudge it, and so defeat the right of the associate." That is because it is to two jointly, and their heirs; and though the survivor will be the absolute faiar, if he should survive, yet each has the disposition of the fee to him in the meantime. Then comes these words, which have not been adverted to in the judgment on the reasons "where it is 'to have jointly, and the heirs of one of them' the one less favoured is a bare liferenter, the other is faiar and not only cannot be gratuitously disappointed, but cannot even by onerous conveyance be deprived of his right." That is exactly the case before your Lordships. There is nothing here about liferent. The way in which Bell expressly puts it, is, that where it is to two jointly, and the heirs of one of them, it must go to the

June 28. 1852. one to whom the fee is assigned to go. Then, what is the true construction here according to these decisions, and according to *Brown, &c. v. H. M. Advocate-General.* these rules? It is simply that the two take as liferenters without the word "inheritance;" and the word inheritance not being necessary in the Scotch law, that does not exclude such a limitation as this, where there are words of inheritance applicable to one, whichever may be the survivor, and not applicable to the other. Therefore the limitation to them, and the survivors and survivor of them, and the heirs and assignees of the survivor, must be to them as liferenters, and the survivors and survivor of them, and then the fee to the last taker. I have already said that one of them must be the survivor, and the limitation being as if they could all dispose, that power is entirely consistent with the limitation.

My Lords, I have given my anxious consideration to this case, partly from my respect to the learned Judges who decided the case in Scotland, and also from its being a case, the decision of which is dependent upon Scotch law. I have come to a clear opinion that this is a decision which cannot be supported, and which was not called for, because the result of it is not to effect the object of the deed, so as to let the destination go to the parties according to its language; but it is indirectly to put upon it a very strained construction, where, if you allowed the deed to speak for itself according to the natural construction of the words, and according to the rules of Scotch law, every object contained in it would be effected. I therefore move your Lordships that the judgment of the Court of Exchequer be reversed.

Judgment of the Court below reversed.

*Dodds and Craig*, Westminster, Agents for the Plaintiffs in error.

*Solicitor of the Inland Revenue*, for the Crown.

## SECOND DIVISION.

No. 370.

*Niddrie v. Dean and Smith.*

*Injury to Person—Culpa—Damages—Issue.*—Where a party, aged fourteen, employed to work on a railway, alleged that he was put to work unsuitable to his age and strength, in the course of which he received serious bodily injury, this statement held relevant to infer damages. Form of issue approved of by the Court to try the case.

Parties in this case being at issue whether the pursuer had stated a relevant case to entitle him to an issue, the matter was reported to the Court by the Lord Ordinary (Anderson.)

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Dean, &c.

The pursuer's averment was, that while a boy of fourteen years of age, he had been engaged by the defenders, who are railway contractors, to work on the line of the Aberdeen Railway, then in course of formation; that on the 28th December 1846, he was put to drive a horse in the fourth of five waggons employed in conveying the earth and other stuff along a line of temporary rails:—that his instructions were, 1. "After the three foremost waggons were emptied to put his horse briskly forward at a trot, and to unhook a chain which connected the horse with the waggon, and then to pull the horse to the side of the railway on which the pursuer was, when the waggon would proceed by its own impetus to the bank end. 2. That the pursuer accordingly put the horse to a trot, loosed the said chain from the horse and from the waggon, but he was unable to pull the horse to the side, and instead of coming to the side where the pursuer was, the horse proceeded to the opposite side, as it had done on the two previous occasions, when it was driven along the other fork, but there was no room for it to pass that way on the said occasion, in consequence of the three waggons which preceded the one which the pursuer drove, and which were now empty, having been left standing there, and the horse was brought to a stand, with its fore legs on the space between the limbs of the fork, and its hind legs within the rails of the eastern limb. 3. That the pursuer was urged, by the shouts and commands of the defenders' overseers, and others who were standing by, to run within the rails, in order to bring the horse back; but the horse having got frightened at the waggon coming up, turned of its own accord, and meeting the pursuer, threw him down on the rails, and before he could recover himself, the waggon came up, and passed over his leg, breaking and crushing it in the most excruciating manner, and to such a degree, that the pursuer had immediately to be carried to Laurencekirk, where two surgeons were called, who considered that instant amputation was necessary; and the leg was accordingly immediately amputated above the knee. 4. That the employment to which the pursuer had been put, as aforesaid, at the time of said accident, was not of a kind which a boy of his age was able, with safety, or ought to have been requested, to perform, but was of so complicated and heavy and dangerous a nature as to require for its performance the strength and experience of a person of mature years; and it was not the practice,

July 12. 1852. either of the defenders or of other railway contractors, to employ  
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 Dean, &c. any but grown-up men in the performance of such work ; and the conduct of the defenders in so employing the pursuer was reckless and unjustifiable."

The pursuer concluded for L.800 of damages.

Monro and *Lord Advocate*, for defenders. There is no relevant matter here for an issue. According to his own statement, the pursuer had himself to blame for what happened. He was quite strong enough for the work ; besides, if there was any danger, he ought to have refused to do it, and have left the service ; he was above pupillarity, and could enter into a proper and binding contract of service.

Shand, for pursuer. Giving the whole of the statement in the summons fair play, there is enough stated, if proved, to infer damages. We must satisfy the jury that he was improperly put, by the culpable conduct of the defenders, in a situation which required the steady head and strong arm of a man to avoid danger.

LORD COCKBURN. It appears to me, that on the pursuer's own statement, the whole was an accident, for which no one is responsible.

LORD MURRAY. I am of a different opinion. The pursuer charges the defenders with great culpability. If he proves this, he will be entitled to damages.

LORD JUSTICE-CLERK. The pursuer will probably find this a difficult case to prove, but I cannot say there are no relevant averments. It would not do, in my opinion, to shut the doors of the Court against him. It is a very special case.

LORD MEDWYN concurred.

After some discussion, the following was the form of issue approved of by the COURT :—" It being admitted that, on or about the 28th day of December 1846, the pursuer, while employed by the defenders to work on a part of the line of the Aberdeen Railway near Laurencekirk, then in the course of construction by them, received severe bodily injuries, in consequence of which amputation of one of his legs became necessary—Whether the said injuries took place in consequence of the fault and recklessness of the defenders, or of those in their employment, to the loss, injury, and damage of the pursuer ?"

Damages laid at L.800.

William Hunt, W.S., Agent for Pursuer.

Stein and Campbell, W.S., Agents for the Defenders.

HIGH COURT OF JUSTICIARY.

Before the LORD JUSTICE-GENERAL, LORDS IVORY, WOOD,
COWAN, and ANDERSON. No. 371.

HER MAJESTY'S ADVOCATE v. FRASERS.

Justiciary, Court of—Res judicata—Tholing an Assize.—A case having been certified from circuit in general terms without fixing a peremptory diet, the Court held that the process had fallen, discharged the warrant of incarceration, and ordained the panels to be set at liberty. Thereafter, a new indictment having been brought, and the panels having pleaded that they had already tholed an assize in bar of trial on a new indictment, the Court sustained this defence, assoilzied the panels, and dismissed them from the bar.

See ante, p. 806, No. 305.

The prisoners having been recommitted on a new warrant, were July 12, 1852. again served with an indictment, setting forth the same species ^{H. M. Advocate & Frazers.} *facti*, against which indictment they now pleaded *res judicata*, and that as they had already tholed an assize, they could not be tried again on the same facts in regard to which the former process had fallen.

Logan and *Young*, (with whom *W. H. Murray*,) argued for the panels, and referred to *Hughan*, 24th August 1810; *Burnet* on Criminal Law, pp. 312, 368; *Hall*, January and February 1789, 2 *Hume*, 470; 2 *Hume*, 143, 465, 479; *Blackstone's Com.* 4, 26, 42; *Hume*, 463; *Cobb or Fairweather*, 21st November 1836, *Swinton*, 354.

The *Lord-Advocate* and *Solicitor-General*, for the Crown, cited *Commelin*, September 1836, and *Rosenberg*, April 1842, *Bell's Notes*, p. 144.

At the conclusion of the argument, the LORD JUSTICE-GENERAL announced that the Court were agreed in opinion that the prisoners were entitled to their judgment; they had tholed an assize, and could not be tried again. The verdict returned at the trial was a legal and proper one; and the prisoners having therefore been put in peril, the objection now pleaded must be allowed.

The COURT pronounced the following interlocutor:—"The Lord Justice-General, and Lords Commissioners of Justiciary, having heard counsel, *hinc inde*, in respect that the panels were formerly tried and a verdict returned upon an indictment which applies to the same *corpus delicti* as is now made the charge against them in the present indictment, sustain the defence in bar of trial:

July 12. 1852. Find that the panels cannot be tried again, and therefore desert
 H. M. Advocate v. Frasers. the diet against them, assoilzie them *simpliciter*, and dismiss
 them from the bar.

DUN. M'NEILL, I.P.D.'

James Tytler, W.S., Crown Agent.
L. Mackintosh, S.S.C., Panels' Agent.

FIRST DIVISION.

No. 372. Susp. and Int., THE EDINBURGH, PERTH and DUNDEE RAILWAY COMPANY v. ROWAN and COMPANY.

Process—1 and 2 Victoria, cap. 86, sec. 5—Suspension—Decree in absence—Reponing.—In a suspension of diligence proceeding on an extracted decree in absence:—*Held* that it is incompetent to repon in the original action, and that the suspension must be prosecuted to an end and decided on the merits, before the original decree can be touched.

July 18. 1852. The complainers were charged at the instance of Rowan and Company, the respondents, to make payment of £500, for which, Edinburgh, Perth, and Dundee Rail. Co. v. Rowan and Co. it was alleged, the complainers had granted their promissory note. Of this charge the complainers now presented a note of suspension, and also a relative note of suspension and interdict, alleging in their statement of facts, that the extract decree and warrant on which the respondents were acting, had been pronounced in absence of the complainers, and without their being heard on their defences. In the suspension and interdict the Lord Ordinary (Cowan,) in respect this note had been duly intimated and no answers lodged, passed the note and continued the interdict. In the suspension the “Lord Ordinary passes the note of suspension in terms of the Act 1 and 2 Victoria, cap. 86, sec. 5.” Subsequently on 11th June, “the Lord Ordinary grants warrant to, and authorises the principal extractor and his deputes to transmit the original process mentioned in the present suspension, to the clerk of this process, *quam primum*,” and thereafter his Lordship appointed parties to be heard upon the suspenders’ motion to be reponed in the process in which their defence had not been heard. His Lordship after hearing parties in part, reported the case, which was now heard upon the competency of reponing in the original action.

T. Mackenzie, for the complainers.

G. Young, for the respondents.

LORD IVORY. My doubt is as to the competency of reponing under the statute in any case. It was formerly necessary to

proceed by reduction in order to get quit of an extracted decree ^{July 13. 1852.} in absence. This statute authorises a shorter form of proceeding, ^{Edinburgh, Perth, and Dundee Rail.} and substitutes a process of suspension for a process of reduction. Now that is but a sist of diligence; it does not destroy diligence, ^{Co. v. Rowan} and it is a sist, which, according to the case of *Kelty*, 13th Feb. and Co.

1830, stays diligence where it stood, but leaves a means over the subject. It appears to me that the statute makes no distinction between cases where there is diligence, and where there is not. I do not think it necessary that a sist shall be accompanied with a prayer for interdict. The note is passed by a ministerial proceeding in the Bill Chamber, and operates as a sist of the diligence. Now there is here a sist of diligence, and the Act says, it shall be competent to call and enrol the case before the Judge who pronounced the original decree. That is the suspension that is to be so enrolled. It is not the original proceeding. Therefore the suspension is the case, and must be proceeded in as suspensions always are. The form of reponing at once is without authority. The proper proceeding is, that the Lord Ordinary shall suspend the letters of suspension, or find them orderly proceeded. The parties in the suspension must be heard on the merits; after a record has been made up in the usual way, and as to the making up of the record, it may be done either by condescendence and answers, or by holding the summons in the original cause as the condescendence in the suspension. But the whole proceedings in the suspension must be prosecuted to an end in the suspension; and till that is done, the decree in the original action cannot be touched. But although we cannot repone, it may be right to conjoin the processes.

The LORD PRESIDENT and LORD CUNINGHAME concurred.

Motion to repone refused.

Sir Charles Gordon and Co., Suspender's Agents.

William Hunt, W.S., Respondent's Agent.

FIRST DIVISION.

PETITION, CLELLAND.

No. 373.

Entail Amendment Act, sec. 4.—Feuing Power.—In a petition for authority to feu under sect. 4 of the statute, the Court granted authority to grant feu rights of the whole or any parts of the lands mentioned in the petition, and remitted to the Lord Ordinary “to examine the several feu rights proposed to be granted, as the same shall be successively pre-

July 13. 1852. pared, and to report." Such feu rights must be executed at sight of the Court.
Pet. Clelland.

This was an application by Mrs Clelland, heir of entail in possession of the entailed lands of Springfield, near Glasgow, for authority to feu "the whole or any parts or portions of the said lands, and to authorise her to grant feu charters thereof in favour of any parties who may be willing to transact with her for feus of the said lands, for such feu-duties, and under such conditions and declarations as she may think proper, or in the form to be approved of by your Lordships, all in terms of the said Act 11 and 12 Vict., c. 36."

The application was made under § 4, which, *inter alia*, empowers an heir in possession with such and the like consents as by said Act would enable him to disentail such estate, to feu the estate "in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents,—the authority of the Court being always obtained thereto in the form and manner hereinafter provided; and such heir of entail shall be entitled to make and execute, *at the sight of the Court*, all such deeds," &c., as might be necessary for giving effect to the feus so granted.

The necessary consents were obtained, not only from the heirs specified in the statute, but also from certain annuitants on the estate, to the unconditional feuing by the petitioner of the whole lands, or any part thereof, and to the petitioner "granting feu-charters thereof in favour of any parties who may be willing to transact with her for feus of the said lands, for such feu-duties, and under such conditions and declarations as she may think proper."

The petition was remitted to the Lord Ordinary (Cowan), and sent by his Lordship to Mr W. Campbell, W.S., to inquire into the facts, and report. Mr Campbell reported that the procedure was all regular, and that the Court might grant the prayer of the petition, and follow the procedure adopted in the case of *Campbell*, 4th June 1850, 13 D. 41, viz., to allow the petitioner to renew her application under the present petition as each feu came to be granted.

At the request of the petitioner, however, Mr Campbell stated in his report that she maintained that, considering the unconditional terms of the consents, she was entitled to obtain authority to execute the necessary charters, without having each separate deed approved of by the Court; and that the expense of obtain-

ing such approval would more than swallow up at least one year's feu-duty of each feu, and would be detrimental to the feu-ing, and was besides unnecessary.

July 18. 1852.
Pet. Clelland.

Lord Cowan reported the case this day, and stated that it would be very advantageous if the powers sought by the petitioner could be legally granted by the Court, as the expense, in cases of small value like the present, entailed great hardship on the petitioners.

Marshall, Jr., for the petitioner, maintained that under section 4 of the statute, the Court were not bound to see the deed executed in cases where the consents were to the unconditional feuing of the estate; that the statute was not imperative on this point; and that as the Court could not alter a word of any of the deeds proposed by the petitioner, any examination or approval of these deeds by the Court was unnecessary. The case of *Campbell* was different. His consents and prayer were not in the same terms as in the present case.

The COURT held the statute to be imperative, and that all the deeds to be executed by any party claiming the benefit of sec. 4, must be executed at sight of the Court, but, to save expense, the petition was remitted back to the Lord Ordinary, with power to him to examine the deeds as successively prepared, and to report. The following was the interlocutor pronounced:—

The Lords, on report of Lord Cowan, authorise the petitioner to grant feu rights of the whole or any parts of the lands of Springfield and others, contained in the instrument of sasine in favour of the petitioner, mentioned in the petition, and that in terms of the prayer of the petition, and decern *ad interim*: Farther, remit to the Lord Ordinary to examine the several feu rights proposed to be granted, as the same shall be successively prepared, and to report.

Thomas Ranken, S.S.C., Petitioner's Agent.

SECOND DIVISION.

MORTONS v. WALDIE.

No. 374.

Account—Reference to Pursuer's Oath—Repairs to Vessel—Vendition—
Vendition in Security—Liability for Repairs.

This case came before the Court on a reference to the pursuer's oath after a trial before a jury. The action was at the instance of Samuel and Hugh Morton, engineers, Leith Walk, and Hugh Waldie.

Mortons v.
Waldie.

July 13. 1852. Morton, the individual partner of that firm, who sought to recover from the defender, James Waldie, merchant in Leith, payment of an account incurred to the pursuers in executing certain repairs upon the boilers, engines, and machinery of the steam ship, *St Kiaran* of Leith. The defence was, that another person, Mr John Macindoe, of Macindoe and Company, and not the defender, was the party liable for the account, the right of the latter being that of a mortgagee, although at one time proprietor. The defender had sold the vessel to Macindoe for £1800, and the good will of its trade for £200. The defender afterwards executed a vendition in favour of Macindoe, who, of the same date, granted a vendition in security for £1800, the price of the good will of the trade having been paid.

The defender denied all the averments in the summons, to the effect that the repairs or work specified in the account libelled were executed by the pursuers upon the order and credit of the defender, and for the defender's benefit. That the pursuers were well aware that Macindoe had purchased the vessel, and that the defender had no further concern with her or her trade. The defender, therefore, pleaded, that he was not liable for the account; and further, that the holder of a vendition in security or mortgage over a vessel, was not, as such, liable in law for any repairs executed on the same.

An issue having been adjusted, the case went to trial before the Lord Justice-Clerk and a jury, when a verdict was returned for the pursuer. Thereafter the defender moved for a new trial, on the ground that the verdict was against evidence. The Court refused the rule, and the defender then referred the matter to the oath of the pursuer, Hugh Morton, who deponed to the effect that Waldie employed the pursuers to execute the repairs, and that the whole communings and dealings had been with Waldie as principal, Macindoe having merely acted as agent.

The COURT "find the oath negative of the reference, and find the defender liable in the expenses incurred by the pursuers in relation thereto."

*Lockhart, Morton, Whitehead, and Greig, W.S., Agents for Pursuers.
James F. Wilkie, S.S.C., Agent for the Defender.*

FIRST DIVISION.

No. 375.

Petition, JOHN GELLATLY.

Poors' Roll—Declaration—Remit to Sheriff—Certificate as to Character and Credit of the Applicant.—

In this case, owing to there being no ordained clergyman in the parish, the Court had remitted to the Sheriff of the county to take the declaration of the petitioner for the benefit of the poor's roll. See *ante*, p. 804.

The usual declaration having been taken before the Sheriff of Forfarshire,

Wilson, for the applicant, now moved for a remit to the reporters in the *probabilis causa*.

Scott, for the defender, in the proposed action objected to the remit, on the ground that the Sheriff had not appended to the declaration the usual certificate with regard to the character and credit of the applicant required by the Act of Sederunt, to be appended to the declaration by the minister and elders.

The COURT were of opinion that the machinery of the Act of Sederunt was not applicable to remits made to the Sheriff as in this case, and remitted to the reporters.

George C. Adams, S.S.C., Petitioner's Agent.

John Gellatly, S.S.C., Objector's Agent.

FIRST DIVISION.

Petition, LADY JANE MONTGOMERY or HAMILTON.

No. 376.

11 and 12 Victoria, cap. 86, sec. 26—*Entail Amendment Act—Improvements—Balance of trust estate—Competency of application of funds.*—An entail was executed in 1820 by trustees under a trust-settlement, in terms of the directions of the trustee. A small balance of the trust estate, which the trustees were directed to invest in lands, in the same series of heirs, remained over, which balance the Court directed to be consigned in bank. An application was now made by the heir of entail, to apply this balance in improvements of the estate:—*Held* that the application of the funds was competent, under sec. 26. of the Entail Amendment Act.

This was a petition for warrant to uplift and apply consigned money. The petitioner is heiress of entail in possession of the entailed estate of Blackstone, under an entail executed by the trustees of the deceased Dame Margaret Hamilton Cathcart of Bourtriehill.

The petitioner set forth that there is a sum of money amounting to £495 : 18 : 3 sterling, consigned with Messrs Hunter and Company, bankers, Ayr, under the authority of the Court, “being

July 14, 1852. the balance of Dame Margaret Hamilton Cathcart's trust-estate, which her trustees were directed to invest in the purchase of lands in the county of Ayr, to be settled upon the petitioner, and series of heirs entitled to succeed to the said entailed estate of Blackstone, under the disposition and deed of tailzie before mentioned, but in consequence of their being unable to obtain so much land held under the same superior as might exhaust this balance, and that to have applied it to any other purchase held otherwise would have loaded the heirs of entail with an unsuitable expense in making up titles, the trustees obtained the sanction of the Court to consign the sum until either a suitable purchase should occur, or it might be exhausted by provisions for younger children, the interest in the meantime being drawn by the petitioner as the heiress of entail in possession."

Pet. Lady Hamilton.

This application was now made to enable the petitioner to lay out the consigned sum of £495 : 18 : 3, or a portion thereof, in permanently improving the entailed estate; and in the event of any surplus remaining, the same, if less than £200, to be paid to the petitioner for her own use and behoof, in terms of the Act.

The Lord Ordinary remitted the petition to Mr Patrick Dalmahoy, W.S., who stated in his report, that the doubt which occurred to him, in regard to the competency of the application, under § 26, was, "that it seems to relate to trust-funds standing in a different position from the money held by the trustees in this case. The clause deals, in the first place, with money that has been derived from the sale or disposal of some portion of, or interest in an entailed estate; and, in the second place, with money held in trust for the purpose of purchasing lands to be settled upon the heirs who have right to succeed to an entailed estate. The consigned money in question was not derived from an entailed estate; and although it certainly falls under the other description of being held in trust to be invested in lands for behoof of heirs under an entail which is now in existence, the question is, whether the entail referred to in the statute is not an entail that was in existence at the time the trust was executed; whereas the entail of the lands on which the improvements are here desired to be made emerged after the trust was created, and was the fruit of that trust. There can be no doubt that the consigned money in this case answers the description given in the next section of the Act, the 27th, which deals with money or property that has never been entailed, but which is simply ordered to be entailed; but that section does not provide for the money being applied to the purposes

specified in the 26th section, and for the obvious reason, that the trust it speaks of makes no reference to an existing entail." July 14. 1852.
Pet. Lady Hamilton.

The Lord Ordinary (Cowan) reported the case, holding that the application of the fund can only be reached by construing the statutory provisions upon principles which will have a wide operation, and effect the disposal of trust-funds, of much greater amount than the sum here in question. The proposed application of the fund, he considered the most beneficial that could be adopted.

Boyle was for the petitioner.

The COURT allowed the petitioner to put in a minute in reference to this question, and to print such portions of the deeds as might be considered proper for the information of the Court.

The case was again called to-day.

LORD IVORY. It is impossible to overlook the importance of the considerations which are now brought before the Court. In common with the Lord Ordinary, I am of opinion, that nothing could be more beneficial than the application of the money here proposed, and if I could have done so under the statute, I should have been happy to give way. But being driven to the statute, I am utterly unable not to adopt the doubt raised by the reporter. There are two sections which deal with this matter, and that just because there are two situations which the legislature had in view, in which funds might be placed. There is first, § 27. There can be no dubiety here. There is a remedy of disentail, the only remedy that is granted by the statute, for monies which stand in the situation to which this clause has reference. Now it is the first part of the section that applies to money in the situation of the funds in the present case. There can be no doubt that the description therein given applies literally as well as in spirit to the money now in dispute. It is money invested in trust for the purpose of purchasing land to be entailed, and that description applied not only to the portion of the money that now remains, but to the whole fund of which that portion is only the residue. The whole fund as left by the trustee was not the entailed estate. It was a fund left for the purpose of purchasing land to be entailed. Now the state of the fact is this, that the money which was left before bulk was broken has been partially applied to the purchase of lands, that is, the purposes of the trust have been partially executed, and there is a portion of the funds left in the state in which the whole was before it was executed. We cannot deal with this portion of the funds differently from the

July 14. 1852. whole. For, look to § 26. That section provides for all cases where "money has been derived from the sale or disposal of any portion of an entailed estate." That is, has reference to money not in the situation of the money here; and it is only necessary to look to this, because it shews that the succeeding part of the section applies to a pre-existing entailed estate. I think the whole context shews that the money here spoken of is money to be invested in lands according to the same description as lands which stand entailed at the time. The purpose of the one section is to enable the Court to deal with a fund which has been vested in trust with a view of a new entail. The purpose of the other is to deal with a fund to be invested in land in which the heirs are to be the same as in a pre-existing entail. Now, if we were here to deal with a fund before bulk was broken, I would ask what was the purpose of the trust? for it is that which we must form an idea of, before we can construe which of these two sections applies. Now the money was directed to be invested in lands "to be entailed." To have brought this case under section 26, it would have been necessary that the trustee referred to an entail already existing, settling the destination on the same series of heirs. I think therefore the two sections are quite different, and have reference to two quite different cases. I think that the portion of the money which now remains, stands in the same situation as the whole, of which it is a portion, originally stood, and therefore being ordered to be vested in land for heirs not under a pre-existing entail, it results from these considerations that § 27 alone applies. Now the application is under § 26, and therefore we have no power, however beneficial we may think the application may be, to give it judicial support.

LORD CUNINGHAME. I am disposed to think that this application is both within the letter and spirit of the late Entail Act, § 26. This appears to me to be a *bona fide* and competent application under the statute. The fund was an isolated investment long before the date of the last Act, and as the entailed estate must be in a very different situation now from what it was at the date of the deposit of the fund in the bank, it is clearly most for the interest of the heir of entail to apply it in improvements in terms of the late Act.

The LORD PRESIDENT. I think this is a very nice question under the statute. It appears to me that the application we have here clearly is not upon § 27, nor could it be, because that section does not provide for the application of money in

improvements. Then, if this proceeding be competent at all, it must be under § 26. Under that section, the legislature gives power to the Court to authorise the application of funds in certain ways. Now, it is plain that if this money had been invested in trust originally for the purpose of purchasing lands to be entailed on the same series of heirs as at that time were called to the succession of another estate, it would have been competent for the Court, under that section, to apply the money for the improvement of the estate that was at that time entailed, and not to the purchase of new lands. But in the present case, at the date of the trust, it is not stated to us that this deed contained directions to entail upon the heirs of any such estate. Whether they are the same as the heirs in any estate then existing we do not know; it is not so stated. But the money is to be invested in trust, for the purpose of purchasing lands, and to be invested in a certain series of heirs. Now the lands were purchased in 1820, and settled on a certain series of heirs. The whole question therefore is, whether the money that might have been applied to the improvement of another estate, had it been pre-existing, can be applied to the estate of Blackstone. It is no answer for us to say, that there is no good reason why the legislature should not have allowed it. If the legislature has not done it, we cannot. This is no doubt a beneficial statute, but if we cannot reach it by the words of the statute, we cannot touch it at all. I rather think we can do it by a construction of the words of the statute. There remains £400 invested in trust for the purchase of lands. Now, suppose lands to be purchased and settled on a series of heirs entitled to succeed to the estate of Blackstone, that would satisfy the words of the trust, and I think it would also be a satisfaction of the statute, for it would be a settlement on the heirs of a separate estate, and would be made on a separate deed of entail. On that view of matters, I think that the prayer of the petitioner may be granted. It may be a new construction of the statute, but I think it is consistent with the spirit of the Act, and although I have difficulty, my leaning of opinion is in favour of the construction, and I think the statute will admit of it.

Petition granted.

Hunter, Blair, and Cowan, W.S., Petitioner's Agents.

SECOND DIVISION.

No. 377.

THOM v. THOM'S TRUSTEES.

Landlord and Tenant—Lease—Feu—Personal Exception—Acquiescence—Damage.—Circumstances in which a tenant was found, in respect of delay and implied acquiescence, to have no claim or right of action against the trustees and representatives of his deceased landlord.

July 14, 1852. This was an action of declarator, and for payment of certain sums of money in name of damages, in respect of the following facts:—The pursuer, Robert Thom, was tenant of the farm of Upper or North Ascog, in the parish of Kingarth and county of Bute, which he held from his paternal uncle, the late Robert Thom, senior, heritable proprietor of the estate of Ascog, who had agreed to grant the pursuer a lease of the farm for a period of nineteen years, at the yearly rent of L.110 for the first two years of the lease, and L.140 for the remainder of the term; and under which agreement the pursuer, with the landlord's consent, entered meanwhile into possession of the farm. Disputes and differences having afterwards arisen as to the terms of the lease, more especially with reference to a stipulation whereby the landlord was to have a reserved right of occupying a part of the farm with plantations, or for other purposes, on the one hand, and to allow a proportional abatement of rent on the other, the parties agreed to a reference or submission to Mr Samuel Girdwood, residing at Kerry-Lamont, who issued an award, or decree-arbitral, by which he appointed the parties to execute, in a valid and effectual manner, a lease, in terms of a draft contained and embodied therein, one of the clauses of which reserved to the proprietor to feu for villas any part of the ground let, the tenant being allowed a deduction according to the annual value of the ground so taken, with the exception of a field next the sea, the deduction for which, in consequence of its having been drained by the landlord, was to be 10s. 6d. per acre. The arbiter also allowed the sum of L.2, 5s., subsequently increased to L.2, 10s. of annual abatement from the rent, as compensation for ground already taken and used for plantation by the landlord, and by which abatement, the rent during the seventeen years of the remaining part of the lease was reduced from L.140 to L.137, 10s.

This lease was never executed, but the pursuer continuing to occupy the farm, the parties appeared to have acted according to its terms. The record set forth that Mr Thom, the proprietor,

had been at considerable expense in draining, cleaning, and leveling the above field next the sea, and, having arranged to grant a feu of it, he addressed the following letter to the pursuer :—
" Ascog, 15th April 1840.—Sir, the field next the sea, and ex-tees.
tending north from the march with Mr Glass' property, is now
being feued, and as the feuar's right of entry is to be on the
15th day of the next month (say the 15th of May 1840,) you
cannot be allowed to possess that part of your farm after that
term. I am, Sir, your humble servant." (Signed) "RT. THOM."
(Addressed) "To Mr ROBERT THOM, junior, of North Ascog
farm."

Of the field referred to in that intimation, extending to about eight acres, the pursuer ceded possession at Whitsunday 1840. He was in consequence allowed the stipulated deduction from the rent of the farm of 10s. 6d. per acre for the eight acres until 1842 ; and since that time, Mr Simpson, his assignee, has been allowed the same deduction per annum.

There did not appear to have been any evidence that any formal feu right of the field had been granted during Mr Thom's life, nor what the arrangements regarding the field in question really were. But it was stated for the defenders, that a villa or dwelling-house had been built by Mr Thom, and that during his lifetime the pursuer never pretended that he had been illegally removed from, or improperly induced to cede possession of the field. The pursuer, on the other hand, maintained that he had been all along under the belief that the portion of the farm taken possession of by the landlord had been actually feued by him as mentioned in his letter of 15th April 1840, and after an attempted negotiation by correspondence, he presented a petition to the Sheriff of Bute, for the purpose of ejecting them from the field ; which petition was dismissed as incompetent.

In this state of the facts the pursuer concluded for various grounds of loss and damage ; also, that Mr Thom had fraudulently and illegally violated his engagements with the pursuer ; and, computed with reference to all these grounds of action, the summons concluded for numerous payments, in name of damages and expenses, &c.

The defenders, *inter alia*, pleaded that (2d plea in law) the pursuer had not averred matter relevant in law to support the conclusions of the action ; and that (4th plea in law) the pursuer having ceded possession of the field in May 1841, and allowed a house to be erected on it, and Mr Thom having survived until

July 14. 1852. December 1847, without any such pretences and claims as the present having been made during his lifetime by the pursuer, the latter is barred and excluded from insisting in his present claims, and the defenders are not, *post tantum temporis*, bound to produce evidence that the late Mr Thom granted a formal feu right of the ground, under the penalty of subjecting his estate to the pursuer's claims.

The Lord Ordinary (Anderson) pronounced an interlocutor, by which he "Finds that there are relevant averments set forth in the record to support the conclusions of the action: Finds that the facts admitted by the pursuer are not sufficient to exclude the grounds of action as laid in the summons: Therefore appoints the pursuer to lodge, within eight day's from this date, a draft of the issue or issues proposed by him, and the defenders a draft of their counter-issue."

The defenders, Thom's trustees, reclaimed.

Hector and Moncreiff were for the reclaimers.

Hallard and the Solicitor-General, for the respondent.

The COURT differed from the Lord Ordinary, and pronounced the following interlocutor:—"The Lords having advised the reclaiming note for Donald and Others, trustees and executors of the late Robert Thom, and heard counsel, alter the interlocutor reclaimed against, in so far as it repels the 2d and 4th defences: Find that the pursuer ceded possession of the field in question to his uncle, the late Robert Thom, after receiving a letter from him of date the 15th April 1840, in reference to the latter's powers to resume said field: Find that the pursuer was satisfied with that communication, and ceded possession on the terms stipulated in the lease, and did not again, during the lifetime of the said Robert Thom, who survived till December 1847, require farther evidence that the said field was actually feued, or make any claim for re-occupation of the same, or for greater compensation, if it was not actually feued: Find that the pursuer cannot now in this action raised in 1850 and after the death of the said Robert Thom, legally insist on the conclusions of the action founded on the ground that the said Robert Thom ought not to have made said application to him, and therefore assoilzie the defenders, and decern: Find the defenders entitled to expenses," &c.

J. and J. Macandrew, S.S.C., Pursuer's Agents.

Gibson-Craig, Dalziel and Brodie, W.S., Defenders' Agents.

FIRST DIVISION.

HAGART v. MUNRO.

No. 378.

Process—Defences—Judicature Acts, 6 Geo. IV., c. 120, and 13 and 14 Vict., c. 36.

In this case an objection was taken by,

July 15. 1852.

Macfarlane, for the respondent—That the claimer had not printed the original defences, which were an essential portion of the case, and as to which the recent Statute had not repealed the provisions of the previous Judicature Act, requiring specially that the summonses and defences should be printed.

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Maidment answered—That the record had been closed on summonses, revised condescendence, and revised defences, and had been heard on this closed record by the Lord Ordinary; that the original defences were superseded by the second defences; and that the conditions of the previous statute had been fairly complied with.

The Court sustained the defences, and sent the case to the roll.

R. Arthur, S.S.C., Agent for Pursuer.

Lockhart, Morton, Whitehead & Greig, W.S., Agents for Defender.

FIRST DIVISION.

M'NAUGHTON v. BAIRD.

No. 379.

Sale—Delivery—Right of Retention.—The agent in Bristol of a Scotch Iron Company, sold to a merchant there a quantity of iron deliverable in Clyde. The price was paid in Bristol, but delivery was not taken. The purchaser sold the iron to a third party, who resold it. A delivery order was duly endorsed to the eventual purchaser, who demanded delivery, but was refused by the vendors, on the ground that the original purchaser was indebted to them on transactions subsequent to the sale, for which they held the iron sold in security:—*Held*, that the transaction fell to be regulated by Scotch law, that the plea of retention was well founded, and that the right was not affected by the passing of the delivery order from hand to hand—no intimation of which transactions had been made to the vendors of the iron.

This was an action to compel delivery of a quantity of iron under July 15. 1852. the following circumstances.

In 1845 the defenders, the Messrs Baird, iron-merchants in Glasgow, by their accredited agent in Bristol, sold to Acraman of the same place, 500 tons of pig iron. The agent Mr Davies, communicated this sale to his principals of same date, and next

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July 15. 1852. day delivered to Acraman the following sale note. "Sold to W. E. Acraman 500 tons Gartsherrie pigs (3/5 No. 1 and 2, 5 No. 3) at 70/- nett cash in the Clyde, for immediate delivery on payment, say in fourteen days, for William Baird and Company." In course of post the Messrs Baird wrote to their agent, confirming the sale, and informing him that they had booked the order, "and now send you the enclosed invoice thereof, the amount of which you can remit when due, £1750 nett." The transaction was at the same time mentioned in the Messrs Baird's invoice book as 500 tons pig iron to Mr Acraman, "laying to order £1750 due 20th February." Acraman paid the £1750 as the price of the iron within the fourteen days, to Davies at Bristol, and Davies remitted the amount to the Messrs Baird. Acraman did not take delivery of the iron himself, however, but sold it to Mr Robertson of Glasgow, who paid him the price, and obtained a delivery order upon the Messrs Baird. Robertson again sold the iron to Robertson and Company, who paid the price, and in whose favour he endorsed the delivery order obtained by him from Acraman. Soon thereafter Robertson and Company demanded delivery of the iron from the Messrs Baird. The latter refused, on the ground that after the iron had been paid for by Acraman, they subsequently had other transactions with him, by which he became indebted to them, and that they were entitled to retain the iron in security of the debts subsequently contracted to them by Acraman. In these circumstances an action was brought by Messrs Robertson and Company, (now represented by M'Naughton,) to compel the Messrs Baird to give delivery of the iron to the pursuer, or those in their rights.

In November 1848 the Lord Ordinary (Wood) pronounced an interlocutor, finding, &c.: *First*, That in this case although the contract was made in England, the place of performance was Scotland, and that therefore the contract, as to its validity, nature, obligation, and interpretation, is to be regulated and governed by the law of Scotland. *Second*, That "transactions having taken place in England by which it is alleged that Acraman's rights under the said contract came to be transferred to the original pursuers the force and effect of these transactions is to be determined by the law of England: Farther, and assuming theforesaid *first* finding to be correct, finds, *Third*, that the validity of the defender's plea of retention in the circumstances in which it is maintained by them is to be decided by the law of Scotland."

Against this interlocutor M'Naughton, as trustee on the seques^{July 15. 1852.}
trated estate of Robertson and Co. reclaimed.

The case was fully discussed, and the Court intimated that they ^{M'Naughton v. Baird.} were not prepared to acquiesce in the Lord Ordinary's interlocutor, but as they were desirous in the meantime to see a more specific statement as to the pursuer's averments in reference to the usage of trade, &c., they, on 30th Nov. 1850, pronounced an interlocutor, requiring such specific statement to be given in. This was accordingly done. The case was again discussed in November 1851.

Inglis and Macfarlane, for the claimer.

The *Lord Advocate*, (*Moncreiff*), and *Neaves*, for the respondents.

The Court intimated that they would recal the whole interlocutor, and in the first instance hear parties farther on their pleas in law. Parties having been fully heard the case was now advised.

THE LORD PRESIDENT. This is an important case, and attended with considerable difficulty. The question arises, whether Baird is entitled to plead retention. No demand for delivery of this iron was made prior to the 30th May, the date of Acraman's bankruptcy. This is properly a plea of retention on the part of Baird. The iron never passed out of his custody. It never was separated from the other iron in his possession, and he maintains his right to retain possession of it. Something was said as to the right of lien, but that is a different matter. This is a question arising in reference to a right of retention which Baird pleads. It is a right known in the law of Scotland which belongs to the seller of an article which he has not parted with the possession of, not only as against the price of that particular article, but as against any claim due to him on general account, and especially where the party who demands delivery avows his inability to settle the remaining part of his account. It is important to keep that in view, for such is the plea maintained by Baird. The particular nature of the plea was brought out in the case of *Melrose v. Hastie*, 7th March 1851, where the Lord Justice-Clerk lays down the distinction between lien and retention; perhaps the most clear and concise explanation of the law of retention is given in the opinion of Lord Moncreiff.

This was a sale made by the Baird's agent in Bristol to Acraman in Bristol, and the first matter to be considered is, how that circumstance will deprive Baird of that right of retention, which certainly would have been good had Acraman been a merchant in Greenock or Edinburgh, or any other part of Scotland. Now the nature of

July 15. 1852. the contract was one made by an agent in Bristol for a Scotch house, avowedly acting for his principal in reference to goods that were to be delivered in Scotland. The place of delivery is Scotland. The contract takes place in Liverpool, and it is an engagement by the agent binding on the Bairds to deliver the iron in the Clyde,—not any particular parcel of iron, so that it could be claimed out of the mass of iron belonging to the Bairds, but to deliver a given quantity of iron. I have difficulty in understanding how that could transfer the property of any particular portion of iron, rather than another portion of the goods, all of which are still in the possession of the Bairds. It is said the price was to be payable in Bristol. I see nothing to that effect in the document that passed at the time. There is no statement of a place where the price was to be paid, and I apprehend that Acraman being in Glasgow, or having an agent there, had he paid the price within fourteen days, that would have been full implement of his part of the contract. The obligation was to pay the price to the Bairds, and there is no statement where it was to be paid. It was paid at Bristol, but there is no part of the original agreement to that effect. How then does the nature of the transaction deprive the party who is in possession of the iron of his right of retaining it when the purchaser comes to demand it? If Acraman himself had come demanding the iron, avowing that he would give no satisfaction about the other accounts owing by him, it appears to me that the Bairds would have had the remedy in that case. Suppose the purchase had been made in Scotland. This is an equitable remedy that the seller has until he shall be satisfied of any debt that is due to him by the other party, and whenever the party comes to Scotland to demand delivery of the goods in the seller's possession, the seller is entitled to plead all the benefits that possession gives him, unless he has done something that plainly bars the right to that plea. Therefore, unless it can be shewn that the Bairds had relinquished their right by some agreement expressed or implied, I cannot see how they do not now possess that right.

But there may be a difference of circumstances arising out of what took place with the Robertsons. It appears that Acraman had transferred his right to Robertson, but the sale note or invoice which was the title of Acraman in the matter, was not a thing transferable from hand to hand. The order of delivery might have been very effectual, supposing there had been no subsequent transaction, but it is a different thing if the Bairds were not bound to deliver to Acraman. And if in the interval Robertson had come

to the Bairds and been recognised by them before they applied ^{July 15. 1852.} their right of retention, that also might have been different. But it does not appear that intimation of the transaction had been made ^{M'Naughton v. Baird.} to the Bairds before the 30th May, and therefore up to that point it appears to me that nothing has occurred to bar the right of retention. The purchase having been made by Acraman in Bristol in communication with an agent there, did not deprive the owner of that iron of the right of pleading retention as against Acraman, when he comes to demand delivery of it as by other purchasers.

It was put on record that by the practice of England as well as of Scotland, the sale and delivery orders transferred the obligation to deliver the iron to the parties in whose favour the orders were made. And there is a statement here that the parties transacted in reliance on the law of England; and the usage of the trade is set forth. I understand this to mean that after payment of the price there would be no lien. That I understand to be the law of England in reference to the purchase of specific goods. But that is a totally different state of the law from ours, and I do not see that it is here specifically stated, that the sellers or their agent came under a condition at the time of the sale, that they were not to maintain the rights that belong to a party in Scotland to keep possession of goods till he has been satisfied of the debts due to him by the purchaser. But I do not think that this allegation would bring it up to a case of waiver. If the right does exist in Scotland, then the statement would have required to amount to this, that a right which would have existed notwithstanding the sale having been transacted in Bristol, was expressly abandoned by the party; and there is no statement of that kind here.

Now, in regard to whether this is a Scotch or English contract, that is a wide way of speaking. It is in one sense English, on the other Scotch. It is both. But the obligation to deliver is an obligation to be implemented in Scotland. That is substantially a Scotch matter; and the parting with the custody of the goods,—the rights that attach to custody and possession,—whether the seller has divested himself of the goods,—are Scotch matters too. If the Bairds had been in England accidentally, and entered into such a transaction as this, and Acraman had then come to demand delivery, would the Bairds not have been entitled to plead retention? And is it different because an agent did so? The obligation here is delivery. I think the place where delivery was to take place is a matter of Scotch law, and on these grounds it

July 15. 1852. appears to me that in this case we have little to do with the transference of this order, which was never intimated to the Bairds at all. The plea of retention, therefore, is well founded.

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LORD CUNINGHAME. In the important question of mercantile and international law which here arises, it is impossible not to revert to the late case of *Melrose v. Hastie*, which was elaborately argued before both Divisions of the Court in March 1851. In that case the leading authorities in our own system and in that of England were anxiously enumerated and considered; and while it was shown and admitted that in England no lien is allowed to a seller for a general balance over specific goods, the *price* of which has been paid, it was found by a majority of the Court, (mainly on the authority of the single case of *Mein v. Boyle*, in 1829) that such a lien did exist in Scotland; and accordingly the right of retention was allowed to the seller in *Melrose's* case. As I view the present case, however, it is not affected by the case of *Melrose*, but must be regulated by the law of England on the plea now at issue between the parties. I have come to the conclusion that the lien claimed by the defendants cannot be sustained.

1. The transaction upon which the present claim is founded seems to me to have been peculiarly an *English contract*, subject to all the rights and obligations, express and implied, in the law of contract in England. The party who concluded it carried on business and resided in England; the price was payable instantly to *himself*, and not to any constituent in Scotland, and he received the price and discharged it. The agreement was thus in every essential point an English agreement. The words of Lord Chancellor Lyndhurst in the case of *Mills v. the Albion Company*, in 1828, apply directly to the present case.

2. The next inquiry is, whether this transaction *on payment of the price* by the principal vendee, was transferable to a sub-vendee in England, without being subject to any lien in favour of the first sellers, for subsequent debts and transactions of the primary vendee. I do not understand that any such doctrine has ever been propounded in England. The vendor's lien while the goods are not delivered is described by all writers as existing only *for the price*; and when that is paid, it cannot be revived in respect of future transactions. Cross on Lien p. 322; Deacon on Bankruptcy, vol. I. p. 545; Morton on Vendors, p. 183. The plea of *sub-vendees* or *vendors*, who have received the price from the primary vendee is even clearer and stronger. So soon as the vendors received the price, they held the goods for behoof not only of the first vendee,

but of all future purchasers, who might acquire the goods in the due course of trade, the property was transferable to them, and passed by their payment of the price, and the delivery to them of the note of sale and order of delivery. The plea of the first vendors seems to rest on this, that no *intimation* of the sub-sale by Acraman, the first vendee, was made to them by any party, and that by the English law of *set off* the vendors were entitled to hold the iron for a balance incurred by Acraman on subsequent transactions. But when the price is paid in England, I can find no authority and no allegation of usage to support any claim on the part of a vendor for a lien for his general balance; Deacon on Bankruptcy, vol. I., p. 755; Burge, vol. III. p. 296; *Spear v. Travers*, 4 Campbell's Reports, p. 51; *Davis v. Reynolds*, 4 Campbell, 267.

3. Holding the vendor's claim under the law of England on this point to be clear (and only on that assumption) I conceive that that law must govern the present case. On the grounds already explained, I must hold it as a point admitting of no question that if the iron in dispute had been deliverable in England, the vendor's lien would have been at an end on payment of the price. But the opposite plea is urged here solely on the ground that the iron was situated in Scotland, and deliverable to the purchaser there—and that every lien over it competent by the law of Scotland applied to it. But *mobilia non habent situm*, the rights of vendors and vendees *inter se* must be regulated by the law of the place where they have contracted. It is difficult to see what effect the place of deposit of the goods sold could have on the case. They were at the disposal of an English merchant and agent, who drew the price, who concluded a bargain, and obtained a sale note and order of delivery as effectual in England as a bill of exchange. He was therefore bound by an English contract to make the iron forthcoming; and nothing but a defence competent in England could absolve him and his employers. Finally, although the present question is not settled by any case precisely in point, yet the *dicta* of institutional writers seem to coincide in a great measure with the preceding views. Story, 3322; Burge, vol. III. p. 370.

LORD IVORY. I concur substantially with the Lord President. The conclusion to which I have arrived is, that the first finding of the Lord Ordinary's interlocutor can not be sustained, but I concur with the third. The grounds on which I have arrived at this opinion, is with reference to the doctrine of *concursum debiti et crediti*. The contract of sale does not, as in England, pass the pro-

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July 15. 1852. perty except by delivery; and so long as delivery has not been made the contract remains an obligation merely. This doctrine has been uniformly given effect to. The party is refusing to fulfil an obligation until a counter-obligation be fulfilled to himself. The foreign debtor is *in pari casu* with a Scotch. The case, as it appears to me, has nothing whatever to do with the question of vendor's lien in England. Lien in that sense is the right of retaining the property of another. In this case there is no room for lien. The property has never passed at all. It is the property of the party who refuses to part with it. The vendor's lien cannot apply to the case in another point of view, because lien depends on possession, and if so it must very much depend on the law of the country where possession is held. I am not of opinion that any difference in the case is created by the delivery order being transferred to third parties. If, like a bill of lading or bank note, the right could be said to be passed by it from hand to hand, that would have changed matters, but there is no offer to prove that it is so. Had there been an offer to that effect, I should have been clearly for allowing the proof. There is here an obligation payable to Acraman. It has not been enforced until after his bankruptcy, and when the Baird's right of retention comes into effect. The trustee is in no better position than Acraman himself would have been. But the *lex loci solutionis* will not in all events regulate everything connected with the contract. That has never been so laid down. It is only where everything that belongs to the contract co-exist in one and the same country, that it does so. The present question resolves into a remedy under the contract; and whether we look to the Scotch doctrine of tradition, or apply the lights of international law, according as I can gather them from the conflicting authorities, they both resolve into this, that the plea of retention ought to be given effect to.

The COURT (Lord Cuninghame dissenting) "Find that the defendants' plea of retention in the circumstances in which it is maintained by them, is to be decided by the law of Scotland, and sustain that plea, and *quoad ultra* remit to the Lord Ordinary to proceed farther, as may be just, reserving all questions of expenses, and grant power to the Lord Ordinary to dispose of the question of expenses."

Campbell and Smith, S.S.C., Pursuers' Agents.

Lockhart, Morton, Whitehead, and Greig, W.S., Defendants' Agents.

SECOND DIVISION.

CULLEN v. DYKES.

No. 380.

Process—Multiplepoinding—Riding Claims—Decree in name of Agent—Interest on Expenses prior to taxation.—1. Held, that an illiquid claim cannot be admitted as rider in a multiplepoinding. 2. Where expenses had been found due to a party in a suit, but were not taxed and decerned for till some years after, held that no interest could be claimed on the sum prior to the date of the taxation and decerniture. 3. An agent disburser has no hypothec over the subject-matter of the suit, but only over the expenses decerned for.

See *ante*, p. 327.

The questions in this case, which was a conjoined action of July 15, 1852.
multiplepoinding raised by Dykes, and an ordinary action by Cullen v.
Cullen against Dykes, arose out of a complicated series of pre- Dykes.
vious litigation.

Dykes was cautioner for a Sheriff-officer, Baird; Struthers employed Baird to charge and poind M'Closkie, for a protested bill for L.20, due by him. The charge was blundered by Baird, and M'Closkie, in consequence, raised an action of reduction, suspension, and damages, against Struthers, which went to a jury. The verdict was in favour of Struthers, but was set aside, and on a second trial, a verdict was given against Struthers, with one shilling damages. The Court held, 9th Dec. 1843, that this verdict carried expenses. Cullen was agent for M'Closkie, and took decree in his own name for these expenses, but did not get them taxed and decerned for till 1849, when they were taxed at L.362 : 16 : 6½. Struthers in the meantime had raised an action against Dykes, as cautioner for Baird, in which he concluded for payment of the original bill of L.20, and of all expenses which he might incur, or to which he might be found liable in the action proceeding against him at the instance of M'Closkie. Cullen was his agent in this action. Decree was given in his favour, under certain deductions from the expenses which he claimed. Struthers became bankrupt, and Woodside, the trustee on his estate, arrested in the hands of Dykes, for the sums in which he had been found liable in relief to Struthers. Cullen also, as judicial assignee for M'Closkie, in his action against Struthers, brought an action against Dykes, for payment of the expenses for which he had got decree. Dykes, in consequence, raised a multiplepoinding, in which he consigned the balance remaining due of the principal

July 15. 1852. bill, and the sums in which he had been found liable to Struthers.

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As to part of that sum, amounting to L.204, which was the amount to which Struthers had obtained relief for the expenses he had incurred to M'Closkie, there was no claimant but Cullen. But he objected to its being included in the multiplepoinding at all, and insisted on obtaining it in his ordinary action against Dykes. The Lord Ordinary (Rutherford), however, conjoined the two actions, held the ordinary action by Cullen, as a claim for him in the multiplepoinding, to the sum of L.204, and preferred him to it, gave him decree in the ordinary action, for the balance of the L.362, for which he pursued—preferred Woodside, Struther's trustee, to the whole balance of the fund *in medio*, reserving to Cullen all action against him, decerned against Dykes for legal interest to Cullen, on the L.362, from 1843, when it was found due in the action at the instance of M'Closkie, till 1851, except as to the part consigned in the multiplepoinding, as to which he found bank interest only due, and found Cullen liable to Dykes for the expenses of his objections to the competency of the multiplepoinding, and to the condescendence of the fund *in medio*.

Against this interlocutor both parties reclaimed; Cullen praying to be preferred in regard to the fund *in medio* in the multiplepoinding, to the whole extent of a claim for L.311, being the balance of his account against Struthers, as agent for him in the action, *Struthers v. Dykes*, in which only part of the expenses were decerned for against Dykes; and also to be found entitled to full legal interest on the other sum of L.362, during the whole period from 1843, till paid. Dykes, on the other hand, prayed to be found not liable in interest on that sum, betwixt 1843 and 1849.

Penney, and the *Lord Advocate*, for Cullen, *First*, as to the interest, if Cullen was entitled to succeed in his ordinary action, Dykes could not escape payment of legal interest, by consigning the sum in a multiplepoinding. Cullen was so entitled, as the Lord Ordinary has found, by giving him decree in it for the full balance of his claim; and as for the part consigned, as there was no counter claim for it at all, there was no double distress, and it was improperly included in, and consigned as part of the fund *in medio*, in the multiplepoinding. Legal interest ought therefore to continue to run on it: *Secondly*, As to the objections of Dykes to be found liable in interest from 1843, that was the date at which Cullen was found entitled to the sums, and consequently interest must run on it, as a debt from that date, till paid: *Thirdly*, As competing with Woodside in the multiplepoinding.

This was only as to the sum composed of the original bill, for the expenses which Struthers had incurred to his own agents in defending himself against M'Closkie. These were recovered by Struthers in an action in which Cullen was his agent, in which he took decree for expenses in his own name; but they were modified to two-thirds of the whole. He now claims here for the remaining one-third, as from his own employer, for whom he was agent disburser. Although it is true that an agent has no claim of hypothec over the subject of a suit as against the creditors of his employer, yet he has as against his employer himself, which is the case here. Woodside sisted himself in this action almost at its close, and Cullen's claim for the sum is a rider upon Woodside. It has never been held that in all cases a riding claim must be constituted by decree before it is admitted.

G. Young, for Dykes. Dykes has been found liable in interest from 1843, but on a sum that was not taxed and decerned for till 1849. It is true Cullen was in 1843 found entitled to have decree for it; but this he did not choose to take, and cannot be suffered to benefit thus by his own remissness.

T. Mackenzie, and Solicitor-General, for Woodside. On the first point; as Cullen had raised an action, and other parties used arrestments against Dykes, he was quite entitled to raise a multiplepoinding, and was not called on to discriminate for himself his several liabilities in so complicated a case. Cullen's claim for £204 not being opposed, he ought at once to have taken the money that was offered in the multiplepoinding, and was justly found liable in the expense caused by his objections. On the third point. Cullen is here as competing with creditors, for he is competing with the trustee on the sequestrated estate, who is really in the place of an arresting creditor therefore he can have no preference over the fund pursued for. *Skinner v. Magistrates of Haddington*, 7th February 1813, 2 Bell's Com., 37. Cullen's claim, as constituted in the ordinary action, is admitted by the trustee to rank as an ordinary debt; it is only objected to as being a preferable one in the multiplepoinding. No riding claim can be admitted, except in virtue of a constituted, or at least a liquid debt, which this is not. *Royal Bank of Scotland*, 4th December 1849.

The LORD JUSTICE-CLERK. On the first point it is the general rule not to discourage the bringing a multiplepoinding, unless where plainly collusive or unnecessary. Here it was not so, for double diligence was used against Dykes. As to this sum of £204

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July 15. 1852. it was clear, when it came into Court, that no one was entitled to it but Cullen ; but Dykes was not bound to know this before. Cullen ought to have claimed it in that process, and then he would have got it at once ; but instead of that he objected to its being there at all, and therefore has been justly found liable in the expense caused by his objections.

On the 2d point, the Court desired to confer with the Lord Ordinary, whose able judgment shews him to have carefully considered this most perplexed case. I have had the satisfaction of learning that this particular point was not brought under his attention, and that on now considering it, he quite concurs with the judgment of the Court in reversing his interlocutor, in so far as it is concerned. Cullen was entitled in 1843 to have the expenses to which he was then generally found entitled, taxed, and decerned for ; and if he had done so, he would have been entitled to full legal interest on them till paid ; but he chose, for some reason not to get this done till 1849. An agent disburser may sometimes be entitled to charge interest on his outlay against his own client prior to decree, but he cannot against the adverse litigant. As he has no claim, therefore, for interest against Struthers, before getting this done, he can have none against Dykes, as liable to relieve Struthers.

On the third point. If Cullen, at the time when Woodside sisted himself in the action *Struthers v. Dykes* had intimated to him that he had a claim which would swallow up the whole amount pursued for, Woodside would probably not have sisted himself, and if he had, Cullen might possibly have been now entitled to be preferred, in virtue of that private arrangement. But he did not. And his claim now therefore resolves into no more than either a claim as rider, in virtue of an unliquidated amount, or a claim of hypothec as law agent over the subject of a suit for a separate debt. Either claim is perfectly unsound in law ; and the Lord Ordinary has done quite right in rejecting them.

The other Judges concurred, and the COURT pronounced the following interlocutor :—

“ Refuse the reclaiming note of the said John Cullen, and adhere to the interlocutor reclaimed against by him : Find the claimants, Dykes, Woodside, and Currie, entitled to additional expenses, such expenses being solely those applicable to their opposition to the said reclaiming note, and not to the reclaiming note of the said Thomas Dykes : Find that the expenses in the ordinary action due by Dykes are the expenses incurred in the

action until the remit by the Inner House to the Lord Ordinary, July 15. 1852. and no other expenses : Further, as to the reclaiming note of ^{Cullen v.} Thomas Dykes, refuse the same, and adhere to the interlocutor of Dykes. the Lord Ordinary, except as to the interest due to the said John Cullen on the sum contained in his decree of the 18th day of February 1849, as to which interest alter the said interlocutor : Find that the said decree infers the sum of £362, 16s. 2½d., which bears interest until payment, but contains no decerniture for the interest prior to the date of said decree : Find that the decree for the said sum of expenses, in the case M'Closkie v. Struthers, for which the said Thomas Dykes is liable in the name of the said John Cullen, as agent disburser thereof, does not entitle the said agent to claim interest on his account prior to the date of said decree ; and that except to the extent of the decree, the said John Cullen is not vested in any right at the instance of M'Closkie, or of Struthers, to proceed against the defender, Thomas Dykes : Therefore find legal interest due on the said decree from the 8th day of February 1849, until the 18th day of October 1851, when the sum of £204, 8s. 10d. was consigned by the said Thomas Dykes in the multiplepoinding : Find that bank interest is due on the said sum of £204, 8s. 10d., and that legal interest is due on the balance of £154, 7s. 4½d., from the said 15th day of October 1851, until payment : Find no expenses due to the said Thomas Dykes : Allow accounts of such expenses as are found due under this interlocutor to be lodged, and remit," &c.

John Cullen, W.S., Pursuer's Agent.

Lockhart, Morton, Whitehead, and Greig, W.S., Agents for Defendants.

John Ross, S.S.C., Agent for Woodside.

SECOND DIVISION.

THE EARL OF MINTO, *Petitioner.*

No. 381.

Entail Amendment Act (1848)—Improvements.—Held that the erection of a mansion-house was an improvement under sec. 26 of the statute 11 and 12 Vict. c. 36, but that the erection of a school-house and a house for the teacher was not.

This was an application by the Earl of Minto, as heir of entail, July 15. 1852. under sec. 26 of the Act 11 and 12 Vict. c. 36. That section provides, that in all cases where money is " derived from the sale or disposal of any portion of an entailed estate in Scotland, . . . and where the heir in possession" " could, by virtue of the Act,

^{Earl of}
*Pet. Earl of
Minto.*

July 15. 1852. acquire to himself such estate in fee-simple, by executing and recording an instrument of disentail as aforesaid, it shall be lawful for" the Court, upon summary application, to "grant warrant and authority, to and in favour of such heir of entail, for payment to such heir of such sums of money as belong to himself in fee-simple; but if such heir of entail shall not be entitled to acquire such estate in fee-simple, then it shall be lawful for such heir, with the approbation of the Court, to lay out such money, or any portion thereof, in or towards payment of entailer's debts . . . or in permanently improving the" estate "or in repayment of money already expended in such improvements."

The petitioner had received from the Edinburgh and Northern Railway Company a sum of money as compensation for portions of his estate taken for the formation of the line. He had erected on the estate a mansion-house, and also a school-house and dwelling-house for the teacher, and he now applied for permission to apply to the expenses of these buildings the sum obtained from the Railway Company.

The Court remitted to Mr John Colquhoun, Barrbush, Johnstone, "to inspect the improvements mentioned in the petition, and report whether they appear to be of the nature of improvements contemplated by the Act of Parliament therein mentioned." Mr Colquhoun reported as to the mansion-house, that it is a permanent improvement, and of the nature contemplated by the Act mentioned in the petition. "With regard to the school-house and house for the schoolmaster, he reports as to these, on this point, with less confidence. That they are important and permanent improvements upon the estate, in one sense, there can be no doubt. They are not improvements of the nature contemplated by the Montgomery Act;" but by their erection "the reporter conceives that the estate of Lochgelly has been permanently improved, not merely in a social and moral, but also in a patrimonial or pecuniary point of view,"—in a social and moral point of view by educating the numerous people employed on the estate and in neighbouring blast furnaces. "It may further be observed, that should anything occur to render it unnecessary to continue to use the school-house and teacher's house for the purposes for which they are now used, they could easily be converted into excellent dwelling-houses for letting, or the school-house could be used as a factor's house, or, with offices added, they would form a very good farm-house and steading. The reporter is therefore inclined to

regard these buildings as permanent improvements of the nature July 15. 1852.
contemplated by the Act."

Pet. Earl of
Minto.

The COURT, after consulting with the Judges of the other Division, pronounced the following interlocutor, Lord Cockburn dissenting from the first finding:—" . . . Find that the school-house and dwelling-house for the teacher, mentioned in the petition, are not improvements of the nature contemplated by the Act of Parliament. . . . Find that the said mansion-house is an improvement on the said entailed estate of the nature contemplated by the Act of Parliament."

Mure was for the Petitioner.

Tods and Romanes, W.S., Agents.

SECOND DIVISION.

CRAWFORD and OTHERS v. LENNOX.

No. 382.

Statute—Construction—Jurisdiction.—In a local Road Act in which power was given to trustees to shut up superfluous roads on notice to all concerned, and in which certain modes of obtaining redress by any aggrieved by the actings of the trustees were provided, but without any express exclusion of the jurisdiction of the Court,—*Held* that a party who had failed to take the statutory remedies was barred from bringing an action in the Court of Session.

This was a reduction of certain proceedings of the Stirlingshire Road Trustees, by which they had, in 1840, shut up an old road as being useless.

July 15. 1852.
Crawford, &c.
v. Lennox.

The road had been shut up under the Stirlingshire Road Act, 50 Geo. III., c. 69, which, in section 36, gives power to trustees to shut up superfluous roads, on petition being presented to them which has been duly intimated to all concerned, so that they may be heard.

Section 64 provides, That in case any person shall think himself "aggrieved by any proceedings to be had in the execution of this act, for which no particular relief has been hereby provided, it shall and may be lawful to the said person or persons to appeal for redress to the next general quarter sessions of the peace for the said county, at which not fewer than three justices shall be present, and such appeal shall be lodged within six days after the matter complained of shall have been done;" and if any person shall think himself "aggrieved by the judgment of the quarter sessions, or of any general meeting of trustees for altering the

July 15, 1852. direction and course of improper and inconvenient roads, and for
 ~~~~~  
 Crawford, &c.  
 v. Lennox. shutting up superfluous and useless roads, it shall be lawful for such person or persons to apply for redress by summary complaint to the Court of Session," whose judgment shall not be subject to appeal, "provided always that before such application the party making the same shall pay into Court the sum of L.10 sterling, besides finding caution to pay the full costs of suit," and "that such application to the said Court of Session for redress shall be presented within fourteen days after the date of such judgment of the quarter sessions, otherwise the same shall be final and conclusive on all parties."

No part of the procedure here pointed out had been adopted by the pursuers.

The present action of reduction was founded on the alleged irregularity of the statutory notices.

It was pleaded, *inter alia*, for the defenders in their third plea, that the pursuers not having adopted any of the remedies provided by the statute, are barred by the terms of it from raising or insisting in the present action, and that the proceedings of the road trustees are final and conclusive.

The Lord Ordinary (Robertson) assailed the defender. The pursuer reclaimed.

*Macfarlane* and *Moncreiff* were for the pursuer.

*Monro* and the *Solicitor-General* for the defender.

LORD JUSTICE-CLERK. I think this objection must prevail. The Act makes the decision of the justices final, unless appeal in a certain form is taken. It is only by following the mode of redress prescribed by the statute that the pursuer can escape the finality which is otherwise fixed.

LORD MEDWYN. I have some difficulty in holding that review is excluded by the provision allowing it to be obtained in one particular way. I should have wished an excluding clause to justify me in arriving at that result.

LORDS COCKBURN and MURRAY concurred with the Lord Justice-Clerk.

The COURT "sustain the defence stated in the third plea in law, founded on 50 Geo. III., c. 69, and find that the pursuers are barred from insisting in this action; therefore, assail the defender, and decern."

*John Leishman*, W.S. Pursuer's Agent.

*Dundas and Wilson*, C.S., Defender's Agents.

## SECOND DIVISION.

CRAVEN v. M'KINLAY.

No. 383.

*Fund due to absent party—Advertisement—Nobile officium.*

This case was reported by LORD ANDERSON, who stated that July 15. 1852. in it a claim was made by Robert M'Kinlay, the brother, and Andrew Lees, the brother-in-law, claiming in right of his deceased wife, Isabella M'Kinlay, sister of William M'Kinlay, who is supposed to have died in India seven years ago, for his share of the residue of a certain fund; that they undertake to find caution to repeat the sum in the event of his being found alive, and that the question is, are the executors in safety to pay on such caution? He thought it difficult for the Lord Ordinary to allow that, but that the Court might, in the exercise of its *nobile officium*. Advertisements have been made in India.

LORD JUSTICE-CLERK. A remarkable instance occurred lately, shewing the danger of permitting these payments too easily:—Lord Langdale was persuaded to grant authority for the payment of money, in respect that the man to whom it belonged had not been heard of for many years. The order was carried to the engrossing clerk, who himself turned out to be the missing man. I think the advertisement should here be renewed. The Court have always great difficulty in granting these authorities.

Advertisement ordered in all the Presidencies, and in Ceylon.

*Macfarlane* was for Craven.

*N. Campbell* for M'Kinlay.

*Craufurd* for Lees.

*John French, W.S.*, Agent for Craven.

*William Wishart, S.S.C.*, Agent for M'Kinlay.

*John Robertson, S.S.C.*, Agent for Lees.

## SECOND DIVISION.

SMART v. BEGG.

No. 384.

*Process—Expenses—Taxation of Account.*

See *ante*, p. 942.

This case now came before the Court for the approval of the July 16. 1852. Auditor's Report. The Auditor disallowed a charge made by the defender, to whom expenses had been found due, for copies

*Smart v.  
Begg.*

July 16. 1852. of the minutes of debate in the Inferior Court for the use of counsel—there being no charge for a memorial.  
 Smart v. Begg.

*Buchanan*, for the defender, objected. The Auditor founds on the case of *Hall v. Whillis*, 6th March 1852, *ante*, p. 591. But there a memorial had been charged for—here not.

*Deas* was for the pursuer.

**LORD JUSTICE-CLERK.** We must adhere to the case of *Hall*. Copies of Inferior Court pleadings ought never to be allowed. Where an agent prepares a memorial in a case advocated here, which in some cases he may do, he always does so with the responsibility that, if found not necessary, the Auditor can disallow it. But if you allow copies of the minutes of debate, as in this case, then that is a thing over which the Auditor has no check. Besides, a memorial prepared after a Sheriff's judgment may be infinitely more valuable than the pleadings on which that judgment was given. Many cases turn, by that judgment, into entirely new questions.

**LORD MEDWYN.** I think a certain portion of the charge should be allowed, as the agent was entitled to draw a memorial if he had chosen.

**LORDS COCKBURN** and **MURRAY** concurred with the Lord Justice-Clerk.

Objection disallowed.

*James Burness*, S.S.C., Pursuer's Agent.

*John Cullen*, W.S., Defender's Agent.

*Note.—See also Vass and Others v. Methuen. Ante, 950.*

## SECOND DIVISION.

No. 385.

**HENDERSON v. JACKSON.**

*Agent and Client—Account—Taxing of Account.*

July 16. 1852. This was an advocation from the Sheriff-Court of Glasgow.  
 Henderson v. Jackson. Henderson, who is a writer in Hamilton, was employed by the pursuer and his brothers to recover a debt due to them, secured over an heritable property. This he did in the end of 1849, and from the price of the subjects he deducted a sum for various law expenses alleged to be owing to him by the Jacksons, without his accounts being taxed. The present action was now brought at the distance of eighteen months from the transaction, on the

allegation that the defender's accounts were exorbitant, concluding July 16. 1852. that they should be remitted to the Auditor for taxation, and the <sup>~~~~~</sup>  
defender decreed to make payment to the pursuer of the sum <sup>Henderson v.</sup> Jackson. overcharged.

The Sheriff (Alison) adhering to the judgment of the Sheriff-substitute, found that the pursuer was entitled to have the accounts audited, and that the defender was bound to hold count and reckoning with him for the money received.

Henderson advocated; and the Lord Ordinary (Anderson), on the motion of the respondent, reported the case to the Court.

*N. C. Campbell*, was for the advocator, and  
*Deas*, for the respondent.

The COURT advocate: "Find in point of fact that the advocator received the sum due to the family of Jackson, as averred by the respondent: Find the advocator retained a sum to pay his accounts, which accounts were untaxed; and that there was a further sum not accounted for in the advocator's hands: Find, in point of law, that the respondent was entitled to insist for the taxation of the accounts: Find that in accounting, the advocator is due to the respondent the sum of £16, 9s. 4d., with interest as craved, for which sum decern against the advocator, with expenses in both Courts."

*William Meikle*, S.S.C., Advocator's Agent.  
*William Waddel*, W.S., Respondent's Agent.

### HOUSE OF LORDS.

STODDART *v.* GRANT and OTHERS.

No. 386.

MURRAY *v.* GRANT and OTHERS.

*Testament—Several Writings.*—Circumstances in which several testamentary writings, executed at different periods of the testator's life, were held by the House of Lords, reversing the decision of the Court of Session, to constitute together one will.

*Executors—Third of Dead's part—Act 1617, c. 14.*—Construction of statute 1617, c. 14, which held to apply, and that executors were entitled to one-third of the dead's part.

The late Mrs Agnes Barclay or Bell, widow of the late Dr June 28. 1852. Andrew Bell of Egmore, died upon the 23d day of March 1846, <sup>~~~~~</sup>  
leaving seven testamentary writings, executed at different periods <sup>Stoddart v.</sup> Grant, &c. <sup>Murray v.</sup> Stoddart Grant, &c.

June 28. 1852. *v.* Grant, was, whether Mrs Bell's succession should be regulated by the three last of the writings, or whether the whole seven should be read together, so as to constitute her will. In Murray *v.* Grant, the question related to the executor's claim, under the statute 1617, c. 14, to one-third of the dead's part.

*Stoddart v.  
Grant, &c.  
Murray v.  
Grant, &c.*

The proceedings in the Court of Session, in regard to both appeals, originated in a summons of multiplepointing, brought by the respondents, who are Mrs Bell's executors, in which process the Lord Ordinary, (Robertson,) on the 6th July 1847, referred the whole matter to the Lords of the First Division of the Court, adding a note, in which his Lordship observed that the case was of the same class with that of *Horsburgh*, 19th Dec. 1846, and appeared to be of a description more fitting for the determination of the Inner House in the first instance. The Judges of the First Division were equally divided in opinion, and they therefore consulted the other Judges of the Court of Session, nine of whom were of opinion that the will should be held to consist only of the three last dated documents. Four of the learned Judges, on the other hand, considered that the whole seven documents ought to be deemed Mrs Bell's will and testament. The majority of the Judges were, The Lord Justice-Clerk, Lords Mackenzie, Medwyn, Jeffrey, Cockburn, Wood, Cunningham, Ivory, and Robertson. The minority were, the Lord President, Lords Fullerton, Moncreiff, and Murray.

The Court of Session in *Stoddart v. Grant*, therefore, pronounced the following interlocutor :—"The Lords, on the report of Lord Robertson, Ordinary, in respect of the opinions of a majority of the consulted Judges, Find that the succession of the late Mrs Bell is to be regulated exclusively by the three last deeds or writings mentioned in the summons, and that the other deeds or writings therein mentioned, of dates anterior to the 26th of June 1844, are not to be held to any extent as subsisting testamentary writings : Find the claimant, Miss Martha Stoddart, entitled to her expenses from the fund *in medio*, and remit to the Auditor to tax the account, when lodged, and to report to the Lord Ordinary, and grant authority to his Lordship to decern therefor ; and, in respect of the circumstances stated in the petition for Ann and Mary Murray, and of the consent of the parties, remit to Lord Murray, in room of Lord Robertson, to proceed farther in this case as may be just."

In *Murray v. Grant*, the First Division adhered to the following interlocutor of the Lord Ordinary (Murray), "The Lord

Ordinary having considered the revised cases with regard to the June 28. 1852. claim made on the part of the executors of the late Mrs Bell, for one-third of the free residue of her moveable property in terms of the Act 1617, and the case for the nearest of kin of the said Mrs Bell: Finds that the said statute 1617 is not in desuetude, and that the executors are entitled to one-third of the free executry, deducting therefrom their legacies respectively; and appoints a statement to be given in of the precise sums due to them, in order that decree may be pronounced accordingly; and finds no expenses due to either party."

These were the interlocutors which were now appealed from.

In Stoddart v. Grant, *Sir F. Kelly*, Q.C., and *Anderson*, Q.C., were for the appellants; and *Bethell*, Q.C., and *Rolt*, Q.C., for the respondents.

In Murray v. Grant, *Sir F. Kelly*, Q.C., and *Rolt*, Q.C., were for the appellants; *Bethell*, Q.C., and *Anderson*, Q.C., for the respondents.

The cases were argued last Session, when their Lordships took time to consider their judgment, which was this day moved in both appeals by Lord Truro, the subjoined report of whose opinion, it will be found, sufficiently sets forth the nature of the writings, and the views maintained in argument.

#### 1. STODDART v. GRANT and OTHERS.

LORD TRURO, (after reading the interlocutor of the Court below, and explaining the opinion of the Judges,) The first of those instruments is dated 15th August 1828, by which this lady executed a power of appointment which she had over a certain sum which had been settled upon her upon her marriage. She was to have the interest during a certain period, and when her husband died she became entitled to the principal, and the principal was accordingly transferred to her. My Lords, that instrument not only disposes of that property, but also gives several specific legacies. In consequence of the death of her husband, and the subsequent transfer of the property to her, it has been argued that the change in the position of the subject-matter of this will, the £8333, ought to be deemed to have the effect of revoking that will. That is the first instrument. It is further to be observed upon it, that it gives legacies to persons to whom the lady gives other legacies in subsequent documents. She there appoints trustees, and she appoints them executors, and reserves to her-

June 28, 1852. self, as she certainly seems to have done throughout these documents, the power of revocation, not a necessary reservation on her part, but she always seems to have contemplated that which, in point of fact, happened, viz., a change in her intention from time to time, though I cannot help saying that she seems to have been actuated by the same general feeling. Though there was a change in her feelings upon different occasions, she appears throughout to have been a benevolent person, and several of those documents contain bequests to charities. One of the circumstances which appears to me to be material, is that there are legacies given to charities in the later documents as well as in the earlier documents, which marks the continuance of that same benevolent feeling with reference to public charitable institutions from the beginning to the end. It is one of the circumstances which impresses upon my mind that it cannot properly be inferred from the later documents that she intended to revoke the legacies which had been given to benevolent purposes in the earlier documents. The document I have now read is dated in 1828. I have stated to your Lordships the general effect of it.

The next document is dated July 1837. I do not know that I need particularly trouble your Lordships with the contents of that document—it gives several legacies—and that she calls her will and testament. She nominates certain trustees "in the event of her death, or in the event of a state of distress whereby she might be unable to manage her affairs for herself, and also in the event of her marriage," thereby excluding any person whom she named from any of her property, or from interfering with her money or effects. There are legacies also given to the same persons to whom legacies had been given before. There is one part of this document which it is necessary to call to your Lordships' attention—it is a bequest in reference to which subsequent variations seem to have furnished one of the several reasons which influenced the learned Judges in thinking that the later documents were intended to revoke the earlier ones. She says, "I hereby leave and bequeath to my who shall be at the time of my death the except such of my furniture as shall have the name of any person marked upon it, the person whos name is mar marked upon it it shall be theres. I also leave bequive to who shall be in any at my death, the sume of lor every every year she shall have with me of and also what ever other legacy, or what ever else I may afterwards name eather on this or on any other piece of

paper, they trustees will have the goodness to order to be paid." June 28. 1852.  
 Now I cannot find any ground in this second document from  
 which to infer that it was intended to revoke the previous docu-  
 ment of 1828 which I have read.

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 Grant, &c.  
 Murray v.  
 Grant, &c.

The third paper is dated 2d January 1840, and that, likewise, contains legacies to the same persons. Your Lordships will observe how distinctly she contemplated making a further will in aid of this, because she expressly refers to that, and that she must have intended to fill up the blanks in these documents or to supply the blanks by future documents. The third document in 1840 only gives legacies to certain persons. The fourth document is in 1842. The lady calls it her last will and testament, and having, in the former papers which I have read, spoken of her furniture and given it to it seems from the language of this document that she contemplated giving it to some servant, "I, Agnes Bell, widow of Dr Bell, do hereby make mak my last will and testament, and I do hereby leave, bequeath, all the furneture in my dwelling house, and my wearing appreal, except some that I may leave to others, free of leg. duety, I leave and bequith the said furnatur to my servant Jenet Bruce Bruce, otherways Swanston, widow of Mr Swanston, and I leave and bequith her to have the power of remaining in the said house after my death, the few duty to be paid by my heirs, but she is not to let the house, this in the event of my death, and leave myself a power of altering this at any time, she is not to allow any person to exemene into papers or furnature, except the rights of the houses must show or give the rights of the house." The whole is very bad spelling and in equally bad writing, and it is not very distinct in its language. The fifth document is a document prepared by a professional man, and it is one of the documents which the majority of the learned Judges below held to form part of this lady's will and testament; this document is dated 26th June 1844; it begins "I, Mrs Agnes Bell, presently residing at No. 3 George's Place, Leith Walk, widow of the late Reverend Doctor Andrew Bell, with a view to the settlement of my property hereinafter conveyed, in the event of my death, do hereby assign and dispose to Mrs Janet Bryce or Swanston, presently residing with me, widow of the late Swanston, pilot in Leith, but that in liferent only, during all the days of her lifetime, and in case only of her being in my service at the time of my death, whom failing, either by death or by her leaving my service, to Miss Martha Stoddart, residing in Charlotte Street, Leith, (that is the appellant)

June 28. 1852. but that also in liferent during all the days of her lifetime, and failing both, then to Misses Jean Glen and Anne Glen, residing in Teviot Row, Edinburgh, daughters of the deceased Captain Nisbet Glen, Royal Navy, equally between them and their heirs in fee, all and whole, that dwelling house No. 3 George's Place, Leith Walk, presently occupied by me, with the gardens," and so on; then she says "and, further, I do hereby assign and convey to the said Janet Bryce, if in my service at the time of my death, but in liferent only, as aforesaid, whom failing, to the said Martha Stoddart, also in liferent as aforesaid, whom failing, to the said Jean and Anne Glen, equally between them and their heirs in fee, the whole household furniture, plate, linen, books, pictures, glass, chrystral, china, and other articles which shall be in my said house at the time of my death, with the exception of such articles as I may hereafter otherwise destine." Your Lordships will have observed that in the previous document she gives to Janet Bryce absolutely the furniture in the house, except such as should have a mark upon it, and so much as was marked should go to the person represented by that mark. In this case she gives it in liferent only, and gives it to those other persons in succession, and gives it without taking any notice of any part she might have marked: there might have been a reason for that, those persons in favour of whom she had marked the furniture might have died, in the meantime. Then she says, "and I reserve my own liferent of the whole premises, and full power to alter or revoke these presents." That is considered to be one of the testamentary documents. The next document is also prepared by a professional man, and is dated the 3d of May 1845. That likewise begins, "I, Mrs Agnes Bell, presently residing at No. 3 George's Place, Leith Walk, widow of the Rev. Doctor Andrew Bell, considering that, I some time ago executed a settlement of my dwelling-house and furniture, and other articles therein contained, and that I have now resolved to make a settlement of my personal estate in manner hereinafter written, therefore I do hereby leave and bequeath, 1st, To the society for the sons of the clergy of the Church of Scotland, to be applied to the fund applicable to the daughters of the clergy of the Church of Scotland, under the management of the said society, the sum of £500," and then she goes through the settlement and gives several legacies. There are a considerable number of legacies, many of them to the persons who are mentioned in the former documents, and she gives to the present appellant, Miss Martha Stoddart, an annuity of £30, then she

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gives a bequest to her servants, and she concludes, "I reserve full power to myself, at any time of my life, to revoke or alter these presents in whole or in part." It is in similar language to that which is found in the previous documents, "as I shall think proper, and also full power to me to name residuary legatees, and to appoint executors for carrying my will into execution."

There is then a document: "I, Mrs Agnes Bell, within designed, in explanation of the last legacy within bequeathed, do hereby declare that the years during which my servants shall have been in my service, and according to which the amount of their annuities are to be regulated, shall only begin to be computed from and after the term of Whitsunday next, 1845, so that the said annuities shall not be increased or affected by the circumstance, that my servants or any of them may already have been sometime with me: In witness whereof, this codicil written by the within designed, James Ogilvy, is subscribed by me at George's Place, the said 3d day of May 1845, before these witnesses, the said James Ogilvy, and the also within designed William Gallo-way." It is in truth of the same date as the former document. Your Lordships will observe, that, by this, she distinctly refers to some former paper in which she had given legacies to her servants, and I am inclined to think most of them give legacies to her servants from time to time. Then there is one holograph paper left to this effect: "I do hereby add this codicil to my will, and do hereby nominate and appoint the following executors." She then names certain persons, General Murray, and Dr Grant, and some ladies, to be her executors, and concludes, "each of the executors I leave two hundred pounds sterlin, the money is the stock, is only to be transferred into the name of the leg." The precise meaning of that passage, it is not very easy to understand, nor is it very material.

Now, my Lords, such are the documents. They are documents signed, and some of them wholly prepared by an extremely illiterate person. It is plain, that this lady from time to time, changed her views partially, and throughout these papers; the question is, whether or not those two last documents, the fifth, dated in June 1844, and the sixth, dated in May 1845, together with the document which names the executors, are to be held to constitute this lady's will.

My Lords, the general rule applicable to this case, as I before stated, is perfectly clear. I am not aware that there is any exception to be found any where; it is this, that all questions relating to

June 28. 1852. wills should be decided by looking to the whole contents of the documents with a view to discover what is fairly to be inferred as the intention of the testator. I will just call your Lordship's attention to various circumstances, in this case, which are relied upon on each side. In the first place, in support of the opinion that the will ought to be deemed to consist of the three last documents, reliance is placed upon the words used, "the last will." Now, several of those documents do profess to be the last will, as of course they were, but, my Lords, those words "last will," found in testamentary papers, have, for a very long time, been the subject of comment. Your Lordships will find, in 2d East, the case of *Thomas v. Evans*. These questions have more generally arisen, I should observe, with regard to real estate. Your Lordships are aware that the question of what constitutes a will in this country, with regard to personality, is decided by the Ecclesiastical Courts. But the question as to what constitutes a will, with regard to real property, is decided by the Courts of Common Law, but the same principles are applicable to each. In the case of *Thomas v. Evans*, which related to real property, Lord Ellenborough states the facts of the case, and he says, "so circumstanced, he makes another will, which he describes as his last will, on which stress is laid, and so indeed it was his last will with regard to his newly acquired property. But it is not enough to say, that by making this will in terms large enough to include all his property, he must therefore have meant to revoke the former will, unless it be shewn that he has made a disposition of the same property inconsistent with it, especially since the case of *Harwood v. Goodright*, and that of *Hutchins v. Basset*. It is said that he must have intended either to confirm or revoke the dispositions contained in the first will; but there is a third proposition he might not have contemplated to do either, but to make a mere collateral disposition of other property, and that seems to have been the case." He then further remarks, "Here the devisor has concluded by declaring his intention to dispose of the rest of his real and personal estate, by a codicil thereafter to be made." That seems equivalent to this lady's reservation of the nomination of residuary legatees. "The plain sense of which is, that instead of having two distinct instruments, he meant to dispose of his personal property, the bequest of which had lapsed by the death of his mother, and also of his real property which he had acquired subsequent to his first will, and by means of a codicil to connect the two instruments and make it all one will." Justice Lawrence also

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says, "The circumstances relied on to shew that the subsequent instrument was a revocation of the former, are, first, that the testator calls it his last will, to which the true answer was given at the bar, that it is merely a word of form, and he meant no more by it than that it was the last of those instruments which he had executed." My Lords, I do not apprehend, that in reality those words ought to receive any weight whatever in deciding this question.

The next ground which is laid down by the learned Judges is, that the last of the papers which the majority of the Judges were of opinion should be deemed a testamentary paper, was prepared by a professional man. I own that it strikes me that that argument rather tells the other way. Mr Gibson appears to have been this lady's adviser for a considerable period, as he prepared the deed of 1828 as well as that of 1845. It is perfectly well known among professional men, that when called in to prepare a will, it is proper to ascertain whether there be any former testamentary paper, and if there be, what is the intention of the testator who is about to make a new will—whether he intends to revoke it, or to make this new will subsidiary and additional; and as this gentleman had prepared that deed in 1828, in which there was a power of revocation expressly reserved, it does strike me that the circumstance is very much in favour of these papers, this document being prepared by a professional man and not containing any clause of revocation on the part of this lady, whose disposition for making wills might, to a degree, have been known to her professional adviser—but whether it was so or not, it was very likely that, in the length of time that had elapsed, this lady might have made testamentary papers; I cannot help thinking that, if it had been intended to revoke such papers, the professional man would have inserted such a clause, and supposing him to possess, as no doubt he did, ordinary intelligence, I can hardly imagine he would have omitted inquiring whether there were any former testamentary papers, and more particularly, as he himself had prepared one in 1828. I should have supposed with a professional man making a will who had prepared a former paper, which was to operate as a testament, as the deed of 1828 was, that it was more natural that such a person would have introduced a clause of revocation if the testator had intended it, and that he would have taken care clearly to understand whether there was any previous testamentary paper which she desired to revoke. That is one of the circumstances that is put forward—it is one of those

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June 28. 1852. from which different men may draw different conclusions of equal authority—but those are not circumstances which the law permits to revoke a will; it is not upon speculation of expressions used in the will, or circumstances which are just as much open to the one conclusion as the other, that the Courts act; the object is to ascertain the intention of the testator; you find that she has left certain papers which, from their import, are testamentary, having preserved them all subject to another circumstance which I shall mention, *prima facie*, they are all to be taken as one will, then, if you say a portion of them is not to be so taken, I think there should be something more than that upon which you may conjecture or may guess, for your guess and your conjecture may lead to the very opposite conclusion to that which a person of equal professional experience and equal common sense would draw; and, my Lords, it does not seem to me that the Courts in Scotland have ever sanctioned repudiation of papers, as testamentary, upon that ground. The next circumstance referred to is, that the will of 1845 refers to one paper only; that one paper, your Lordships will have observed, is the paper which disposes of the house in particular; that also had been prepared by Mr Gibson, and he refers to that in very general terms; the paper says, “having disposed of so and so by such a paper, I now propose to settle my personal estate.” I own I cannot understand why, from the circumstance of that gentleman, when alluding to the disposition of a particular property, referring to a previous paper which had been prepared by himself, it should be supposed from a reference to that paper and no reference to the other, that that was the only paper which was intended to be continued and confirmed by the subsequent documents. It strikes me that that is much too uncertain to form the ground of any such conclusion. It is further observed that the executors are named, but it is perfectly plain that there were yet important things to be done, that is to say, there was a disposition of the residue. Now it is very true that she did a very important act in naming executors; she had done so before, and she had done it before in cases where it appears to me there was nothing whatever upon the face of the document to import an intention to revoke the previous documents, nor can I draw any inference from that circumstance.

My Lords, there is another circumstance relied on, which appears to me also rather to weigh against the conclusion which has been formed—that is to say, that of the earlier testamentary papers, some of them are altered by the lady—erasures are made; and

new matter is written upon the erasures. My Lords, that seems <sup>June 28. 1852.</sup> to me rather to imply that she altered it as far as she intended <sup>Stoddart v.</sup> that it should be altered; and the leaving the paper with those <sup>Grant, &c.</sup> alterations rather imports an intention on her part that it should <sup>Murray v.</sup> continue to operate as a testamentary paper, subject to the alter-<sup>Grant, &c.</sup>ations, and that there was no intention to destroy it by those means; and, further than that, when the paper is preserved in the house with others, not I believe that they were stowed in the same places of deposit, but they were stowed in places of deposit equally calculated to keep them secure, I think that is a circumstance rather in favour of her intending them to operate than the other way; but that is another instance of the danger of drawing conclusions from slight circumstances which are open to two constructions; I think that it would tend very much to diminish the power of testators over their property, if the rule were to be acted upon, that from any expressions which any body can lay hold of, you may draw conclusions adverse to the continuance of the previous documents, and therefore hold that they ought to be revoked. I do not understand the law to be such. As I understand the law, if you can execute the whole of the papers as one testament you are bound so to do. It is said that the dispositions are inconsistent. I can hardly call them inconsistent. It is very true that in one case she gives the house and furniture absolutely, and she afterwards cuts down that interest to a life-interest. She gives the household furniture, except such as shall be marked, and that which is marked is to go to the person indicated by the mark. But has it ever been contended that the mere circumstance of a subsequent testamentary paper, cutting down and diminishing the interest which had been given by a previous one, was to be held to be an entire revocation of the will. I am not aware of any authority whatever for that proposition, and I do not see that in this case the subsequent bequests have any other effect than that of modifying the previous bequests.

The next remark is, that legacies are repeated to the same persons. What is the inference from that? Why what happens constantly, viz., that the question arises whether cumulative or substitutional legacies are intended to be given to the same persons by the previous and subsequent papers. But you do not hold that to be any evidence of an intention to revoke. It becomes a question, with reference to the particular legacy, how you shall deal with it, whether you shall deal with it as revoked or not. But that this lady, whose property is said to have been growing

June 28. 1852. from time to time, should give £.30 to an object of her bounty in  
one case, and £.200 to this person, and £.200 to another, does  
not seem to me, the lady living and growing richer, inconsistent  
at all.

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My Lords, I think I have adverted to all the circumstances which are relied on by the learned Judges who held the former papers to be revoked. I think I have mentioned them all. Not that they all adopted the same grounds. Some think the erasure important, others think it not important. It will be found that there are differences of opinion and different inferences drawn from some of the circumstances among the learned Judges who adopt a conclusion as to the revocation of the earlier instruments. Having stated what appears to me to have been the foundation of the opinion of the learned Judges, adverse to the continuance of the previous testaments, I will call your Lordships' attention to what is relied upon by those who hold the contrary opinion. They rely upon the very alterations in the uncancelled papers which formed the subject of the opposite inference by the other learned Judges, and they also rely upon the papers being uncancelled. They also rely upon the continuance of the power which the lady refers to of revocation and alteration, because in several papers she says, "I reserve to myself to alter them in all or in part," shewing therefore the probability that an alteration might take place in her intention, without her intending absolutely to revoke the whole document. That is to be found in three or four of the papers. I have remarked upon the last papers being prepared by a professional man, and that is another of the circumstances from which the Judges draw opposite conclusions. One of the conclusions I draw from that is, that it rather tends to shew that revocation was not intended when there is the omission of so necessary and so ordinary a provision, and one so likely to occur to a professional man; and I think the omission of that, where the document was drawn by a professional man, is much more favourable to the continuance of these former documents than if it had been drawn by the lady herself; and, more than that, when I see that this lady is animated by the same benevolent spirit for the period, from 1828 to 1845, and that she is constantly giving legacies to charitable institutions, I can discover no reason to warrant the conclusion, that because she gave legacies to new institutions or increased her legacies to the old institutions, she meant to revoke the former bequest. I think, on the contrary, it marks the continuance of the same feeling, and considering that her property was accumu-

lating, it is but an exercise of the same benevolent disposition, June 28. 1852.  
and which leads to any conclusion rather than that she was dis-  
posed to do less for these institutions instead of more. I have ex- Stoddart v.  
plained to your Lordships what I consider to be the general rule, Grant, &c.  
viz., that all those documents being found under circumstances Murray v.  
which entitle them to consideration, are, *prima facie*, to be regarded Grant, &c.  
as one will; they may be altered, and they may be partially re-  
voked, or they may be inconsistent without the latter operating  
as an entire revocation of the former, the circumstance of a partial  
inconsistency, as it is called, that is to say, dispositions in two  
documents, both of which cannot be fulfilled, is held only to oper-  
ate as a revocation, *pro tanto*, and only to bear upon the particular  
legacy in which that inconsistency exists, and the general rule  
being that the onus is upon those who seek to impeach those docu-  
ments, the question is, whether your Lordships are satisfied with  
the reasons which are assigned by the very learned Judges below,  
which I have read to your Lordships; if those reasons satisfy your  
Lordships, then they form a proper judicial ground from which to  
infer this intention to revoke the previous papers. I own they  
appear to me to be in themselves but slight, and they appear to  
me, being slight in themselves, to be outweighed by the circum-  
stances which tend to the opposite conclusion. Therefore, my  
Lords, I do not think it necessary to trouble your Lordships by  
referring to the text books for those principles which are too well  
understood by the profession to render it at all necessary, and  
particularly, as I do not find that any of them are in any respect  
impeached by what has fallen from the learned Judges who have  
pronounced an opinion which does not appear to me to be war-  
ranted by the principles which are admitted. I think that the  
principles are admitted, but that in this case there has been a mis-  
application of those principles to the particular case. Your Lord-  
ships will have observed that the question as to what part of this  
will may be revoked, as to what legacies may be cumulative, or  
what may be substitutional, is a matter not now before your Lord-  
ships. The interlocutor which I have read, your Lordships will  
have observed, is an interlocutor that the testament is to be deemed  
to consist of only three documents, to the exclusion of the pre-  
vious four. Thus, therefore, if your Lordships shall take the view,  
which occurs to me as the correct view to be taken, namely, that  
there is nothing to be found upon the face of those latter papers to  
warrant the conclusion that the former papers were intended to  
be revoked, the case must go back to the Court of Session to con-

June 28. 1852. sider those papers, and to give effect to different parts of them as by law they may. Where there is an inconsistency it will operate as a partial revocation; where the inconsistency is only of such a nature as that the general intention can yet be executed, the general intention will prevail. I therefore, respectfully, submit to your Lordships that this interlocutor should be revoked and the case remitted to the Court of Session.

**LORD BROUGHAM** concurred.

Interlocutor complained of reversed, and cause remitted with a declaration.

## 2. MURRAY v. GRANT and OTHERS.

**LORD TRURO.** My Lords, in this case the same will comes under your Lordships' consideration. There is a large sum which, in Scotland, is properly described "the dead's part;" there is a large residue undisposed of, and the question raised upon the present appeal is simply this, whether an executor under a Scotch Act of Parliament passed in the year 1617, is entitled to one third of "the dead's part," even though it may be satisfactorily collected from the contents of the will that the testatrix did not intend that the executors should take more than the special legacies which she had left them. On the other hand, it is contended that the statute positively and distinctly gives to the executors one-third of "the dead's part," perfectly irrespective of the intention of the testator, except the intention is expressed by the disposition of the residue, and if any expression of intention, which leaves the residue undisposed of, leaves it under the operation of the statute, that by the operation of that statute the executors are entitled to a third. That, my Lords, is the question in this appeal. Now, my Lords, you can seldom find an Act of Parliament which presents less difficulty of construction than the present one; in the first place, it has the virtue of being very short. The case submitted in this appeal must often have occurred; but it does not appear that any question arose till a comparatively recent period. Your Lordships are aware, that on the 17th of February 1819, a case occurred of *Nasmyth v. Hare*, in which a question arose in a remarkable way, presenting the question in the most distinct form which I think can be imagined. In the case of *Nasmyth v. Hare*, the testator had, by his will, given certain legacies, and then he disposed of the residue to a given individual; he left no "dead's part," but he disposed of the whole—the residuary legatee died during the life of the testator—the legacy therefore

lapsed—the executors claimed one-third of that residue ; it was June 28, 1852.  
the subject of a good deal of discussion in Scotland, and the Judges  
unanimously held, at that time, that whatever might be argued  
from the effect of the previous disposition of the residue to an in-  
dividual other than an executor, as to the testator's intention, it  
was perfectly irrelevant to the consideration of their right, which  
right did not depend upon the intention of the testator expressed  
in any other way than by an absolute disposal to somebody else  
taking effect, and therefore the executors were entitled to one-  
third. The case underwent considerable discussion. There is  
only one remark which tends in any degree to weaken its authority,  
and that is, that circumstances occurred which prevented an appeal  
to this House against that decision. The question of the validity  
of the will arose and came before this House upon appeal. This  
House held the will to be altogether invalid, and that put an end  
to the question as to the construction of this statute, coupled with  
the residuary bequest, because the residuary bequest was disposed  
of by the will being held altogether invalid, and no question has  
arisen since.

Now, my Lords, what is the rule by which your Lordships  
should be governed in construing this very old statute ? It is  
most simply laid down, I think, by Lord Chief-Justice Tindal, in  
the case of *Warburton v. Loveland*, in 2d Dow and Clarke, where  
he states, "that where the language of an Act of Parliament is  
clear and explicit, effect must be given to it whatever may be the  
consequences, for in that case the words of the statute speak the  
intention of the legislature. If in any case a doubt arises from  
the words themselves, we must endeavour to solve that doubt by  
discovering the object which the legislature intended to accomplish  
by passing the Act. But then he goes on to say, that we must  
not do that by referring to some ambiguous clause in the Act of  
Parliament, in order to construe that which is manifest, or which  
is more clear than that which is referred to. Now here no parts  
of the enactments of the Act are at all inconsistent—the question  
arises whether you can argue from the preamble that such an am-  
biguity exists as to create doubt of the enactment ? I do not  
apprehend you can do any such thing. Whereas, Lord Chief-  
Justice Tindal says, the language is ambiguous ; you may resort  
to the other parts of the Act, as to other parts of any instruments  
which it is your judicial duty to construe, to find what the mean-  
ing of the authority was that has used that language. But in no  
part of this Act does it appear to me that there is any ambiguity ;

June 28. 1852. and I have before remarked that you find that this Act of Parliament is mentioned in almost every text book and authority, from the period when it was passed, down to the present time; and it is universally stated as a general proposition, that after the passing of this statute, the executor, instead of taking the whole of the "dead's part," is to take one-third; it is generally added, "for his trouble in executing the will," or, "in respect of his office of executor." But I have not been able to find the slightest passage in any one book; nor has one been referred to at the bar in which any doubt was raised on this question; and what I have before stated I must repeat, that the arguments here, as the arguments in Scotland, turn mainly upon what would be the construction of this statute with reference to the English law; but it is quite clear, and the Judges expressed themselves very strongly upon it, and nothing whatever has been brought before the House at all tending to break in upon the perfect accuracy of the view that they took, viz., that the principles administered in the Courts of Equity in England, have never found a place, or been adopted in Scotland. My Lords, the Scotch law on this subject appears to have been uniform and consistent, and to have been different from the English law—it seems to me, therefore, that the main arguments which your Lordships had the advantage of hearing from the bar, learned and able as they were, were arguments rather tending to shew the difficulties which might by possibility arise, if this were the case of an English statute, and to be decided by the English law, though I am not sure that that would be the case, for the statute is so plain, that if it had occurred in England, I think such difficulties could not have arisen—it is hardly a possible case, because if such a statute had existed, those decisions which have been made, and possibly the arguments at the bar, could not have existed at all; for it is by those decisions that the argument is sought to be sustained. I therefore move your Lordships, that the interlocutor of the Court below be affirmed.

**LORD BROUGHAM concurred.**

**Interlocutor affirmed, but without costs.**

*Dunn and Dobie, Solicitors, Gray's Inn, Agents for the Appellants in Stoddart v. Grant.*

*Spottiswoode and Robertson, Solicitors, Westminster, Agents for the Respondents in do.*

*Spottiswoode and Robertson, Solicitors, Westminster, Agents for the Appellants in Murray v. Grant.*

*Connell and Hope, Solicitors, Westminster, Agents for Respondents in do.*

Stoddart v.  
Grant, &c.  
Murray v.  
Grant, &c.

## FIRST DIVISION.

Petition, ANN ALLAN and OTHERS, for appointment of a *curator bonis* to DAVID YOOLOW.\* No. 387.

*Curator bonis appointed of consent to administer the affairs of a party, with regard to whom a brieve had formerly been negatived.*

This petition set forth that Yoolow, the petitioner's grand-uncle, aged sixty-eight years, is helpless and bed-ridden, and so imbecile in mind as to be incapable of managing his own affairs, or of giving instructions to others to manage them for him. It was further stated that Yoolow was possessed of considerable property, and was lessee of certain lands, for the administration and protection of which it was necessary that some person be appointed to take charge of, and manage his affairs, and Mr Christopher Kerr, town-clerk of Dundee, was nominated as a fit person to be *curator bonis* to Yoolow. July 16. 1852.

With the petition was produced a medical certificate in the following terms:—"Perth, 29th June 1852. We recently visited and conversed with David Yoolow, at Mill of Kinnochtry, whom we have known for a long period, and from our previous knowledge, and the result of our recent conversation with him, we certify, on soul and conscience, that, in our opinion, he is so imbecile in mind, and weak in body, as to be incapable of managing his own affairs, or of giving directions to others to manage them for him. Wm. MALCOLM, M.D. DAVID HALKETT, surgeon."

Answers were given in on behalf of Yoolow, in which it was stated that the state of his mind had been made the subject of judicial investigation in 1837, when a brieve, directed to the Sheriff of Forfarshire, was negatived by the verdict of the jury. The answers proceeded to set forth that Yoolow's mind was in the same condition now as it was when the verdict was returned, but that he "is known to have been desirous of settling his affairs after his death, and perhaps this may have had some influence in inducing the petitioners to make this application; but he presumes that your Lordships will not be disposed in this way to prejudge any question as to his mental capacity." Mr Kerr was objected to on the ground that he was the factor of Yoolow's landlord, and as questions might arise between landlord and tenant, he could not properly settle them, and besides he was not a practical farmer. But that none of these objections applied to Mr John Tasker, farmer, Hatton Mains, of Cargill, one of the trustees ap-

\* This case is of little or no value as a law report, but it is obviously important to preserve a record of the proceeding.

July 16. 1852. pointed by Yoolow's sister, and acquainted with his peculiarities  
Pet. Allan, &c. and habits.

Thereafter a minute was put in, setting forth that Yoolow "could agree to no proposal or arrangement that implied any doubt as to his mental fitness to manage or dispose of his affairs. At the same time, he admitted that he had corporal infirmities, which prevented him from exercising any active superintendence over his affairs, and that, on this account, he had taken the assistance, for a number of years, of respectable servants. He was, however, advised that he would have better security for due administration of his affairs if an officer were appointed by the Court, and he was therefore willing to consent to the appointment of a respectable person who might be acceptable to him." The minute stated that Yoolow was averse to the interference of any stranger, but he was willing to agree to the appointment of Mr Tasker, or Mr Hugh Watson of Keillour, whom failing, Mr James Morrison, accountant in Perth.

The COURT having advised this minute, with answers, &c., interposed their authority thereto, and Mr Tasker having declined, they pronounced an interlocutor, by which they nominated and appointed Mr Watson, failing whose acceptance, Mr Morrison, to be *curator bonis* to Yoolow, with the usual powers.

*Patton*, was for the petitioners.

*P. Fraser*, and the *Solicitor-General*, for the respondents.

*Graham and Webster*, W.S., Petitioners' Agents.

*Murray and Rhind*, W.S., Respondent's Agents.

## SECOND DIVISION.

No. 388.

**WRIGHT v. BROWN, MACINDOE and COMPANY.**

*Charge, Production of—Suspension—Record—Process.*—A suspender after the record was closed, objected that the charge, (being his own acceptance and diligence thereon), had not been produced, and that such production was barred by the interlocutor closing the record. The Court allowed the charge to be produced, recalled the *sist*, and remitted to the Lord Ordinary to hear parties on objections to the bill.

July 16. 1852. In this case, which was a suspension of a charge upon a bill, a record was made up, and closed without production of the bill and diligence. The suspender maintained that the case could not proceed without such production, which the closing of the record had now rendered impossible, and moved the Lord Ordinary to suspend the charge *simpliciter*.

Wright v.  
Brown, &c.

The Lord Ordinary, (Anderson) "in respect the suspender did <sup>July 16. 1852.</sup> not insist on the production of the bill and diligence before closing <sup>Wright v.</sup> the record, and stated no plea in law, to the effect that the want <sup>Brown, &c.</sup> of such production entitled him to have the charge suspended, allows the same to be now produced."

The suspender reclaimed.

*Cook* and *Buchanan*, for reclaimer. The charger ought to have known that he could not ask to have the letters found orderly proceeded without producing the grounds of charge, Act of Sederunt, 11th July 1828, § 32. The word "charge," used in the Act of Sederunt, means the whole grounds and warrants of the diligence. Beveridge's Forms of Process, p. 358. § 55 of the Act of Sederunt provides, "after the record is made up and closed, it shall no longer be competent for the party in any case to produce any writing which was in his possession, or within his power, at the time of completing the record, unless he shall instruct it as *noviter veniens ad notitiam*." *Muir, Wood and Co. v. Sibbald*, Hume, p. 80. The suspender cannot be heard on pleas against the regularity of this diligence, without production of its grounds. The suspender, it is true, admits on the record that he granted a bill, but it may be vitiated.

*Macfarlane*, for the charger, was not called on.

**LORD MEDWIN.** I understand that the charger is ready and willing to produce the charge and grounds of debt, if the suspender will consent to their production. I think that the suspender was bound to call for such production before the record was closed.

**LORD COCKBURN** concurred.

**LORD JUSTICE-CLERK.** The motion which the Lord Ordinary has refused, was a most extravagant one. None of the suspender's pleas deny the existence of the bill. Accidentally, the bill was not produced before the record was closed. To give effect to this view, would be to make the forms of Court an instrument of gross injustice.

**LORD MURRAY** concurred.

The Court "Refuse the desire of the reclaiming note, recal the sist, find the respondent entitled to the expenses of the reclaiming note, and, *quoad ultra*, remit to the Lord Ordinary, and recommend to his Lordship to hear the case on Tuesday next, on objections to the bill, if any."

*John Cullen, W.S.*, Suspender's Agent.

*John Murray, Jr., S.S.C.*, Respondents' Agent.

## SECOND DIVISION.

No. 389.

BROWN v. HENDERSON.

*Statute 1695, c. 24—Precept of Clare Constat—Service.*—Held, that the provision of this statute, which renders “any man that shall serve himself heir, not to his immediate predecessor, but to one remote,” liable for the debts and deeds of an interjected heir who has been more than three years in possession, applies where his title is made up by precept of *clare constat*, as well as where it is made up by service.

July 16. 1852. This was an action of reduction of a conveyance, executed in 1799, by the pursuer's grandfather, John Brown, of the minerals in his estate. This estate John Brown had succeeded to on the death of his father, Henry Brown. He possessed the estate twenty years, and was succeeded by his son, Henry Brown, the father of the present possessor. Henry possessed the estate six years. After his death, the pursuer made up title by precept of *clare constat* from the superior, as the nearest and lawful heir of Henry Brown, his great-grandfather.

Brown v.  
Henderson.

In defence to the present reduction of his grandfather's (John) conveyance of the minerals, it was pleaded by Henderson, that the challenge was barred by the Act 1695, c. 24, which provides, “that if any man shall serve himself heir,” &c., “not to his immediate predecessor, but to one remote, he shall be liable for the debts and deeds of the person interjected, to whom he was the apparent heir, and who was in the possession of the lands and estate to which he is served, for the space of three years.”

The Lord Ordinary (Robertson) pronounced an interlocutor, by which, “in respect that the deeds sought to be reduced were not challenged by the said John Brown, who survived the same for upwards of twenty years, and who was seventeen years of age at the date of executing the said deeds; and, in respect, at the said date, John Brown had been more than three years in possession of the estate, and that the pursuer has served heir by precept of *clare constat* to a remoter ancestor, passing by the said John Brown, Finds that the pursuer, in terms of the Act 1695, c. 24, and of the decision in the case of *Hay v. Hay*, 17th January 1775, Mor. 9775, is liable to the debts and deeds of the said John Brown, and has no right or title to insist in the present action of reduction; and, therefore, sustains the defences, assoilizes the defender, and decerns: Finds the pursuer liable in expenses,”

The pursuer reclaimed.

July 16. 1852.

*Maidment and Solicitor-General*, for claimer. The Act 1695 <sup>Brown v.</sup> <sub>Henderson.</sub> refers only to service, or to adjudication on a party's own bond. But a precept of *clare* is not service. The case of *Hay* bears marks of having been imperfectly reported as to this point. The other cases shew that this Act ought to be strictly construed—See *Burns v. Picken*, 3d July 1758, 5 Br. Sup., 361; Bell's Com., i., 656; and *Corbet v. Porterfield*, 20th Jan. 1839.

*Moir and Dean of Faculty*, for defender, were not called on.

**LORD JUSTICE-CLERK.** I have no doubt as to this case. The claimer's argument proceeds on a misconstruction of the statute. It entirely loses sight of the object of the statute, and of the remedies to be applied. What the statute looks at is this, that the party enters into possession by taking a title from a remoter ancestor. If the immediate ancestor is passed over, the statute applies, however the title is made up, and the terms it uses are to be read as generally descriptive of the act of taking one's title from a remoter ancestor. In a subsequent part of the statute a precept of *clare* is spoken of as perfectly analogous to a service.

**LORD COCKBURN.** I concur. Although the statute refers to service as the usual mode in which a title is made up, it does not do so for the purpose of restricting the statutory remedy to that mode alone. Very slight authority would be required to satisfy me that, in this respect, there is no distinction between a precept and a service, and that authority we have in the case of *Hay*.

**LORDS MEDWYN and MURRAY** concurred.

The COURT "Find that the ancestor, the granter of the deeds under challenge, was more than three years in possession of the estate, and that the pursuer has entered to and taken up the lands as the heir of a remoter ancestor, passing by the granter of the said deeds by a precept of *clare*, as nearest lawful heir of the said remoter ancestor, and thus has taken up, as an heir, the estate possessed by the granter of the deeds, and is under the obligation imposed by the statute 1695 on the party taking possession, and making up a title to the estate: Therefore, of new sustain the defences, assoilzie the defender, and decern: Find the pursuer liable in expenses."

*James A. Robertson*, S.S.C., Agent for Pursuer.

*Davidson and Syme*, W.S., Agents for Defender.

## SECOND DIVISION.

No. 390.

*JAMESON v. WATSON.*

*Title to Sue—Partnership.*—A joint stock company carrying on business under a descriptive firm, was dissolved ; and, under the provisions of the contract of copartnery, a meeting of partners was held, at which A. was appointed to wind up the company's affairs, with the power of suing and being sued :—*Held*, in a reduction at the instance of A., (acting under this appointment), of a deed granted by one of the partners, that his title was good.

July 16. 1852. In April 1850, the Glasgow Commercial Exchange Company was dissolved. Section 51 of the contract of copartnery provides, that, “in the event of the dissolution of the company, the affairs thereof shall be wound up, the outstanding debts realised, the books balanced, and the whole funds and property converted into money, with every possible despatch ; and that by such person or persons, and in such manner as shall be fixed on by a majority of the votes of the partners, ascertained and reckoned as aforesaid, at any general meeting of the company.” On 22d May, at a meeting of the partners, at which William Watson was present, it was resolved that the pursuer “shall be, and is hereby fixed upon and appointed as the person to wind up the affairs of this company, subject to the superintendence, direction, and advice of the committee of shareholders to be appointed as hereinafter mentioned, and with all the powers conferred upon him by the 51st section of the contract of copartnership, and specially with the following powers” : “to ask, demand, sue for, recover, and receive, from the partners of the company, all such farther contributions, in addition to the call or calls already made, as may, to the said Robert Jameson, appear necessary for duly meeting and paying off the debts due by the company ; as also to sue and defend all actions brought at the instance of or against the company, and, for that purpose, to employ counsel and law-agents, as also to employ and remunerate any professional persons, officers, clerks, and servants, that may to the said Robert Jameson appear to be necessary for winding up the affairs of the company, and to suspend, dismiss, and change them at pleasure ; and generally, with power to the said Robert Jameson to do, perform and execute, all such further acts and deeds as may, to the said Robert Jameson, appear to be necessary for winding up the affairs of the company ; and the said Robert Jameson is hereby empowered and directed to return him-

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Watson.

self as the registered officer of the company, under the statute 7 July 16. 1852. Geo. IV., c. 67." It was also resolved that Alexander M'Kenzie Kirkland, and five other persons named, "any two being a quorum, shall be, and are hereby appointed a committee of the shareholders of the company, with power to superintend, direct, and advise with the said Robert Jameson in the winding up of its affairs; as also with power to superintend or dismiss him, or his successor or successors, at pleasure."

In March last, the pursuer had obtained decree against Watson for L.5,600, as due upon calls; and he now brought this action, founded on the Act 1621, to reduce a deed granted by Watson to the defender, his sister. The summons bore to be at his instance, "as registered officer of the Glasgow Commercial Exchange Company, in whose name the same shall sue and be sued, in terms and under the provision of the Act of Parliament, 7 Geo. IV., c. 67; and also as the person fixed upon and appointed to wind up the affairs of the said company, at a special general meeting of the partners thereof, held upon the 22d day of May 1850, in virtue of the powers and provisions contained in the contract of copartnership of said company, pursuer,—with concurrence of Alexander Mackenzie Kirkland," &c., "as the surviving committee of partners of the said company, appointed by the said special general meeting to superintend, direct and advise with the said Robert Jameson in the winding up of its affairs."

The defender pleaded, that neither under the statute nor under the minute of appointment to wind up the company's affairs, had the pursuers a good title to sue.

The pursuer abandoned his statutory title, and tendered an amendment of the libel, setting forth, as joint pursuers with himself, "the Glasgow Commercial Exchange Company, now or lately carrying on the business of banking in Glasgow." He also described himself as a partner of the company, suing with the concurrence of Kirkland, &c., also partners.

The Lord Ordinary (Rutherford) "disallows the proposed amendment, sustains the objections to the title of the pursuer, dismisses the action, and decerns; but reserves to the company all action competent to them as accords: Finds the pursuer liable in expenses."

The pursuer reclaimed, and prayed to have the summons sustained, either with or without the amendment.

*Hector* was for the pursuer, and  
*Macfarlane* and *Deas* for the defenders.

July 16, 1852. **LORD JUSTICE-CLERK.** This is a question of much practical importance. The authority of the pursuer to sue is ascribed—*1st*, To an appointment made at a special meeting of the partners of the company; and, *2d*, to that appointment being made in terms of the provision in the contract of copartnery for the case of winding up the affairs of the company. The effect of the provision in the contract, and of the appointment duly made in terms of such provision, is, not to give an existing company carrying on business any power or title to appoint the party who is legally and technically to represent them, and to sue and be sued as representing them. It provides for the case of winding up on dissolution. On the occurrence of such an event, the situation of the company is at once fundamentally altered. For all the proper objects of the copartnership of the company, the partnership is at an end, and the company dissolved. Neither the directors nor the partners can carry on business, or do any partnership act. Of course the liabilities of the partners remain both towards third parties, and *inter se*, and their mutual rights and obligations of relief, and also the right of recovery towards third parties. But the adjustment of all these matters implies the dissolution of the partnership. Hence, the expression that the company subsists, although only for the purpose of winding up, tends to mislead. The relative rights and obligations of the partners *inter se* subsist, and the partners are entitled *qua* such, but not as a company, to recover the debts due to that dissolved company, in right of which they individually act. The dissolution brings into direct operation their individual rights and obligations.

It is argued by the defenders, that an unincorporated joint-stock company is not entitled to sue in a descriptive name with the privileges of an incorporated company. That is the rule when they attempt to carry on business as such. But that very rule ought to support the title here; for, in terms of the provision in the contract, the partners, laying aside the name, style, and character to which the rule denies them a valid claim, meet individually as the *partners* for the special purpose of winding up, and appoint a person as their commissioner or factor, to act for them as individuals, not attempting to continue or use the style and character of a company at all. Hence, the rule in no degree militates against this title; on the contrary, what has been done acknowledges and bows to the rule,—and on the very ground on which the rule rests, law ought to support and give effect to the title of their commissioner.

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Watson.

The pursuer has obtained decree against Watson for payment July 16, 1852, of the call made against him. Well, does not that constitute him <sup>Jameson v.</sup> effectually the creditor of Watson?—no matter whether he is to Watson. recover for others, and not for his own benefit. If he arrests, can he not make his arrestment effectual in competition with other creditors? If he pounds, may he not recover, against other creditors, the proceeds, according to the preference of his poinding? It would be difficult to deny such effect to his decree—else of what use is it? Then, on the same title, and founding on this decree, the pursuer finds that the whole property of his debtor has been fraudulently assigned away to a conjunct and confident person, in order to secure the property against the very heavy, and, to many, ruinous liability, arising out of this lamentable concern. Is he not entitled to follow that property? Can the title, good in a forthcoming—good in a competition—be rejected when used *active* in this process? I can see no distinction. Even if no prior decree had been obtained, the title seems to me perfectly complete against all third parties. I am therefore for sustaining this title.

LORD MEDWYN. I think the instance in this case is sufficient. I cannot see why it should be beyond the powers of a private mercantile association to arrange to wind up after its dissolution by such an appointment as this, because, during the existence of the association, it cannot carry on its business, sue or be sued, in its associated name, as if it were a chartered company. The two situations in the history of the company are quite different—indeed, the very opposite of each other;—the one carrying on its business against all parties connected with it or dealing with it; and the other, when the business is expired, collecting and dividing its funds among its partners as individuals. And because, in the first case, the company can only sue in its official name, with the addition of certain of the partners, there seems no analogy to maintain that this form must be observed in winding up, and when not carrying on its business, nor that to grant a commission to effect this winding up is not the reasonable way of proceeding, after the company no longer exists, to carry on business; and more especially does there seem no objection to such an appointment by those who were at one time partners, to settle and adjust their rights *inter se*, seeing that it was a special provision in the deed of copartnery so to effect the winding up upon the dissolution of the company. I cannot help thinking it is the most correct form of winding up after the company is expired. For although we say that a company continues to exist to the effect of winding up, this extension

*July 16. 1852.* of its existence, and the object of the rule, seems best accomplished by the company, on its expiration, appointing some one with all their powers to wind up for them, stating his title as is done here.  
*Jameson v. Watson.*

LORD COCKBURN concurred.

LORD MURRAY differed. Good effects may follow from sustaining this title as a good title to sue. But I do not see how it can be reconciled with the law. Against Watson and any other parties consenting to the appointment, I think there is a good title to sue. I think the cases go that length, but no further.

The COURT "alter the interlocutor reclaimed against, so far as it sustains generally the objections to the title of the pursuer: Sustain the title of the pursuer to sue, in so far as he insists on the action," "as the person fixed upon and appointed to wind up the affairs of the Glasgow Commercial Exchange Company, at a special general meeting, held upon the 23d day of May 1850, in virtue of the powers and provisions contained in the contract of copartnership of said company, with concurrence of" (here follow the names of the committee) "as the surviving committee of the said committee appointed by the said special general meeting, to superintend, direct, and advise with the said Robert Jameson in the winding up of its affairs. Remit to the Lord Ordinary to proceed in the cause," &c.

*Alexander Hamilton, W.S., Pursuer's Agent.*

*Lachlan Mackintosh, S.S.C., Defender's Agent.*

## SECOND DIVISION.

No. 391.

**HILL v. THE DUNDEE, PERTH, and ABERDEEN RAILWAY JUNCTION COMPANY.**

*Submission, Renewal of*—A. had two claims against a railway company, one of which fell within the Lands Clauses Consolidation Act, while the other did not. For the one not falling under the statute he raised an action. But he afterwards entered into a submission of both claims,—the deed declaring that the submission was to be taken as a submission within the statute. The arbiters accepted, but the time for decision having expired without a decision being pronounced, the parties endorsed on the deed a minute of renewal. The time fixed again expired without a decision. Thereafter A. insisted in a wakening of the action, for the non-statutory claim:—Circumstances in which *held*, that the submission subsisted so as to bar any further procedure in the action.

Hill had two claims against the Dundee and Perth and Aber-deen Railway Junction Company. The *first* was for damages incurred in the course of the company's formation of their railway; the *second* was for injury done by the company in the management of the line after it was formed, and in the course of working. He made the latter the subject of an ordinary action before the Sheriff of Perthshire.

In this state of things the parties entered into a submission which was under the Lands Clauses Consolidation (Scotland) Act, 8th Vict. c. 19—so far as regarded the first claim, and at common law in so far as regarded the second claim, which had been the subject of suit. To combine the decision on these claims under one form of procedure, they not only specially empower the arbiters to name an oversman, as authorised by the statute, but bound them to decide within three months, as required by the statute, and farther, declared specially that the submission should be held to have been entered into under and by virtue of the Act, the 8th of her Majesty, c. 19. The arbiters named an oversman. But no award was issued within the three months, and this first submission expired by the lapse of three months from its date, the 16th and 18th January 1850.

The parties then, by indorsation dated the 7th and 10th of May 1850, on the deed of submission, entered into a new agreement, by which, in consideration of the former submission, and that the arbiters had accepted and appointed an oversman, and that various steps of procedure had been taken, but that it had expired, and required to be renewed, "therefore, and without prejudice to the proceedings which have already taken place before the arbiters in the said within submission, the parties submitters do hereby renew the within submission, and empower the arbiters and oversman before named to proceed in and determine the matters submitted, in the same way as if such submission had never expired; and farther, the said parties submitters do hereby of new submit and refer to the amicable decision, final sentence, and decree-arbitral to be given forth and pronounced by the said Hugh Watson and Peter Christie, as the arbiters appointed by the parties, and, in case of difference in opinion between the said arbiters, to the said James Horne as oversman, the whole claims of the parties, as specially mentioned in the within written submission." The term of three months again expired in August 1850, without any award by the arbiters. The arbiters, however, pronounced subsequent orders, which were obeyed by the parties, and, in

July 16, 1852. January 1851, they had issued notes of judgment, which, it is alleged, only required to be reduced into the formal shape of a *decreet-arbitral*. The notes were unfavourable to Hill, and in *Hill v. Dundee & Aberdeen Railway Junction Co.* February 1851 he raised an action of wakening of the action which he had previously raised before the Sheriff of Perth, upon the ground that, by the lapse of three months from the date of the renewal of the submission without award, the submission had expired, and he was entitled to proceed under the statute as regarded the one claim, and to prosecute at common law for the other.

The Railway Company pleaded that this action is excluded by the submission—that the second or renewed submission was not a submission under the statute, but was a submission at common law—that it was not, like the original submission, limited to three months, nor even to year and day—that the parties, by proceeding in the submission subsequent to the lapse of the three months, had either proved that it was not their intention so to limit its duration, or had prorogated it indefinitely—that the arbiters' notes did not finally dispose of the matter submitted, and they were not precluded, even by the expiry of the term of three months, from reducing them into the formal and operative shape of a *decreet-arbitral*—and that these pleas, if not effectual so far as the statutory claim was involved, were good at least to the extent of the common law claim.

The Sheriff (Craufurd) sustained the defence, and Hill brought the present advocation.

The Lord Ordinary (Rutherford) reported the case to the Court.

The first additional plea in law stated by the respondents was to the effect that "the action in question was properly dismissed by the Sheriff, in respect that the subject matter thereof had been referred by the parties to arbitration, and was and is in dependence in a good valid subsisting submission."

*Macfarlane*, for respondents. The original submission shews, that while one of these claims might have been put forward and disposed of under the railway acts, the other could not. The advocator withdrew his action before the Sheriff, and consolidated both claims in this single arbitration. There is an express stipulation that the submission was only to endure for three months. These three months expired. The minute of renewal contains no limitation in regard to time. The parties go on to make a new submission, which is in itself complete. They go on to plead

before the arbiters beyond the expiry of the three months. We <sup>July 16. 1852.</sup> maintain that the submission did not fall, and that the conduct <sup>Hill v. Dundee</sup> of the parties construed the minute into a power to the arbiters <sup>Perth & Aber-</sup> to go on. *Fleming v. Wilson and M'Lellan*, 7th July 1827. But, <sup>deen Railway</sup> Junction Co. at all events, this is sufficient for our success, that the action before the Sheriff is withdrawn and extinguished.

*Dean of Faculty*, (with whom *Fraser*), for advocator. If the matter had rested upon the first submission, it is clear that the agreement could not have lasted more than three months. The submission was either competent, or it was not. If it was not competent, then there never was any good submission effectual to bar me from insisting in my action. The submission must stand as a whole, or not at all. But the other side admit that this was an effectual submission. After the expiry of the first submission, there was nothing to prevent the action from being wakened and insisted in. The parties were then in the same position as if no submission had ever been entered into. Is it to be said that after the minute of renewal, there were two submissions between the parties? It is impossible to put this construction on the document, for the two things are quite inconsistent the one with the other. Three months are again allowed to expire from the date of the renewal. But it is said to have been virtually renewed, because the parties pleaded under it. Will that renew it? If the submission never existed except as a submission under the Lands Clauses Act, could it be renewed at all except under that Act? If the circumstance of these parties appearing before the arbiters revives the submission, it is a submission of the same kind, and with the same limitation of three months. It is settled law, that a submission blank in the endurance is limited to one year. *Wallace v. Wallace*, M., 639.

**LORD JUSTICE-CLERK.** There is some difficulty in this question. I could not go on the distinction adopted by the Sheriff-depute of Perth, (Mr Craufurd,) that the submission subsists as to one claim and not as to the other. The first submission unquestionably fell after the lapse of three months. An interval took place, and the submission was renewed. If the three months' termination had still been within the view and intendment of the parties, it is certainly remarkable that all reference to that important clause should have been left out. The minute of renewal is clearly a substantive submission, complete in itself, and independent of all that went before. This must be taken as

July 16, 1852. an ordinary and as an independent general submission. It is therefore a submission within the rule of *Fleming v. M' Lellan*,  
*Hill v. Dundee*, *Perth & Aber-* and does not fall by lapse of year or day.  
*deen Railway*  
*Junction Co.*

LORD MEDWYN concurred.

LORD COCKBURN. I come to the same result, and upon the same grounds. I doubt whether even the first was a proper statutory three months' submission. One of the two claims being beyond the statute, the parties bound both claims into one. By connecting the claim which was not statutory, with the statutory claim, it appears to me that the whole submission is beyond the statute. But whether this view be sound or not, *estilo* that the submission was a statutory one, it fell at the close of three months. The parties then came to renew it. But how did they renew it? Not as a statutory submission to endure three months. Neither they nor the arbiters understood this to be the meaning of the renewal. They renew it; but the minute of renewal contains an additional creation of powers to the arbiters to take it up and renew it. I don't believe that the parties intended this to be a three months' submission. The parties brought the matter between them into the shape of an ordinary submission, and that position, I think, it still retains.

LORD MURRAY. In the original submission, it is most positively laid down that the arbiters are to proceed according to the statutory provisions, and that a decision is to be pronounced within three months. The three months expire and there is no decision. But there is a renewal of the submission, and the question is, what does that renewal import. In the first place, the parties say, we hereby renew the within submission. This minute of renewal is not a separate deed. It is written on the back of the original submission, and must be taken as forming a part of it. It refers to it, adopts it, and is one and the same with it. This would have been quite clear if only the first clause quoted by your Lordship from the minute of renewal had been there. But, then, the minute goes on—of new the parties submit and refer their *whole* claims as specially mentioned. The object of this was to put it in the power of the arbiters to look at their whole claim. It gave them power to consider the whole of them as before, but also, as before, to decide upon them within three months. There is nothing but a renewal of the submission for the same period for which it originally stood. It is clearly a renewal of that submission, of which a leading feature was, that it was to be limited to three months. How can such a renewal make it a submission for

forty years? It seems to me that we are going entirely out of the way in arriving at such a result.

July 16. 1852.

Hill v. Dundee  
Perth & Aber-  
deen Railway  
Junction Co.

The COURT pronounced the following interlocutor :—“ Sustain the first additional plea in law stated by the respondents in this Court, that the submission of the claim insisted on in the action still subsists, and find that the advocator is excluded from going on with the action in the Inferior Court: Find the defenders entitled to expenses as in the interlocutor, dated 17th October last, and also to the expenses incurred in this Court; appoint an account,” &c.

*John Galletly, S.S.C., Pursuer's Agent.*

*Gibson-Craig, Dalziel, & Brodie, W.S., Defenders' Agents.*

### FIRST DIVISION.

Petition, MRS MORRIES STIRLING of Blackgrange, and Others. No. 392.

*Act 11 and 12 Vict. c. 86—Improvement Debts.*—The Entail Amendment Act only contemplates future expenditure, and does not apply to improvements of anterior date, and which do not fall under the Montgomery Act.

This was a petition for authority to uplift the price of entailed lands, in repayment, *pro tanto*, of sums expended in improvements. The usual remit having been made by the Lord Ordinary to enquire into the nature of the improvements, the reporter stated, that as set forth in the petition, L.2555 : 2 : 2 had been expended in improvements; that L.1968 : 0 : 4 of this sum had been expended in improvements under the Montgomery Act, and the remainder, being L.587 : 1 : 10, had been expended in embanking the River Forth, which had permanently improved the estate, but was not expenditure of the nature authorised by the Montgomery Act.

A minute was lodged for the petitioners, in which it was stated to be of importance to them that the discharge to be executed should be primarily of the expenditure falling under the 11 and 12 Vict. cap. 86, although not under the Montgomery Act; and that the Court should authorise the consigned sum to be applied, 1st, In extinction of the sum of L.587 : 1 : 10; and, 2d, In extinction, *pro tanto*, of the sum of L.1968 : 0 : 4, and a discharge to this effect to be executed and recorded.

LORD IVORY expressed an opinion, to the effect that the peti-

July 17. 1852.

Pet. Stirling,

&amp;c.

July 17. 1852. <sup>Pet. Stirling, &c.</sup> titioner could not get the sum of L.587 under the Rutherford Act, which only contemplates future expenditure. The question here was one of pure construction of the statute, and whether they are new or modern improvements, he could see nothing in the statute which has reference to such circumstances as the present.

*Dundas*, for the petitioner, moved the Court to sustain the other expenditure, and in the meantime to allow the consigned money to be applied in repayment, *pro tanto*, of the claims under the Montgomery Act.

Agreed to.

*Dundas and Wilson, C.S., Petitioners' Agents.*

#### FIRST DIVISION.

No. 393. Petition, MISS CATHARINE CAMPBELL PRESTON, and Others.

*Trust-Settlement—Appointment of Trustees.*—Circumstances in which the Court declined to fill up a vacancy in the number of trustees appointed by them to execute a trust-settlement.

July 17. 1852. <sup>Pet. Preston, &c.</sup> The late Sir Robert Preston executed a trust-deed, by which he disposed his estate to certain trustees therein named. Sir Robert having died, the trustees declined to act; and the Court, upon the petition of the present petitioner, and others interested, appointed three trustees, of whom Viscount Melville was one, for the purpose of carrying the trust-disposition into effect. These three trustees proceeded forthwith to act in the execution of the trust. Viscount Melville died on 10th June 1851.

The petitioners are the three next heirs of entail first called to the succession of certain of the estates, after Lady Baird Preston, who has died without heirs of her body; and the trust must subsist until the ultimate purpose of the trust, for the investment of the residue of the estate, shall have been carried into effect. In these circumstances this application was made, to have the vacancy in the trust occasioned by the death of Lord Melville filled up, by the appointment of another trustee in his place.

*Dean of Faculty*, for the trustees.

*Dundas*, for the petitioners.

The COURT held that so long as there were two trustees, and they did not differ in opinion, and no point of importance occurred, it was unnecessary to appoint another trustee, and they therefore refused the prayer of the petition *in hoc statu*.

*Dundas and Wilson, C.S., Agents for Sir Robert Preston's Trustees.*

*Robert Haldane, W.S., Agent for Miss Preston and Others.*

## FIRST DIVISION.

Petition, Dr JAMES JAMIESON, *for appointment of a curator bonis* to Mrs Elizabeth Kilgour or Jamieson.

No. 394.

*Process—Curator Bonis—Interim appointment of—Remit to Lord Ordinary on the Bills to appoint.*

This was a petition for the appointment of a *curator bonis* to ~~July 17. 1852.~~ <sup>17. 1852.</sup> Mrs Elizabeth Kilgour or Jamieson, mother of the petitioner, aged nearly ninety years, on the ground of her mental incapacity and imbecility, and unfitness to manage her affairs. With the petition a medical certificate to that effect was produced. Special intimation had been ordered to be made to five persons mentioned in the prayer of the petition. The agent for the petitioner failed to discover the address of one of them until too late to allow the days of intimation *quoad* him to expire before the rising of the Court for the long vacation.

In these circumstances the case was put to the roll, and

Duncan, for the petitioner, moved their Lordships either to appoint the curator named in the petition, *ad interim*, to act until the meeting of the Court in November next, or to remit to the Lord Ordinary on the bills to make the appointment craved for, on the expiry of the days of intimation.

The COURT pronounced the following interlocutor:—"The Lords remit to the Lord Ordinary on the bills during the ensuing vacation, with power to his Lordship to appoint a *curator bonis* to Mrs Elizabeth Kilgour or Jamieson, mentioned in the petition *ad interim*, said appointment to endure till the third sederunt day in November next."

Barron & Hagart, W.S., Agents for the Petitioner.

## SECOND DIVISION.

SCOTT v. SCOTT.

No. 395.

*Succession—Settlements—“Nearest Relations”—Relationship by the half-blood and full blood.*—A testator, by his settlements, after disposing of his property in favour of certain parties whom he named, directed his trustees, in case any residue should remain in their hands after the purposes of the trust had been fulfilled, to pay the same to his "nearest relations then alive." Held, in the circumstances, and in construction of the deeds, that children of a sister of the half blood were entitled to the residue as "nearest relations," equally with children of a brother of the full blood.

This was a declarator of a right of succession. The late James ~~July 17. 1852.~~ Scott, Esq., of Brotherton, died in 1844, leaving the following *Scott v. Scott.*

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July 17. 1852. deeds of settlement for the disposal of his heritable and moveable estate : — 1. A disposition of settlement, dated on or about the 20th November 1834, by which he conveyed his estate of Brother-ton to his brother, David Scott, merchant in Manchester, in life-rent, and to his nephew, James Robert Scott, (son of Archibald Scott, a brother of the testator, who had predeceased the latter,) whom failing, to certain other parties in fee ; 2. A trust deed and settlement of the same date ; and, 3. A deed of appointment and bequest of legacies, dated on or about the 22d September 1835. By the last of these deeds the testator directed his trustees to make payment of a variety of legacies to different parties therein named. And it further bore, “ and in case of any residue being left in the hands of my said trustees after the purposes of the trust have been fulfilled, I hereby appoint the same to be made over and paid to my nearest relations then alive.”

The debts and legacies due and bequeathed by the testator having been all paid and discharged, or in course of being so, the trustees in 1845 instituted an action of multiplepoinding and exoneration, in which appearance was made for the said David Scott, who contended that the period of division of the said James Scott's residuary estate had arrived, and likewise for various other parties, who maintained that the period of division had not arrived, and would not do so till the death of the said David Scott. In this action the Court found, “ that according to the sound construction and true meaning of the trust-deed and other testamentary writings of the testator, the claimant, David Scott, is not, in the circumstances set forth in the record, entitled to the residue in the hands of the raisers, forming the fund *in medio* : Therefore repel the claim of the said David Scott, find that the residue does not fall to be paid over till the death of the said David Scott, and must then be paid over to the parties who, at that time, shall be the nearest relations in life of the testator.” This judgment was, on appeal, affirmed by the House of Lords.

In these circumstances, the pursuers, who are the children of the said David Scott, with Joseph St John Yates, the assignee of James Robert Scott, the testator's nephew, brought the present declarator to have it found that they were the “nearest relations” of the testator James Scott, who had right to the *spes successionis* of the residue, which, in accordance with the above interlocutor, will fall to be divided on David Scott's death, and that the defenders had no right to any interest in the same.

The defenders are the children of the late Mrs Isabella Robertson Scott, who was a half sister on the mother's side of the

testator, James Scott, and who was married to George Robertson, July 17. 1852. afterwards George Robertson Scott, advocate, now deceased; and it was pleaded for them, that they, equally with the pursuers, fell within the description of the testator's "nearest relations," and that, as such, they or such of them as should be alive at the time of David Scott's death, were entitled to a share of the residue. *Scott v. Scott.*

In the deed of appointment of 1835, the pursuers are described as "my brother David's family," the defenders and their mother being described in the following terms:—"To Mrs Isabella Robertson Scott, my sister, L.500, to each of my nieces, Jane and Helen Robertson, her daughters, L.300, and in the event of the death of either of my said nieces, both of these legacies to go to the survivor; to my nephew, Captain George Robertson Scott, L.500; to my nephew, Hercules James Robertson, advocate, L.300; to my nephews, William Robertson junior, writer to the signet, and Captain Archibald Robertson, of the Regiment, and Charles Robertson, advocate, L.300 each; and to Dr Montgomery Robertson, my nephew, (to whom I have already given L.500, to assist in establishing him in business), L.100."

David Scott's family were benefited to a larger amount; a circumstance which will be found remarked on in Lord Medwyn's opinion.

The Lord Ordinary (Rutherford), reported the case to the Second Division of the Court, with a note, in which his Lordship indicated an opinion in favour of the defenders. His Lordship in this note says, "In some respects the present action is premature, because the trust cannot be fulfilled, nor the period of the distribution of the residue arrive, till the death of the testator's full brother, David Scott, as was found, indeed, by the decision of this Court on the 18th of June 1847, affirmed in the House of Lords, July 24. 1850. This decision, while it necessarily excludes David Scott, the testator's full brother, from any share of the residue, leaves a state of the family likely enough to exist when the residue becomes divisible, namely, the pursuers, nephews and nieces of the testator, by David Scott, a full brother, and James Robert Scott, a nephew by another full brother deceased, and the defenders, nephews and nieces by Mrs Isabella Robertson Scott, a sister-uterine of the testator. It might well be doubted, whether, during the life of David Scott, there was sufficient interest on the part of the pursuers to support what must necessarily be a conditional declarator, but no objection has been taken upon this ground. It is more than probable from the great number of the parties that the question will arise; and as the *whole class* of the pursuers propose to exclude in competition with themselves, the

July 17, 1852. *whole class* of the defenders, it might seem hard upon technical ground taken by the Court itself, to deprive them of the benefit of the judgment, which must have an important bearing upon present interests; and . . . . the pursuers found very much upon the Scotch rule of succession to moveables in the case of intestacy, by which the full blood in a remoter degree excludes the half blood, and by which relations merely uterine are entirely excluded. They do not, indeed, venture to carry their doctrine to the full extent by contending that nephews and nieces by the full blood would under a bequest to 'nearest relations,' exclude brothers and sisters consanguinean, because a remoter degree in the full blood shall take *ab intestato*, preferably to a nearer degree in the half blood; and it was scarcely maintained that under the same bequest to 'nearest relations,' the remoter degree of the full blood, or of the blood consanguinean, would exclude a nearer degree of relations through the mother. They contented themselves with holding simply that in the case which here occurs of relations in the same degree, and in the construction of a bequest to nearest relations, the full blood must exclude the half blood consanguinean, and both exclude half blood through the mother.

"The Lord Ordinary can see no authority for this distinction. It holds no doubt in succession; and the rules of succession go a great deal farther in favour of the full blood; but the Lord Ordinary is not aware that it holds in any other department of the law in which the relationship of the parties is taken into account; as in the declinature of a Judge in the rejection of evidence before the recent statute, or in the law of marriage. Nearest relationship depends, properly speaking, not upon blood but upon degree. The degree, whichever rule be adopted, whether that of the civil or of the canon law, must be reckoned through the common *stirps*, and whether only one side or both be counted, the degree is the same whether the *stirps* be male or female. He thinks nearest relations, both in legal language and in common parlance, depends on degree, not on fulness of blood. No authority was quoted to the Lord Ordinary to affect this view of the law, or to force him to take the arbitrary rules of succession into account in construing the words 'nearest relations.'"

The law of England had been much referred to before the Lord Ordinary, and the following were the chief authorities cited from that law:—Williams on the Law of Executors and Administrators, 4th edition, page 343, *et seq.*; page 1292, *et seq.*; and pages 957, 958, and 959; and also in Roper on Legacies, vol. i. page 113; *Moore and Barham*, 13th May 1723, reported in Peere Williams,

(vol. i. p. 53,) where a grandmother by the mother's side was allowed to claim with a grandfather by the father's side, because they were equal in degree, and fulness of blood was not to be taken into account; and in the case of *Smith against Tracey*, Modern Reports, page 200, where the question occurred whether sisters of the half blood were to come in to share with brothers of the full blood, they were allowed upon the ground "that the sister of the half blood, being akin to the intestate, and not in *remotiore gradu* than the brother of the whole blood, must be accounted in equal degree." The case of *Moore and Barham*, the Lord Ordinary thought was a strong illustration for the defenders, and that of *Smith and Tracey* "is not without use, as shewing that, under such words as next of kin and nearest relation, proximity in degree gives the rule and not fulness of blood."

*Scott v. Scott.*

*Deas*, and the *Solicitor-General*, were for the pursuers.

*Mure*, and the *Dean of Faculty*, for the defenders.

LORDS COCKBURN and MURRAY were of opinion, that the defenders were, in the circumstances, entitled to claim the residue equally with the pursuers.

LORD MEDWYN. The case is no doubt one of novelty; for although certain cases have been referred to, I do not think we can say there is any direct authority to guide us in our inquiry as to the intention of the testator, from any technical terms used by him, but must endeavour to discover it from the circumstances of the case itself. Now, it is plain he did not wish that the residue should be disposed of according to the rules of legal intestate succession; he shews his intention of making it the subject of testate succession; and, in this view, I think it has not been sufficiently observed or commented on, that while the two deeds, the one of settlement of the estate of Brotherton, and the other the trust-disposition, both dated 20th November 1834, are written by his professional man of business, the deed in which is this appointment of the residue of his personal succession in September 1835, is written by himself; and therefore the language used, and the terms in which his will is conveyed, must be considered as emphatically his own, and best indicating the meaning he attached to the expression, when he speaks of his "nearest relations."

It was said, that looking at the amount of his special bequests in their favour respectively, the one being so much larger than the other, it is clear that he preferred the children of his brother David. But I do not hold this to be a sufficient test, even of his affection, in opposition to what I shall notice immediately; for

July 17. 1852. there are many circumstances which might affect the amount of these bequests to them, independent of the scale of affection in which he held them. He was limiting his brother David's power over the estate, giving him merely a liferent over it, and lessening his power of providing for his children; and he might think that the other family had been suitably provided for by their own father, so that the sum he bequeathed was more a proof of affection for them than anything else. But what makes me consider that the one family was as much included by him under the term "my nearest relations," as the other, though only related by the half blood, is the manner in which he designates them, under his own hand-writing, when he appoints the special bequests for them. The contrast between the two families is very striking. He bequeaths, he says, the following legacies "to my brother David's family, L.13,500, to be paid as under :—to Hercules Scott, *his* only son, L.3000, and to each of *his* seven daughters, the sum of L.1,500." Thus he designates them by their relationship to their father, but not in reference to any relationship to himself, although they be his own nephew and nieces; he does not even mention the names of these daughters, as if unknown to him, looking upon them merely as the family of his brother. Now, see how he first speaks of the children of his sister, Mrs Robertson Scott. He denominates her "my sister," putting her in the same degree of relationship as his brother David, and then he specifies her children, not as such merely, but specially describes them as his nephews and nieces, mentioning them all individually as such, thus :—"to each of my nieces, Jane and Helen Robertson, her daughters, L.300; to my nephew, Captain George Robertson Scott, L.500; to my nephew, Hercules James Robertson, advocate, L.300;" and so of the others.' It is impossible for me to hold, after this denomination, given by himself and *ex proprio motu*, to the family of his sister, that he did not mean to consider them as nephews and nieces, and equally related to him as the children of his brother David, or that, when he disposed of the residue, he did not include them amongst his nearest relations along with the family of his brother David, and the son of his brother Archibald, among whom it was to be divided. It is quite according to common parlance in this country, to section them in this degree of relationship although by the half blood only; and the testator has shewn, most unequivocally I think, that he so considered them. I am, therefore, for sustaining the defences.

The LORD JUSTICE-CLERK declined in consequence of his relationship with several of the parties.

The COURT pronounced the following interlocutor:—“Find <sup>July 17. 1852.</sup> that when the residue of the estate of the deceased James Scott, Esq. of Brotherton shall come to be divided among the testator’s nearest relations, his nephews and nieces, the children of his sister, Mrs Isabella Robertson Scott, then alive, will share equally with the children of his brother David Scott, then alive, and with Joseph and John Yates, as assignee of James Robert Scott, being then alive. Therefore, sustain the defences, and asoilzie the defenders from the conclusions of the libel, and decern.”

It was settled of consent that the expenses of both parties, to be taxed as between agent and client, should be paid out of the trust estate.

*James Burness, S.S.C., Agent for Pursuer.*

*Hope, Oliphant, and Mackay, W.S., Agents for Defendants.*

## SECOND DIVISION.

M’COWAN v. WRIGHT.

No. 396.

*Process—Jury Cause—Notice of Trial—Failure of Notice by Pursuer—Expiry of the ten days.—Notice by Defender.*

See *ante*, p. 967.

Issues in this cause were approved of by the Court on the 29th <sup>July 17. 1852.</sup> June.

Ten days having elapsed without any notice of trial being given by the pursuer, the defender gave notice of trial for the next sittings. The pursuer now moved to put off the trial—“on account of the absence of the said James Howie, the bankrupt, and the want of writings, with which he fled from Glasgow, as set forth in an affidavit by the pursuer, to be produced in process.”

*Broun, and Moncreiff,* for the pursuer. The defender’s notice of trial is premature and incompetent.

*Fraser, and Penney,* were for the defender.

LORD JUSTICE-CLERK. The defender had no right to give notice. The expiry of ten days without notice on the part of the pursuer gives such right to the defender only in cases to be tried before the Lord Ordinary during session. In cases to be tried by the Inner House at the sittings, the defender is only entitled to give notice if the pursuer allows the sittings to elapse, and thus forfeits his lead. Besides, here the affidavit of itself furnishes sufficient ground for delay.

July 17. 1852. The COURT, "Upon the motion of the pursuer, discharge the motion of trial given by the defender, and appoint the cause to be tried before the meeting of the Court in November: Renew the diligence formerly granted at the instance of the parties," &c.  
M'Cowan v. Wright.

*Thomas Sprot, W.S. Pursuer's Agent.*  
*Andrew Howden, W.S., Defender's Agent.*

### HOUSE OF LORDS.

No. 397. *MARIANSKI, Appellant; FAIRSERVICE or CAIRNS, Respondent.*

*Trustee—Issues—Bill of Exceptions—Evidence.*—In an action of reduction of certain documents, (20 in number) said to have been obtained from one F., deceased, by improper means, issues were directed to try whether the said F. was of weak and facile mind, at the dates when the signatures of the said F. were attached to the writings, or any of them, and whether the defender, taking advantage of his said weakness and facility, did, by fraud or intimidation, procure the signatures, or any of them, the jury found a verdict for the pursuers on these issues:—

*Held* that it was a misprison of the clerk to enter the verdict for the pursuers generally, (which was inapplicable to the issues from their uncertainty and ambiguity), and thus the proper course in such a case was to refer it to the judge who tried the cause, that the verdict might be entered according to the substance of the actual finding, and that it was not too late to do this after interlocutor.

*Held also*, that on the trial of the above issues, entries made by the said F. in his books of account, and declarations made by him as to expenses paid by him, are admissible, as they may tend to shew the state of the mind of F. at the time; if the evidence was used as evidence of the truth of the entries, objection should then have been taken to the improper use of such evidence, but not to its admissibility.

*Held also*, that defences made and signed by the defender in the course of another suit against him by another party, in which defences there were statements made by the defender as to his pecuniary circumstances, were admissible on the trial of these issues, independently of the 13 and 14 Vict. c. 36, sec. 45. *Observations* generally upon the form of issues for trial, and as to bills of exceptions.

July 1. 1852. The late Alexander Fairservice of Quarryhall died on the 16th of July 1846, at the advanced age of 93. He was survived by his two daughters, Elizabeth and Janet, who, under a trust-disposition and settlement, left by the said Alexander Fairservice, became entitled to share his means and estate equally between them or their families, but exclusive of the *jus mariti* of their respective

Marianski v. Fairservice or Cairns.

husbands. The youngest daughter Janet, one of the respondents, married the other respondent, John Cairns. The eldest daughter Elizabeth, married the appellant, Dionysius Onufri Marianski. After the death of the said Alexander Fairservice two actions were brought by the respondents, Mr and Mrs Cairns, one a reduction - improbation, exhibition, count, reckoning, and payment, and the other a reduction - improbation, and declarator, but the object of both proceedings was to reduce certain documents which the appellant, Marianski, sought to make the foundation of a claim of a very large debt against the estate of the late Mr Fairservice. The only difference in the two actions was the relation of the documents, the one containing some more documents than the other, but the questions in the two actions were precisely the same. In the summons it was alleged that the said Alexander Fairservice was all along in wealthy circumstances, while the appellant's means were entirely limited, and that the latter had continued to establish himself and his wife as permanent inmates in the dwelling-house of the deceased, and had succeeded in establishing an entire ascendancy over his mind and actions. The object of these proceedings was to discuss the validity and propriety of the documents by which Marianski sought to evidence and establish his demand, and the circumstances under which they had been obtained.

After the record in each action had been closed, issues were adjusted. The issues were in both actions identically the same, and they were tried as one action; they were as follows:—

“Whether at the dates when the subscriptions and indorsations of the said Alexander Fairservice, here exhibited to, or upon the writings numbered,” [describing them by numbers, there being 20 documents,] “or any of them, the said Alexander Fairservice was of weak and facile mind and easily imposed upon, and whether the defender, taking advantage of his said weakness and facility, did by fraud or circumvention, or intimidation, procure or obtain the said subscriptions and indorsations, or any of them, to the lesion of the grantor.”

The verdict was entered thus—“Verdict for the pursuer.”

At the trial the pursuers (who are the present respondents), tendered in evidence certain entries made by the late Mr Fairservice in his books of account. Upon which, the counsel for the defender, (the present appellant) objected to their admissibility as evidences in the cause,—in respect that any written statements or books made or kept by the deceased Alexander Fairservice, in

July 1. 1852. whose right the present action was pursued, was not competent evidence on behalf of the pursuers thereof. But the Lord Justice-Clerk, before whom the issues were tried, repelled the said objection, and admitted the documents in evidence. Whereupon the counsel for the defender excepted to the said decision.

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Cairns.

In the examination of one of the witnesses, the counsel for the pursuers proposed to put to the witness the following question :— “Did he (meaning the said Mr Fairservice), tell you whether he paid these expenses himself?” (The question was framed in order to raise a general objection to any such line of evidence as that which should bring forward the statement of the old man himself.)

The counsel for the defender objected to the said question being put, in respect that no verbal statement by the said Mr Fairservice, in whose right the present action was said to be pursued, was competent evidence on behalf of the pursuers thereof. But the Lord Justice-Clerk repelled the said objection, and allowed the said question to be put. Whereupon the counsel for the defender excepted to the said decision, and tendered exceptions accordingly. The bill of exceptions then contained the following statement—“And it was agreed that the objection should be understood to be taken and repelled, subject to acceptance as to all other evidence of the same character.”

In order to prove the poverty of the appellant prior to his marriage with the daughter of the deceased Mr Fairservice, the counsel for the pursuers proposed to give in evidence, the defences of Marianski to an action brought against him for aliment, in 1835, by his first wife (against whom he afterwards obtained a divorce) which document was signed by Marianski, and contained a statement by him as to his having been deprived of a lucrative business, and that he was then “supporting himself on the miserable sum of from 8s. to 8s. 6d. per week, paying 4s. 6d. a-week for his lodgings, and the balance for the mere necessaries of life.” Counsel for defender objected to its admissibility, in respect that “it was incompetent to put in evidence against a party, pleadings given in on his behalf in another process with a different party, and as to a different subject-matter.” This objection being overruled, an exception was taken. Ultimately all the exceptions came on for hearing before the Second Division of the Court of Session, when their Lordships disallowed the same. From their judgments on these exceptions, the present appeals were brought.

The appeals were argued in July 1851 by Sir F. Kelly, and

*Bethell, Q.C., (Anderson, Q.C., with them) for the appellants, and July 1. 1852.  
by Peacock, Q.C., and Hugh Hill, Q.C., for the respondents.*

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Cairns.*

The following cases were cited; *R. v. O'Connell* (11 Cl. and F. 155;) *Wright v. Fatham*, (5 Clk. and Fin. 670;) *Ludd v. Thomas*, (4 P. and D. 9;) *Goram v. Sweeting*, (2 Wm. Sand, 205;) *R. v. O'Brien*, (1 Den. Cr. C. 9;) *R. v. Sarah Willis*, (1 Den. Cr. C. 80.)

LORD TRURO. [after stating the nature of the case, and the issues which had been directed.] It will be observed that those issues are not in the form in which issues in this country are usually directed. Issues from the Courts of law in this country are so framed as to present a single question to the jury, an affirmation with a negation, and admitting of a distinct answer by the verdict of the jury. I, however, have seen issues even in this country from Courts of Equity, which have assumed something like the form of those in question—but it has led to no inconvenience, for this reason, that issues from the Courts of Equity being merely to inform the conscience of the Court, and to afford collateral assistance, they are always accompanied by a direction and permission to the learned Judge to make any special endorsement that may be necessary, and when therefore, it has become necessary to distinguish the parts of the verdict applying only to certain parts of the issues, that has been done by endorsement upon the postea. No objection appears to have been made below to the form of these issues, and for a very obvious reason, that I believe there is not the slightest doubt that the form of these issues is the established form in the Courts below. However this is quite clear, that whatever may be the form of the issue, it admitted, supposing a correct summing up on the part of the learned Judge, of an available verdict on the part of the jury. This case went down to trial in the form which I have mentioned. Now, I would just observe for a moment, that it appears a proceeding took place below, which is not brought before the House in such a mode as to enable the House to take notice of it. It is stated that when the objection was made to the first question relating to Mr Fair-service's declarations, the learned counsel agreed that the objection then made should apply to all the evidence of the same character. But what sort of agreement is that? How much it may vary. It is objected that the declarations are not evidence. Suppose they are made in the party's presence, is that of the same character? In one sense it is. However the House can only deal with the exception as applied to the particular question to

July 1. 1852. that which is the substance of the finding, so that here this appears to me to be little more than a misprison of the clerk in making the Fairservice or entry. What does "verdict for the pursuer" mean? You must resort to the summing up to know what "verdict for the pursuer" means. It means that each and every of the respective documents was obtained by such and such means. Then, when the Court had so assumed, the proper mode of entering up and applying the verdict upon the record, would have been to have stated, not, "verdict for the pursuer" generally, but, that the jury found that the said documents mentioned were obtained by such and such means. It seems to me, therefore, that this is a mere misentry of the verdict. What is the course in such a case? Why, it is a perfectly well known one. It is, that perceiving a verdict which appears to be inapplicable to the issue from its uncertainty and its ambiguity, you refer to the Judge who tried the cause, that the verdict may be entered according to the substance of the actual finding, which he may do by his notes. It is not at all too late to do that, and it has been of frequent practice. My Lords, there are several cases in which it has been done, after a judgment of reversal. One case I may mention, a modern one, (there are ancient cases to the same effect,) *Richardson v. Mellish* (3 Bing. 334, in error 1 B. and C. 819) in which I was one of the counsel. In Tidd's Practice, title "Verdict" you will find the matter all laid down, with a note of several cases. They are very numerous. (His Lordship referred particularly to *Harrison v. King*, 1 B. and Ald., 161, and *Eddowes v. Hopkins*, 1 Douglas, 376.)

Then, my Lords, how does the case stand? Here is an issue, which, if properly conducted, would lead to a verdict, which might be the proper foundation of a judgment — but here is an ambiguous verdict. The proper course, and the course sanctioned and called for by practice, seems to me to be, to let this case stand over, in order to furnish an opportunity for an application to the Court below, to amend the entry of the verdict according to the Judge's notes. It is in that learned Judge's discretion, (always meaning of course, not an arbitrary discretion, but one governed by law, and by fact, and by justice,) whether he will amend it in the way in which he may be asked. If he thinks fit to alter the entry of the verdict, then it will be for the Court to say whether they will amend the application of that verdict, in which case the record in this House will be amended to correspond with it, and the House will give judgment according to the record in its amended state. At pre-

sent therefore, I should recommend your Lordships not to act July 1. 1852. upon the ambiguous verdict as it stands, but to over-rule the exception so far as it applies to the admissibility of the evidence, and to let the case remain over for ultimate judgment, until there has been an opportunity to make the application which I have mentioned.

LORD BROUHAM. My Lords, there have been very few cases in which I have had the good fortune to attend, and to advise your Lordships, in which I have felt more anxiety than in the present case ; that anxiety has been shared, as I know, by my noble and learned friend. We have applied our minds to it again and again, during a very considerable course of time ; and we have come to the result which he has now stated to your Lordships, that this is the course which we should recommend to the pursued. It has this great advantage, that it tends to prevent, as I most earnestly hope it may be found to prevent, opening the case again and sending it to a new trial, because upon the evidence none of us entertain the shadow of a doubt ; the merits appear to us to be all one way ; and it would be a most cruel thing if it should happen that all this enquiry had to be gone over again, which must lead to the same result, and only to the cause of additional expense, delay, and vexation, to the unfortunate parties. My Lords, I hope and trust that nothing which has passed upon the present occasion will at all shake the opinion which I venture to hope has been come to by professional men in the Court below, that the practice to which my noble and learned friend has referred is *mala proxis*. That it is the practice of the Court, and that it has been so, I am afraid is very true. I hope and trust that it will be reconsidered, and that a new course will hereafter be taken. This case is only one of the many instances in which we see the perils to which the suitor and the administration of justice are exposed by that practice. My Lords, I had occasion two years ago, in the case of *Irvine v. Kirkpatrick*, to comment upon it, and I observe that in the report of those comments there is rather an unfortunate error. It states "It must be a bad course of proceeding, which cannot be prevented from working confusion, and begetting error by the accident of a jury finding specially, where no power exists of preventing them from finding a general verdict." That is the reverse of what was said obviously by the omission of the word *but*—it should be "which cannot be prevented from working confusion and begetting error *but* by the special finding of the jury."

My Lords I entertain the opinion which entirely agrees with

July 1. 1852. that of my noble and learned friend, which I held at that time,  
 Marianski v.  
 Fairservice or altered. I therefore move your Lordships that this case stand  
 over, with the intent and for the purpose stated by my noble and  
 learned friend.

*Anderson, Q.C.* My Lords, there is one point about which my learned friend Mr Hill and I are not altogether satisfied, as to how your Lordships mean to dispose of it, namely the point as to the admissibility of the defences in the suit of aliment. The question was, whether the defences that were put into the action of aliment on behalf of Marianski could be admitted?

*LORD TRURO.* The ground upon which it occurred to me that that exception must fail, was this, you are aware of the recent statute\* which directs that no exception either on account of the reception of inadmissible evidence, or the rejection of competent evidence shall affect the judgment, if the Court of Appeal shall be of opinion, that whether the evidence was received or rejected improperly, the pursuit of the right course would not have affected the judgment.

*Anderson, Q.C.* Will your Lordships allow me to mention that that statute was passed since this judgment was given; and there is a clause in the statute providing that it shall only apply to cases commencing after November 1851; it certainly therefore does not apply to this case. It is inoperative from 1851, but it does not apply to this judgment.

*LORD TRURO.* That document was well considered by my noble and learned friend and myself. That document, you observe, stood in rather a different situation from pleadings in general. The argument was addressed to the House as though it had been an ordinary pleading, such as takes place through the instrumentality of counsel; but that was a document signed by the party himself, and I recollect to have asked, though I do not remember whether I received an answer, whether it was not upon oath; assuming it not to be upon oath, still it is a representation made by the individual himself, as to the state of his own circumstances. That representation was made in the suit for alimony to his wife; and it was to the effect that he was then living upon 8s. a-week, which included his lodging and every other expense to which he was put, and one of the points raised in the case being, whether Marianski had ever possessed the means by which to make the

\* His Lordship referred to 18 and 14 Vict. c. 36, § 45.

advances, the amount of which he claimed to be due to him as a debt from Fairservice, that was put in in order to shew his state of circumstances at a given period, a period sometime antecedent to that at which the supposed advances were made, leaving it to the other evidence in the case to deal with the probability of his having in the meantime acquired any such fund. Now it certainly appeared to me that that document was not open to the general objection which would apply to pleadings in ordinary, but that being a statement made by the individual of his own circumstances, it would not render it inadmissible, because that statement had been made in the course of another suit. It did appear to me, as I have before said, not having adverted to what Mr Anderson has pointed out as to the statute, independently of that, and I conferred with my noble and learned friend upon the subject, and it did appear to us both, I believe, that it was distinguishable from pleadings in ordinary, and that the objection could not prevail as to its admissibility.

**LORD BROUGHAM.** I entirely agree with my noble and learned friend; we have conferred upon the point, and although we relied upon the statute, not being aware of the date which has been pointed out by Mr Anderson, we said we are of this opinion, but it does not signify, we need not dispose of this question at all, because the statute includes it. Now, however, finding that the statute does not include it, we fall back upon the merits of the objection, and I agree that although not in the same suit, yet it is admissible, and it would have been so in my opinion if signed by the party though in no suit at all.

One of the interlocutors complained of affirmed, and cause remitted.

|                                                                                        |   |                             |
|----------------------------------------------------------------------------------------|---|-----------------------------|
| <i>Thomas Deans, Solicitor, Westminster,<br/>Wotherspoon and Mack, Edinburgh,</i>      | } | Agents for the Appellant.   |
| <i>Dodds and Greig, Solicitors, Westminster,<br/>William Waddell, W.S., Edinburgh.</i> |   | Agents for the Respondents. |

## COURT OF SESSION.

### FIRST DIVISION.

BROWN v. HUNTER AND COUPER.

No. 398.

*Process—50 Geo. III. cap. 112, sec. 28.—Competency of action.—An action upon a promissory note for £21, accepted by three parties, of whom one is abroad, is properly called in the first instance in the Court of Session.*

*July 20. 1852.* This was an action brought for payment of £21, 16s., the amount contained in a promissory note, of which the defenders were two of the acceptors. There was another acceptor, Robertson, who is now abroad.

*Brown v.  
Hunter, &c.* The defenders pleaded that the action was incompetent, in respect that an action cannot, in the first instance, be brought in the Court of Session for a sum under £25.

The Lord Ordinary (Robertson) "in respect the promissory note libelled on is dated within Scotland, and bears to have been granted by three persons conjunctly and severally, and that it is alleged in the summons, and not denied, that James Robertson, one of the acceptors, is presently in New York, America, or elsewhere forth of Scotland, and consequently could not be made a party in any action in any inferior court of Scotland; and in respect it was correct and proper in libelling on said promissory note, to call all the acceptors, or their representatives, as defenders; Repels the defence," &c.

The defenders reclaimed.

*Houston*, for the reclaimers, referred to the 50 Geo. III., cap. 112, sec. 28.

*Maidment*, was for the respondents.

The COURT "adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the note: Find additional expenses due, &c., and remit to the Lord Ordinary to proceed further in the cause, as may be just, and with authority to decern for expenses."

*Richard Arthur*, S.S.C., Reclaimers' Agent.

*Alexander James*, S.S.C., Pursuer's Agent.

## FIRST DIVISION.

No. 399.

*M'MURRAY v. MURRAY'S TRUSTEES.*

*Trust-settlement—Jus Relictae—Legitim—Provisions—Repudiation—Profits of Business—Fund of Legitim.*—Under a trust-settlement, certain provisions were made for the widow and children of the trustor. At the trustor's death, the widow repudiated the settlement, and claimed her *jus relictae*, and also an increased allowance for the maintenance and education of her children. This claim was submitted to arbitration, and allowed. The trustees, in conformity with the powers given them in the trust, carried on the trustor's business—employing therein the whole trust-funds—and realised considerable profit. The children all died except one, who, as

executrix of her brothers and sisters, on her majority, claimed legitim from the whole of her father's moveable estate :—*Held*, (1.) that payment of the sums under the arbitration did not imply that the children had taken benefit under the settlement, so as to bar the surviving child repudiating it and betaking herself to her legal rights ; (2.) That the right of legitim vested in the children and transmitted to the survivors ; (3.) That the profits of the business, realised by the trustees, did not form an adjunct of the legitim.

This case was reported by Lord Rutherford, “because it was July 20. 1852. contended that it must be ruled by the decision in *Stewart and Others v. Stewart and Others*, reported under date 20th December 1851,” and which case his Lordship could not “well reconcile to other important cases, particularly that of *Fishers v. Dixon*, 16th June 1840, and the principles of law there given effect to.”

By trust-disposition and settlement, Mr M'Murray, who was an upholsterer in Glasgow, conveyed his whole heritable and moveable property to the defenders, as trustees, for the purposes, *inter alia*, of paying, (1.) An annuity of L.15, augmentable in the event therein mentioned, to his widow, Mrs Agnes Boyd or M'Murray ; and (2.) The sum of L.4 annually for maintenance of each of the children of the marriage. Provision was also made for the payment of L.30 to daughters of the marriage, upon their respectively attaining majority, or being married, whichever should happen first. The trustees were also directed, on the death of the trustee's spouse, to convert the whole estate, heritable and moveable, into money, and divide it share and share alike amongst the children, deducting such sums as might have been paid to any of them, upon their marriage or otherwise. And it was also provided, that the provision to the children should not become a vested interest in them until the respective terms of payment thereof; and that on the death of any of them before such term of payment, without issue, the share should accrue to and be divided among the surviving children, share and share alike. The above provisions were declared to be in full of all terce, legitim, and other demands, legal and conventional. Full powers were given to the trustees to wind up the business carried on by the trustee, immediately upon his death, or to continue the same for such period as the trustees “shall consider it for the benefit and advantage of the estate.”

At Mr M'Murray's death, his property, which had been greatly increased in value since the date of his settlement, was valued at L.3000, and in the position in which his business then was, the

July 20. 1852. trustees considered it advisable to continue the business for some time. In doing so, they employed the whole funds of the estate. The sum now available under the trust has, in consequence, been still further increased. Upon the amount of M'Murray's property being ascertained after his death, the widow repudiated the settlement, and betook herself to her legal rights; she also claimed an additional allowance for her children. The claim was submitted to the Sheriff-substitute of Lanarkshire, who found the widow entitled to her *jus reliciae*, which the defenders accordingly paid her. The Sheriff also found that the yearly sums appointed to be paid to Mrs M'Murray for the support and education of the children, were altogether inadequate for these purposes, and disproportionate to the circumstances in which they had been left; and for the reason stated in the award, and, in particular, because it appeared that the proposed additional allowances might be made without encroaching on the capital of the trust-estate, the Sheriff found the defenders bound to pay the additional sums specified in his award. The children were then all in minority. The trust-estate has been administered, since the date of the award, in terms of the findings to the above effect contained therein; and the free residue amounts to L.5931 : 1 : 7. All of the children, with the exception of the pursuer, are now dead. The pursuer is now major, and as executrix *qua* nearest in kin of her brothers and sisters, now claims payment of the whole legitim due from her father's moveable estate.

The ground on which the defenders refused the claim, was, that the pursuer had taken benefit by her father's settlement, by receiving payment of the sums awarded to her in the arbitration as in lieu of those provided by the settlement, and is not now entitled to repudiate that settlement, and betake herself to her legal rights; that the deceased children having died without electing to betake themselves to their legal rights, their rights never vested in them, to the extent of transmitting *ipso jure* to their next of kin, and that in no view is she entitled to demand more than one third of free residue of the moveable estate as at the date of her father's death, with the legal interest thereon.

In his note the Lord Ordinary stated, that "to the claim in the pursuer's own right, there seems to be no answer; to the claim for her brothers and sisters, the Lord Ordinary sees no answer unless it be found in the case of *Stewart*, and it is for this reason that the Lord Ordinary has taken the present case to report."

*Logan*, and *Dean of Faculty*, for the pursuer. Legitim vests

*ipso jure*, although it never has been claimed. *Fisher v. Dixon*, July 20. 1852. Bell's Ap. Cases, 2, p. 63. Assuming that the pursuer is entitled to legitim, the only other point is, whether her claim is satisfied by receiving legitim, with interest from her father's death. *M'Murray v. M'Murray's Trustees*. Her claim is well founded. *Williams, &c.*, on the law of Executry, ed. 1849, p. 1409, part 4, b. 1, c. 1; *Giblet v. Reid*, and other cases there referred to.

*Mure*, and the *Solicitor-General*, for the defenders.

THE LORD PRESIDENT. The first objection is, that the pursuer has taken the benefit of the settlement, and cannot now competently make this claim. It appears to me, that that objection is not well founded. There were payments made to the mother, to enable her to support and educate her children, who at the time were minors. There is nothing there in the nature of election by the children.

But the second objection is the one which was chiefly argued to us ; and it is an important one. It is in regard to that part of the claim which is made by the pursuer in the character of her brothers and sisters. It amounts to this, that the provisions were declared to be in full of legitim, that the children died without claiming legitim, and that in these circumstances it did not vest, and did not transmit. Now I think that it is fixed, that in certain cases the right to legitim vests, *ipso jure*, to the effect of transmitting. The case of *Fisher v. Dixon* is conclusive on that point. I know of no authority for holding that the right that vests in the child is not a right of legitim, but merely a right to claim, which, if not exercised during life, perishes with his death. That would be a perfectly novel doctrine. Therefore, assuming that the right vests and transmits, it appears to me that the father by making these provisions, cannot alter that right. He cannot make the child relinquish the legitim. He can only tempt him to do so ; and until the child yields to the temptation, he possesses the right. Now, does the case of *Stewart* affect that matter, and how ? It may be a question of circumstances, whether the child has yielded to temptation, accepted the provision, and relinquished the legitim ; and it is difficult to say in any one case, what circumstances would be conclusive that the child had done so. I do not think that the case of *Stewart* was intended to set aside the case of *Dickson*, but that it must have proceeded on some of the views expressed by the Lord Ordinary in his note, which are different from the grounds on which *Fisher* and *Dickson* proceeded. Whether I could go along with the Lord Ordinary is a different matter. I

July 20, 1852. am inclined to hold in this case, that the right of legitim vested,  
M'Murray v.  
M'Murray's  
Trustees. that nothing was done in the circumstances of this case that amounted to renouncement of legitim, and that the right of election still remains with the child; so far I think the case of the pursuer is good.

There remains a third point as to the fund from which the legitim is to be taken. Now that has presented to my mind greater difficulty than the point I have been speaking to. Let us look to the position of parties here. The trustees carried on the business of the deceased to a profit. In conducting the business in this way, they employed the whole funds that were left by the deceased, including the fund of legitim. The fact of carrying on the business was sanctioned by the settlement of the father; and if the children had abided by the provisions, the profits would have gone to the residuum. But were the trustees bound to suppose that the children would not abide by the settlement, or that they might betake themselves to the legal provisions, so as to make it incumbent on them to act on that footing? There appears to me to be no reason why they should not go on to manage the fund in the way directed by the trust. The trustees were the managers of an estate which the children had a right to make a claim out of, but which they did not make. I rather think that the children are not entitled to participate in the profits which were made, and I know of no ground on which that could be made, except on the ground that it was an unwarrantable use of the fund. If, therefore, the trustees are not liable as trustees for it, had they any duty incumbent on them as tutors and curators, which, having failed to do, renders them responsible? I do not think that they have done anything wrong as tutors and curators. They had not employed this fund in any speculation for their own benefit. The application of the fund was for the benefit of the estate, and there is nothing but the settlement which could give the children the benefit of it. But this lady is not here now under the settlement. I rather think the profit remains as residue under the settlement, and does not go as an adjunct of legitim.

**LORD CUNINGHAME.** I have rather formed an opinion coincident with that of the Lord Ordinary on both the points raised in the present case. On the *first* point, the observations of your Lordship are complete and incontrovertible. On the *second* question I am also disposed to concur with the Lord Ordinary—that the pursuer is entitled to legitim out of her deceased father's

effects, with a share of all the *accruing profits* made by his trustees July 20. 1852. while trading with the pursuer's money. The present is a stronger case than most analogous proceedings, either in this Court, or in *M'Murray v. M'Murray's Trustees*. The father here was bound to know that the legitim was not his, but the property of his children; he had the legal right of administering it during his life, and he should have directed it to be set apart and invested for behoof of the children on his death. Instead of that, he conveyed it away to trustees, and gave them power to carry on the business with his children's money, which is done for about fifteen years, and a large profit has been realized. It strikes me that if the legatees do not get the profit made out of their money, according to a well known rule long recognised both in our practice and in that of England, the claim for profit made by guardians and their successors on infants' funds may be held as abrogated in our system.

LORD IVORY. I am inclined to agree. Legitim vests *de jure*, and transmits to the party who represents the general creditor. A voluntary provision that is given vests in the same way, and if there has been an election, it transmits with the same force as the other. If the case of *Stewart* is to be viewed as a case decided on general principles, I agree that it is a case which stands in the face of the law. But I do not think it was so meant to be decided. I do not think we are driven into the situation of being obliged to say that the Court meant to overturn what had been at the date of that judgment settled law. If, again, it is said to turn on specialties, it is quite a sufficient answer to say that the specialties in that case do not occur here; and therefore I do not think it necessary to go farther into that case. The point in this case on which I have difficulty, is the same with the Lord President, and the Lord Ordinary. I confess I should have been very willing to come to the conclusion that the profits accrued to the legitim, for this is the conclusion which first presents itself to the mind as the equitable one. But when the claim is analysed I cannot do so. The claim of legitim is a claim against the estate of the trustee, whose settlement has been repudiated. Profits will accrue to the estate, but will not enlarge the creditor's payment, as the claim still remains the same. It is a debt to be paid with interest, but it is nothing else. On the best consideration of the case, I must come to the conclusion that the profits are not here to be an adjunct of the legitim.

The COURT "find that the pursuer is the sole surviving child of the deceased George M'Murray; and as representative of her

July 20. 1852. deceased brothers and sisters, is entitled to one third-part of the free execruty of the said defunct, as legitim, with the legal interest thereof, since the time of his death, under deduction of the sums paid by the defenders to, or for behoof of the pursuer and her brothers and sisters, since the father's death; but repel the claim of the pursuer to a share of the profits of trade carried on by the trustees: Of consent find the expenses hitherto incurred by both parties payable out of the trust-funds, and, *quoad ultra*, remit to the Lord Ordinary to proceed farther in the case as may be just."

*Dundas and Jamieson*, W.S., Pursuer's Agents.  
*Menzies and Macdonochie*, W.S., Defenders' Agents.

## SECOND DIVISION.

No. 400.

**MITCHELL v. CULLEN.**

*Process—Expenses—Judgment of the House of Lords.*—Where the House of Lords reversed the judgment of the Court of Session, without saying anything about the expenses, *held*, on the authority of the cases cited below, that no expenses could be given in this Court.

See *ante*, p. 718.

July 20. 1852. The judgment of the House of Lords in this case, after the declaration and findings on the merits, bore, "that the cause be remitted back to the Second Division of the Court of Session in Scotland to proceed therein as shall be just and consistent with these declarations and this judgment." Nothing was said as to expenses.

*Macfarlane*, for Mitchell, now moved the Court for expenses.

*Dean of Faculty*, (with whom *Buchanan*), for Cullen. The judgment of the House of Lords has exhausted the whole matter in the cause without giving expenses, or remitting to you to give them, or take up any such question. And it is fixed by repeated decisions of this Court, that in such a position of matters no expenses can be given to the gaining party. *Stewart*, 11th March 1836; *Purves*, 31st May 1845; and *North British Railway Co.*, 7th July 1847, are the three last cases in which the question occurred; and, in all these the principle we maintain was acted on. Previous to these cases decisions varied on this point. In all cases where expenses are to be given there is a remit for that purpose.

The COURT, on the authority of these decisions, refused expenses.

*Robert Deuchar*, S.S.C., Agent for Mitchell.

*John Cullen*, W.S., Agent for Cullen.

## FIRST DIVISION.

CUNINGHAME *v.* CUNINGHAME and Others.

No. 401.

*Entail—Original Entail—Subsequent Investiture, discrepancies in—Prescription or Investiture varying from original entail—Construction of Deed of Entail, in a question inter heredes.*—A. possessed an estate under an entail, dated in 1745, but in the investiture made and continued thereon, for forty years, and upwards, including several contracts of excambion, the resolute clause was essentially different from the original entail. But one of the excambions was made under the authority of a private Act of Parliament, which narrated and founded on the original entail in its preamble:—*Held*, in a reduction and declarator of freedom from the fetters of entail, at the instance of the heir in possession, against the heirs substitute, that the validity of the excambion made under the authority of the private Act could not be questioned; and that as to the others, seeing that as there was throughout the title, an obligation to possess under the original entail, the excambions all validly reimposed the fetters of entail by which the heirs continued to be bound:—*Held* also that in the circumstances, this being a case *inter heredes*, prescription had not the effect of working off the fetters of the original entail.

This was a reduction and declarator at the instance of the late July 20. 1852. William Cuninghame, Esq. of Craigends, against his son and the heirs substitute under the entail of that estate, and the object of the action was to have it found that the pursuer held Craigends as fee simple proprietor, free and unfettered by any restrictions of entail. The case was now insisted in by the pursuer's trustees.

The original entail was contained in a deed of tailzie, in favour of Ensign William Cuninghame and other heirs, dated August 1745, embracing lands held partly of the Crown, and partly of the Prince. The investiture was completed under separate charters, both registered and sealed on the 19th of March 1747; and till 1815, when certain deeds of excambion were first executed, the investiture was continued under those charters. But this investiture so made and continued, was, as regarded the resolute clause, essentially different from the deed of entail. The discrepancies were greater in the case of the lands held of the Prince, than in that of those held of the Crown, but in both instances they were essential. The discrepancies of the Prince's charter are stated in the 3d article of the condescendence, as follows:—

Cuninghame  
*v.* Cuning-  
hame, &c.

July 20. 1852.

Cunningham  
v. Cunningham,  
&c.

*1. Resolutive Clause in Deed of  
Entail.*

And with and under these irritancies following, as it is hereby expressly conditioned and provided that in case the said Ensign William Cunningham, or any of the other of tailzie above specified, shall contraveen all or any of the premised conditions, provisions, restrictions, or limitations, that is to say, shall fail or neglect to obey or perform all or any of the said conditions or provisions, or shall act contrary to all or any of the said restrictions or limitations, that then and in any of these cases, the person or persons so contravening by failing TO OBEY THE SAID CONDITIONS, OR ACTING CONTRARY TO THE SAID RESTRICTIONS, shall for him or herself, and his or her descendants, *ipso facto*, amitt, lose and forfeit all right, title, and interest, which he or she hath to the said lands and estate, and the same shall become void and extinct, and the said lands and estate shall devolve, accresce, and belong to the next heir of tailzie, in the same manner as if the contraveener and his or her descendants were naturally dead or not appointed to succeed by this tailzie.

And the discrepancies of the Crown charter in the 5th article of the condescendence, as follows:—

*1. Resolutive Clause in Deed of  
Entail.*

And with and under these irritancies following, as it is hereby expressly conditioned and provided that in case the said Ensign William Cunningham, or any of the other of

*2. Resolutive Clause in Prince's  
Charter.*

Et cum et sub hisce irritantiis subsequentibus, et tenore praesentium expressim providetur et stipulatur quod si dict. locumtenens Gulielmus Cunningham aut ulli allii haeredes talliae supra specificat. in contrarium venerint omnium aut ularum premissarum conditionum, provisionum, restrictionum, aut limitationum; viz., si deficerint aut neglexerint obtemperare seu implere omnes aut illas conditionum vel provisionum aut egerint contra omnes aut illas restrictionum vel limitationum, tunc et in ullo eorum casuum persona seu personae sic contravenient. deficiendo scizt. OBTEMPERARE DICT. CONDITIONES, pro eo vel ea. et eorum vel earum posteria, ipso facto, amittent, perdent, et forisfacient totum jus titulum et interessem, quod ille vel illa habet ad dict. terras et statum, idemq. nullum et extinctum erit, et dict. terre et status devolvent, accrescent, et pertinebunt ad proximum haeredem talliae, eodem modo, ac si contraveniens et ejas posteri naturaliter mortui essent, vel non destinati succedere per hanc talliam.

*2. Resolutive Clause in Crown  
Charter.*

Et cum et sub hisce irritantiis subsequen., et tenore presentium expressim providetur et stipulatur, quod si dict. locumtenens Gulielmus Cunningham, aut ulli allii haeredes

tailzie above specified, shall contravene all or any of the premised conditions, provisions, restrictions, or limitations, that is to say, shall fail or neglect TO OBEY OR PERFORM ALL OR ANY OF THE SAID CONDITIONS OR PROVISIONS, OR SHALL ACT CONTRARY TO ALL OR ANY OF THE SAID RESTRICTIONS OR LIMITATIONS, that then and in any of these cases, the person or persons so contravening by failing to obey the said conditions, or acting contrary to the said restrictions, shall for him or herself and his or her descendants, *ipso facto*, amitt, lose and forfeit all right, title, and interest which he or she hath to the said lands and estate, and the same shall become void and extinct, and the said lands and estate shall devolve, accresce, and belong to the next heir of tailzie, in the same manner as if the contraveener and his or her descendants were naturally dead or not appointed to succeed by this tailzie.

The effect of the variance in the investiture has been already made the subject of judicial decision in an action at the instance of certain creditors of the present pursuer against the pursuer and the heirs-substitute of entail. The case is that of *Holmes v. Cuninghame*, 13th Feb. 1851, 13 D. 689, and the Court there found, in respect of the variance between the resolute clause in the deed of entail and the resolute clauses in the investiture, that the resolute clause was not inserted in the investiture, and that the lands held under such investiture were therefore not protected against the onerous debts of the heir in possession, or the diligence of his creditors, but were liable to be adjudged. Long before 1815, a period beyond the years of prescription had passed upon the investiture.

But certain portions of the estate were made the subjects of excambions in 1815, in 1819, in 1844, and in 1845, under the 10th of Geo. III., cap 51, and the 6th and 7th of Will. IV., cap. 42. (Montgomery and Rosebery Acts.) These excambions ap-

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tallieæ supra specificat. in contra-  
rium venerint omnium aut ullorum  
præmissorum conditionum, pro-  
v. Cuning-  
visionum, restrictionum, aut limi-  
hame, &c.  
tationum, viz., Si deficerint aut  
neglexerint OBTEMPERARE SEU IM-  
PLERE OMNES AUT ULLOS RESTRI-  
CTIONUM VEL LIMITATIONUM, tunc et  
in ullo eorum casuum persona seu  
personæ sic contravenient, defi-  
ciendo, sciitz., obtemperare dict.  
conditiones, vel agendo contra dict.  
restrictiones, pro eo vel ea, et eorum  
vel earum posteris, ipso facto amit-  
tent, perdent, et forisfacient, totum  
jus titulum et interesse, quod ille  
vel illa habet ad dict. terras et  
statum, idemque nullum et extinc-  
tum erit, et dict. terræ et status de-  
volvent, accrescent, et pertinebunt  
ad proximum heredem tallieæ,  
eodem modo sc si contraveniens  
et ejus posteri, naturaliter mortui  
essent, vel non destinati succedere  
per hanc talliam.

July 20. 1852. peared to be all substantially in the same situation. No special deed of entail is recorded in the Register of Taillies in virtue of those contracts of excambion; the parties relying upon the statutory effect of the excambion, as correctly carried through in terms of the statutes, and upon the statutory provision that the excambied lands should be held as part of the entailed estate.

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There was another portion of the estate in a different situation, the excambion having been made under a private Act of Parliament passed in 1832. That Act specially narrates the entail of 1745, the investiture of 1747, which is expressly stated to be under the conditions, provisions, and limitations of the said entail, and the succession to the estate in the continuance of that investiture: and lastly, the Act narrates that the said lands and estate are now enjoyed by William Cunningham, as heir of entail, having right thereto *in virtue and in terms of the said deed of entail*: and that "it would be for the advantage and benefit of the said William Cunningham and the heirs of entail entitled to succeed to him in the foresaid lands and estate of Craigends, under and by virtue of the before-mentioned deed of entail, that the foresaid entailed lands of Ryewraiths, or Ryewraes, and others above particularly described, should be exchanged for the foresaid lands and others belonging to the said William Cunningham in fee-simple." The Act of Parliament then proceeds to authorise the said William Cunningham to execute a disposition and settlement, or deed of entail, of the said fee-simple lands described and set forth in schedule A thereunto annexed, "which disposition and settlement, or deed of entail, shall be made in the form of a strict entail, in such manner as shall appear to the Judges of the said Court most proper for effectually settling and securing the said fee-simple lands, freed of all debts and incumbrances affecting the same, to and in favour of the said William Cunningham, and all and every the other heirs of entail entitled to succeed to and take under the before recited deed of entail, and under all the reservations, provisions, qualifications, conditions, restrictions, limitations, and clauses prohibitory, irritant, and resolute, and faculties provided, expressed, and declared in and by the said deed of entail herein-before recited, and which disposition and settlement, or deed of entail, shall be so framed as to bind the institute as well as all and every other person succeeding as heir of entail to the said lands; and thereupon, and during the lifetime of the said William Cunningham, the said fee-simple lands and others shall go, remain, and be to, upon, for, with, under, and subject to such of the uses,

trusts, intents, purposes, powers, provisions, limitations, and declarations, as by and in the foresaid disposition, or deed of trust, second above recited, are respectively limited, expressed, declared, contained, or referred to, of and concerning the said entailed lands and estate, or such of the said uses, trusts, intents, purposes, powers, provisions, limitations, and declarations, as shall be then subsisting, undetermined, and capable of taking effect."

The disposition and settlement, or deed of entail, is then ordered to be recorded in the Register of Entails, and then it is enacted "That from and immediately after the making, granting, and executing the aforesaid disposition and settlement or deed of entail, the recording the same in manner above mentioned, the expediting the said charter or charters, and the taking and recording of the said infestment or infestments, or other completion of the title as aforesaid, and the authority of the said Court of Session in either Division thereof, being interposed thereto, in manner before mentioned;" the entailed lands described and set forth in schedule B. thereunto annexed, shall be held free of the fetters of entail.

The Act of Parliament appeared to have been complied with in all its provisions.

In this state of the facts (the order of the narrative in the Lord Ordinary's note has been mainly followed) the pursuer brought the present action, and pleaded that the positive and negative prescription, in respect of possession upon the investiture of 1747, had worked off the fetters of the original entail of 1745, and that the same were not now binding upon the pursuer, who was substantially in the position of a fee-simple proprietor, at and prior to the year 1815, when he began to make the excambions. He further pleaded that the deed of entail, executed by the pursuer in 1832, under the authority of the private Act of Parliament, and all the other contracts of excambion were invalid and ineffectual to reimpose the fetters of the entail, and that, therefore, and generally, the pursuer was entitled to deal with the estate of Craigends as a fee-simple proprietor.

The defenders' pleas were to the effect, that the estates are, and have ever since the date of the original entail, been held under the fetters of a strict entail, and that the action was, at all events, ill founded in so far as regards those portions of the estates which are held under the contracts of excambion and entail of 1832, which was a valid and effectual entail, duly recorded and feudalised, executed by authority of Parliament, and under the direction of the Court.

The Lord Ordinary (Rutherford), pronounced the following

July 20. 1852. interlocutor :—“The Lord Ordinary having heard counsel for the parties, and made avizandum, and thereafter considered the closed record, writs produced, and whole process, in so far as regards the lands held under the investiture completed by charters from the Crown and Prince, in 1747, and now held by the pursuer under that investiture by progress, and in so far as regards the lands held under the different contracts of excambion carried through in virtue of the statutes the 10th Geo. III., cap. 51, and the 6th and 7th Will. IV., cap. 42, finds, decerns, and declares, in terms of the declaratory conclusions of the libel, and finds it unnecessary to pronounce any judgment upon the reductive conclusions as applicable to any of the titles under which the said lands, or any part of them, are held; *quoad ultra*, in respect of the lands held under the entail executed in terms of the Act 1832, and investiture following upon that entail, assoilzies the defenders from the whole conclusions of the libel as regards these lands and the titles on which they are held, and decerns, Finds no expenses due to either party.”

In his note to this interlocutor, his Lordship says,—“Had the whole estate stood simply under the investiture of 1747, which left it, according to the decision of the Court, liable to adjudication by the creditors of the heir in possession, the Lord Ordinary cannot doubt that the case would have fallen under the enactments of the 11th and 12th of Her Majesty, cap. 36. . . . . The defect here occurs in the investiture, but it renders the entail ineffectual, as regards all the leading prohibitions, and the case is clearly within the intendment of the statute, as well as under its letter,—the object of the enactment being to make it unnecessary for the heir in possession to accomplish his purpose at a loss, and *per ambages*, but to enable him to deal with the estate at once, and free from the fetters of the entail; when by sale or contraction of debt, or the alteration of the order of succession, he might have freed himself from these fetters. In so far, therefore, as the estate *still stands on that investiture*, the pursuer is entitled, under the statute, to decree, in terms of the declaratory conclusions of the summons.”

As to the excambions, the Lord Ordinary was of opinion, that they “cannot be held to have altered the investiture of 1747, upon which prescription had ran, or raised by inference a new investiture, conform to the entail of 1745, and freed from the fatal objection resulting from the variance between the entail and the investiture of 1747. The excambion was plainly not intended to

have any such consequences. Its object was simply to substitute July 20. 1852.  
one portion of land for another, without otherwise altering the <sup>titles,</sup> Cuninghame  
titles, or their legal import; and the construction of the contract <sup>v. Cuning-</sup>  
and judicial proceeding, plainly warrants this, and no other con-<sup>hame, &c.</sup>  
clusion, that the lands taken in excambion must be held exactly  
as the lands given in excambion were held. If any obligation  
beyond this was contracted by the clause binding the heir to exe-  
cute and register *a new deed of tailzie of those lands*, the Lord  
Ordinary thinks the pursuer would be well-founded in his con-  
clusions of reduction; because, considering that the entail of  
1745 had been extinguished by prescription, and that prescription  
had run upon the titles of 1747, and the entail embodied in them,  
the heirs in possession between 1814 and 1845 were not entitled  
to make any transaction under the statutes, by which an extinct  
entail could be revived, different from that upon which the estate  
then stood."

In regard to the entail of 1832 : "At the time of passing this statute, and of acting under it, all the parties were no doubt in the belief that the investiture in 1747 had correctly followed the deed of entail, that there was no fatal variance, and that the lands were not subject to adjudication at the instance of the creditors of the heir in possession. The consequences of the Act the 10th and 11th of her Majesty, were not at all anticipated. The effect of the private Act undoubtedly has been to make a strict entail of the lands in schedule A, and that by a new and separate deed of entail, recorded in the Register of Tailzies, and followed by a correct investiture. The Lord Ordinary thinks that this entail must receive effect. It is executed directly by authority of Parliament ; it is complete in itself, duly recorded, and followed by an investiture to which no exception can be taken. No reduction is brought of the Act of Parliament, and the Lord Ordinary ventures to think that such a reduction would be incompetent and absurd. But the Act of Parliament subsisting, the Lord Ordinary can see no ground on which to challenge the validity of the new entail of 1832. . . . .

. . . The pursuer proposes to reduce the entail of 1832, or the investiture following upon it, so as to make it correspond with the defective investiture of 1747. This cannot be done in the face of the statute. While the statute stands good, the entail of 1832 must stand good; and the statute, and what follows upon its authority, cannot now be affected by any misapprehension in the preamble, which had been proved to the satisfaction of Parlia-

July 20, 1852. <sup>ment.</sup> Even considering the Act as a Parliamentary contract between the parties, the heir in possession and the heirs-substitute of entail, it is impossible now to say what may have influenced the consents of some of the substitutes, or whether they may not have seen the danger to which the estate was exposed, and so consented to an arrangement which would make a part of it secure."

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v. Cunningham,  
&c.

Both parties reclaimed.

*Dundas*, and the *Dean of Faculty*, argued for the pursuer, and referred to the case of *Hope Vere* (of Craigiehall) *v. Hope*, 5th March 1833, 11 Shaw, 520, called the Craigiehall case.

*Mure*, and the *Solicitor-General*, for the defenders.

The COURT (LORD JUSTICE-CLERK, LORDS MEDWYN, COCK-BURN, and MURRAY) agreed in opinion with the Lord Ordinary as to the entail held under the Private Act of 1832, and so far adhered, but differed from the view taken in his interlocutor as to the lands held under the investiture of 1747; and as to the lands held under the contracts of excambion, carried through in virtue of the Montgomery and Rosebery Acts. The prescription, as it was called, that had passed upon the investiture of 1837, had not the effect which the Lord Ordinary supposed. It was important to observe that this case was to be viewed as one *inter haeredes*; and from the nature of the writs and evidents constituting the title to the estate, the heirs of entail continued bound by the deed of 1745. There was throughout a reference and adoption of that entail. The charter of sale of 1747 recognises that entail, as contained in the conditions and obligations on which the estate is to be held. Each heir is taken bound in express words to insert in his title all the conditions, limitations, clauses irritant and resolutive, contained in the entail of 1745. The obligation contained in the charter of sale had been for a long time disregarded, but still the obligation itself had always been kept up. No right to violate a condition of a title can be acquired by the practice of violating it for 40 years and upwards, especially when it is a question *inter haeredes*, as was the case here; nor was any case referred to sanctioning such a principle. In the *Craigiehall* case the whole matter turned on the important and undoubted fact, that two titles or deeds of entail which differed from each other, though the contrary had been supposed, were referred to—and it was a question, to which was the possession to be ascribed, and under which was the title actually made up. Here there was only

one entail, and we have no adverse title ; every renewal of the July 20. 1852. investiture, every act of the heirs, even in their excambions, refer expressively to the original entail as the subsisting title under which the estate is held by each heir. It is thus recognised by each. <sup>Cunningham v. Cunningham, &c.</sup> No other title is set up. Prescription, then, there is not, against that deed of tailzie. As in a question between heirs, then, there is really no ground, when the titles are carefully examined, for the assumption, that, after forty years, the heir in possession was free from any obligation in regard to the entail, and the other heirs entitled to object to and set aside deeds which brought the lands acquired by excambion correctly under the fetters of the tailzie. The heirs in possession could not prescribe against the obligation contained in their own titles, and against the deed of tailzie under which their investitures were completed. This undoubtedly applies to all the lands acquired under the excambions. Attend to these contracts. Take, for instance, the one in May 1819. It distinctly recognises the entail 1745, by declaring that the lands given off from the entailed estate are to be free from the prohibitory, irritant, and resolutive clauses of the deed of entail, dated 3d August 1745, and recorded in the Record of Tailzies 10th August ; and then the proprietor of the other lands to be exchanged dispenses them in favour of the heirs under the disposition and deed of entail, "of the date and registration above written, and with and under the whole prohibitory, irritant, and resolutive clauses, conditions, provisions, and restrictions therein specified," and "which lands and others are in all time coming to be a part of the said entailed estate of Craigends, and are to be liable to all the conditions, prohibitions, clauses irritant and resolutive, contained in said tailzie ;" that is, the tailzie 1745, so often referred to throughout in the history of the transmissions of these lands of Craigends, and the dealings of the various heirs with the same. Now, this seems to be as strong a reference to the entail, under which alone it can be held that the estate was an entailed estate, as the deed executed under the Act of Parliament. It is to be held under the conditions in the entail—not those contained in the inaccurate investiture, but in the original entail, when viewed as a subsisting deed *inter haeredes*. Against what appears thus on the face of their own title, there can be no prescription. Hence, when the excambed lands are declared to be a portion of the entailed estate, the heir in possession cannot succeed against the substitute heirs to have it declared that he holds them in fee-simple.

July 20. 1852. The COURT therefore pronounced the following interlocutor :—  
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“Refuse the reclaiming note presented by the late William Cunningham, senior, of Craigends, and now insisted in by his trustees, who were sisted on his death, and adhere to the interlocutor of the Lord Ordinary, so far as complained of by said reclaiming note ; and on the reclaiming note for William Cunningham, jun., of Craigends, and his curator, alter the interlocutor of the Lord Ordinary, so far as regards the lands held under the different contracts of excambion carried through in virtue of the statutes 10 Geo. III., c. 51, and 6 and 7 Will. IV., c. 42 ; and as to these lands, and to the titles on which they are held, asoilzie the defenders from the whole conclusions of the libel, and decern ; and quoad ultra, refuse the prayer of the said reclaiming note.”

*Shepherd, Grant, and Cuthbertson, W.S., Agents for Pursuer.*  
*John A. Robertson, S.S.C., Agent for Defendants.*

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THE COURT ROSE FOR THE LONG SUMMER VACATION.

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*Feuing Power.*

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Amendment Act, 11 and 12 Vict. c. 36, sec. 4, Feuing power under.—In a petition for authority to feu under sec. 4 of the statute, the Court granted authority to grant feu-rights of the whole or any parts of the lands mentioned in the petition, and remitted to the Lord Ordinary “to examine the several feu-rights proposed to be granted, as the same shall be successively prepared, and to report.” Such feu-rights must be executed at sight of the Court. Cleland, Petitioner, 13th July 1852,

1039

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578

*Excambion.*

Amendment Act (1848), Form of petition for excambion under.—Part of entailed land proposed to be excambed by an heir of entail had been propelled to the heir by a disposition executed by his father, on which he was infest. The petition for leave to excamb did not set forth this infestment, in terms of the 33d section of the Entail Amendment Act:—*Held* that the Act is imperative, and not merely directory on this point; that it was competent to amend the narrative of the petition; and that the amended petition required to be intimated of new. Lord Wharncliffe, petitioner, 26th June 1852,

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985

Amendment Act, 11 and 12 Vict., c. 36.—Where a petition for authority to excamb lands had been duly intimated to the three next heirs of entail, but one of the heirs had died before the procedure had been brought to a close, intimation was appointed to be made to the next heir in the succession. Gray and Husband, petitioners, 5th June 1852,

795

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Amendment Act 11 and 12 Vict., c. 36, Procedure when one of the heirs required to consent to disentail is an alien.—In a petition for disentail, the third substitute heir under the entail being married to an American subject who was an alien, and her children having been born in America, the next heir was called as one of the three parties whose consent was required. A curator having been appointed on behalf of the children, lodged a minute to the effect that they had no interest to oppose the petition, and an attestation of their alienage by their parents was produced in process:—*Held* that no further proceedings were necessary to protect their interest, and that the application might be granted. Alexander, petitioner, 16th June 1852,

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| provisions of the contract of copartnery, a meeting of partners was held, at which A. was appointed to wind up the company's affairs, with the power of suing and being sued :— <i>Held</i> , in a reduction at the instance of A. (acting under this appointment), of a deed granted by one of the partners, that his title was good. <i>Jameson v. Watson</i> , 16th July 1852,                                                                                                                                                                                                                                        | 1090     |
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| POLICE ACT, General, 13 and 14 Vict., c. 33, sec. 345.—Mode of procedure under.—Where two parties were apprehended and summarily tried and convicted in a Burgh Police Court, without any previous service of the complaint, and without having been allowed time to prepare their defence, according to the rules and regulations framed for the Police Court, under the General Police Act 13 and 14 Vict., c. 33, the Court suspended the sentence of imprisonment <i>simpliciter</i> , and ordered the fine imposed on one of the parties to be repaid. <i>Blyths v. M'Bain</i> , 20th February 1852, | 490                |
| Poor Law ACT.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                    |
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| — Amendment Act, qualification of parochial board under.—Members of a parochial board having been interdicted from acting as such, in respect of the want of the statutory qualification:— <i>Held</i> that they were liable in the expenses of the proceedings against them. <i>Gilmour v. Craig and Others</i> , 18th Feb. 1852,                                                                                                                                                                                                                                                                        | 482                |
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| — Law Act, modifying of assessment by parochial board, under.— <i>Held</i> that a parochial board were entitled to modify a previous rule of assessment to the effect of levying the rate on the true or substantial value of the subject assessed, instead of the nominal rent or the rent actually paid, and that without applying for the approval of the Board of Supervision. <i>Murray v. Bruce</i> , 25th May 1852,                                                                                                                                                                                | 723                |
| — Assessment, double or single rating for.—Lands which originally belonged to the parish of South Leith, were by 7 Geo. III., c. 27, disjoined from that parish, and annexed to the City Parish of Edinburgh, but with a proviso                                                                                                                                                                                                                                                                                                                                                                          |                    |

POOR LAW ACT—*continued.**Assessment.*

- which made them subject to the parochial burdens of South Leith as before the act. The General Poor Law Act, 8 and 9 Vict., c. 83, declares, generally, that there shall not be an assessment for the poor in more than one parish, and repeals all laws inconsistent with that act: *Held*, affirming the interlocutor of the Court of Session, that the proprietor of such lands was not liable to be assessed for the poor in the parish of South Leith as well as in that of Edinburgh, but in that of the latter only.
- Assessment.—Where company assessable under, 8 and 9 Vict., c. 83.— Where a manufacturing company had their works in the Barony parish of Glasgow, and occupied a counting-house in the City parish. *Held*, on construction of § 47 of the Poor Law Statute, that both parishes were entitled to assess proportionally on the means and substance of such company. *Adams v. M'Leroy, Hamilton, and Co.*, 18th December 1852, 202
- Assessment.—Where minister's stipend assessable under, 8 and 9 Vict., c. 83. *Held*, that a minister's stipend is assessable only for the poor of the parish of which the incumbent is minister, and of the rental of which the stipend forms part. *Gillan v. Meek*, 18th December 1851, 205
- Assessment.—Where journeyman bookbinder assessable under 8 and 9 Vict., c. 83. *Held*, that a tradesman is liable to be assessed in the parish in which his employers conduct their business. *Napier v. Adams*, 18th December 1851, 207
- Assessment on manse and glebe under 8 and 9 Vict., c. 83.— Notwithstanding the 8 and 9 Vict., c. 83, a minister of a parish in Scotland is not liable to be assessed to the poor in respect of his manse and glebe. *Gibson v. Forbes*, 890
- Assessment.—Where Procurator-Fiscal assessable under 8 and 9 Vict., c. 83. *Held* that the income of a Procurator-Fiscal is assessable for the poor of the parish in which his chambers are situated. *Salmond v. Adams*, 18th December 1851, 206
- Assessment.—Damages against collector of. *Ferguson v. M'Ewen*, 11th February 1852, 422
- Rates.—Liability of crown property for. See *Crown Settlement*. 291
- Law, settlement under. *Held, first*, that a person who was blind, and had been supported mainly by contributions of benevolent individuals, but who had not applied for parochial relief, nor had recourse to common begging, had acquired a residential settlement in the parish where she had lived; *secondly*, that she was not “a proper object of parochial relief,” in terms of sec. 76 of the Poor Law Act, 8 and 9 Vict., c. 83; *thirdly*, that she could not be held to have had recourse to “common begging,” although contributions had been obtained on her behalf from various persons by one who took an interest in her. *Hay v. Fergusson and Lennox*, 15th January 1852, 255
- Poor Roll, signatures of the minister and one elder to declaration for, held sufficient. *Marion Mitchell*, 17th Dec. 1851, 187
- admission to. Circumstances in which an applicant was admitted to the benefit of the roll, although the reporters on his *probabilis causa* were equally divided in opinion. *Smith, Petitioner*, 11th February 1852, 410
- requisites of certificate by minister and elders as to character and credit. *Dickson*, 15th January 1852, 254
- certificate for. Where an applicant for the benefit of the poor roll could not obtain a certificate in consequence of there being no minister of the parish, a remit was made to the sheriff to take the applicant's declaration. *Gellatly, Petitioner*, 9th June 1852, 804
- declaration of applicant for benefit of, before the sheriff, does not require a certificate as to character by him, 1042

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| — Able-bodied, not entitled to parochial relief. See <i>Parochial Relief</i> , -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 668  |
| — Act, 8 and 9 Vict. c. 83, time within which complaints to be made for irregular proceedings under.—Circumstances in which an action of damages against a collector of poor-rates for diligence under the Poor Law Act was held incompetent, in consequence of the month's notice, as required by sec. 86 of the statute, not having been given. <i>Observed</i> , That in all proceedings under the Poor Law Act, the collector was bound to act strictly and literally in terms of the Act, and was not entitled to apportion the assessment laid on a mercantile company among the individual partners. <i>Ferguson v. M'Ewen, 11th February 1852</i> , - - - - -                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 422  |
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| <b>Precept of clare constat</b> , liability of heir making up title by. See <i>Service</i> , -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 1088 |
| <b>PREFERABLE Title to a bill of lading on bankruptcy of shipper.</b> See <i>Bankruptcy</i> , - - - - -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 542  |
| <b>PRELIMINARY Defence, disposal of.</b> See <i>Process</i> , - - - - -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 611  |
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| — triennial.—A judgment by a sheriff in an action where prescription has been pleaded, finding that a letter founded on as eliding the prescription, does not prove the debt if not acquiesced in, must be immediately advocated, and the pursuer will not be entitled to found upon the letter in an advocacy against a judgment holding an oath in reference negative. Circumstances in which an oath in reference held negative. <i>Meyer and Mortimer v. Lennard, 25th November 1851</i> , - - - - -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 64   |
| — triennial not applicable to mercantile transactions.— <i>Held</i> that triennial prescription does not apply to transactions between merchants in an extended course of trade. * <i>M'Kinlays v. M'Kinlays, 11th December 1851</i> , - - - - -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 143  |
| — of tradesman's accounts.—Where the contractors for a building employed a tradesman to excavate the foundations :— <i>Held</i> that the tradesman's claim for the price prescribed in three years, and that prescription ran from the completion of the work on which the tradesman was employed, and not from the date of the measurer's report on which the claim was founded. <i>Mackay v. Christie, 17th December 1851</i> , - - - - -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 180  |
| — The trustees of the harbour of D. had a right of free port, within the limits of which, and its precincts, they were empowered by Act of Parliament to levy certain dues. The port and harbour of F. were within these limits ; but the respondent, on whose property F. was, alleged that the trustees had not been in use, for the prescriptive period of forty years, or for time immemorial, to levy duties at F.,—and he further claimed a right of free port at F. Issues were directed on both points, and the trustees judicially admitted the affirmation of the first issue, as to the right to levy dues at F. ; whereupon, in a conjoined process of suspension and declarator judgment was given for the respondent :— <i>Held</i> , affirming that decision, that the right of the respondent, in respect of the port and harbour of F., excluded the claim of the trustees ; but that the respondent's claim to a right of free port at F. could not be entertained in this process ; and a variation made in the terms of the interdict accordingly. <i>Dundee Harbour Trustees v. Dougall, 22d March 1852</i> , - - - - - | 660  |
| — Circumstances in which <i>held</i> that a sufficient acknowledgment of the debt had been given by the debtor so as to defeat the plea of triennial prescription. <i>Webster v. M'Lellan, 2d July 1852</i> , - - - - -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 981  |
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- PRINCIPAL and Agent, accounting between, for proceeds of a patent. See *Patent*, — and *Agent*.—A commission-agent, in whose hands goods had been placed for sale, sold them without disclosing his principal. Afterwards he went to the purchaser, along with the principal, whom he then disclosed, and desired a bill for the price to be granted in favour of the principal. Before the bill was delivered the agent interposed, desiring it not to be delivered, but that it and the price should be held for behoof of himself. The principal having become bankrupt, a multiplepoinding was raised by the purchaser to settle whether the agent or the trustee on the principal's estate was entitled to the price. The agent claimed to be preferred, in respect that the bankrupt had been indebted to him in the price of certain goods purchased from him previous to the sale on account of which the bill was granted:—*Held*, in the circumstances, that the claim of the agent was unfounded. *Miller and Paterson v. M'Nair*, 10th July 1852, 1016
- and *Agent*.—A firm in New York transacted with a firm in Glasgow, who acted not as principals but as agents. The principals afterwards became insolvent. They had previously granted a bill to the New York firm, who agreed to a composition, and granted a discharge:—*Held* that whatever may have been the knowledge or belief of the New York firm at the outset of those transactions, as to the character and position therein of the agents as agents merely, they had accepted the principals as their proper debtors, and could not go against the agents for the balance of the debt. *Vallance & Co. v. Beals, Bush & Munkittrick*, 15th June 1852, 852
- PRINCIPAL SUM, payments to be imputed to payment of. See *Payment*, 882
- PRINTING original defences not necessary where revised defences given in. See *Process*, 1051
- reclaiming note not necessary in a *Cessio*. See *Process*, 805
- PRIVILEGE. See *Issues*, 394
- See *Malice*, 986
- in regard to calumnious expressions, 394
- Judicial.—In an action of reduction of a Small Debt decree, on the ground of malice and oppression on the part of the Judges (Justices of Peace), certain statements were made by the pursuer regarding a witness in the Small Debt action, whom he alleged the Justices had not allowed him to cross-examine, and which would have disqualified him: *Held*, in an action of damages at the instance of the witness, that these statements were not pertinent to the cause in the action of reduction, and therefore not privileged, because in the summons of reduction it was not alleged that the facts regarding the witness had been made known to the Justices at the hearing in the Small Debt action. *M'Intosh v. Flowerdew*, 29th November 1851, 94
- PRO indiviso shares, refusal by Court to appoint one factor to two families having. See *Curator*, 441
- indiviso proprietors, division and sale by.—Where two parties were *pro indiviso* proprietors of certain subjects not divisible, either separately or by apportionment: *Held* that declarator of division and sale at the instance of one of the parties was competent, and action sustained to that effect. Observed, that the principle of the action in the Roman law *De communis dividendo* is recognised by the Court of Session, and applies to such a case. *Brock v. Hamilton*, 25th November 1851, 259
- PROBABILIS causa, division of opinion of reporters on. See *Poor Roll*, 410
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- Jurisdiction of Court of Session, competency of action under Statute 50 Geo. III., c. 112, § 28, where the sum sued for is under £.25. *Hay v. Thomson and Bell*, 1st June 1852, 772
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- Title to sue. See 70, 265, 292, 327, 393, 404, 528, 783, 830, 941, 972, 1090
- Title to pursue reduction of service.—Where the defender in a reduction of a service disputed the pursuer's title, on the ground that her legitimacy had not been established, though also in possession of a general service, the Court recommended the defender to repeat a reduction, - - - - - 2
- Title to sue.—In an action at the instance of a shareholder of a dissolved banking company against certain of the directors for the market value of shares, on the ground of fraud and malversation—*Held, first*, that he was entitled to pursue such action, although neither the whole shareholders nor the company were called into the field; and, *next*, that it was not necessary to call all the directors, even although some of the allegations in the action involved them all. *Leslie v. Lumsden and Others*, 17th December 1851, - - - - - 188
- Title to sue.—Query, if inhabitancy without residence will give a sufficient title to a claimant to sue for a right of walking and recreation. *Dyce v. Hay*, May 25th, 1852, - - - - - 783
- Title to sue a reduction.—An assignation of a decree in an action of damages and diligence thereon *held* to be a sufficient title to sue a reduction of a disposition alleged to be granted *in fraudem* of that diligence. *Stewart v. Kidd*, 21st February 1851, - - - - - 492

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- Date of summons. *Anderson and Mandatory v. Laing*, 5th February 1852, - - - - - 372
- Signeting of summons.—Held, *first*, under the Act 13 and 14 Victoria, c. 36, that a consistorial summons is not void because it has passed the Signet; *second*, that a summons was not void because its date was not inserted in the body of the writ after the words "signeted at Edinburgh," but was placed opposite the signature of the Writer to the Signet; but *opinion* expressed, that the former is the more correct mode. *Craig v. Craig*, 18th December 1851, - - - - - 209
- where expenses had been found due to a party in a suit, but were not taxed and decerned for till some years after, *held* that no interest could be claimed on the sum prior to the date of the taxation and decerniture. *Cullen v. Dykes, supra*, - - - - - 1059
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- Relevancy of summons.—Circumstances in which a summons at the instance of a banking company against a director who had resigned, for illegal and fraudulent intromission with the funds of the bank, and otherwise malversing his office, was held relevant. *North of Scotland Banking Company v. Thomson*, 19th June 1852, - - - - - 904
- Summons, relevancy of.—A Scotchman resided and engaged in business in America for upwards of 30 years, during which time he succeeded to an heritable estate in Scotland. He never returned to Scotland, but died in America. Shortly before his death he married a woman, by whom he had previously two children, a son and daughter, having declared it to be his intention thereby to render them legitimate. His succession, however, was not wound up and settled on that footing, but a collateral relation served

PROCESS—*continued.**Summons.*

- heir, and entered into the possession of the heritable estate. *Held* (1.) In a reduction, &c., at the instance of the son against the author of the latter, on the ground of fraud and collusion, &c., that the facts libelled were not sufficient to sustain the relevancy of the summons; and (2.) That the vicen-tial prescription applied and barred the objection to the retour; but *observed*, that the plea of prescription would not have barred an inquiry into the fraud, if relevantly laid. *Shedden v. Patrick*, 10th March 1852, - 611  
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- Defenders to be called in summons.—A., as acting for a number of proprietors in a town, employed B., solicitor in London, to conduct an opposition to a bill in Parliament in reference to the poor rates of the town. B. raised action against A. for the expenses incurred in the opposition. *Webster v. M'Lellan*, 2d July 1852, - 981  
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 — Defenders to be called. See *Railway Company*, - 250  
 — Defences, lodging of.—Where, in an action of damages, certain of the defenders had failed to lodge defences, and the case was afterwards enrolled in the printed roll in the list of defended causes against all the defenders, “as per roll,” no decree being taken against those failing to lodge defences,—the Court, notwithstanding the pursuer’s refusal to consent, ordered defences to be received. *Mullar v. Robertson and others*, 17th December 1851, 186  
 — Defences, competency of reclaiming against decree for not lodging of. *Bell, 13th November 1851*, - 8  
 — Defences, opening up of record for articulate statement of.—In an action against several defenders, where separate records were made up and prospective reference made by one of the defenders to any of the grounds of defence of the other defenders, which in any view might be applicable:—*Held*, the record being closed on such reference, with a denial in their answers, by the pursuers, of the right of the defenders so to put their defences, that it was

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*Defences.*

- competent to open up the record to the effect of allowing an articulate statement of the defences founded on. *Richardson v. Gavin's Trustees*, 19th December 1851, - - - - - 216
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- Opening up of closed record on allegation of *res novit*. *Niddrie v. Dean and Smith*, 15th June 1852, - - - - - 854
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- Condescendence of *res novit*.—Circumstances in which *held*, that no case of *res novit veniens* had been made out by a party in an action, to justify production of a writing. *Earl of Fife's Trustees v. Earl of Fife and Others*, 16th January 1852, - - - - - 271
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*Reclaiming Note.—Inner House.*

- Competency of Reclaiming Note under Act of Sederunt, 10th July 1828, § 110, against a decree by default for not lodging defences. *Bell*, 13th November 1851, - - - - - 8
- Competency of Reclaiming Note.—*Held* incompetent to reclaim against decree by default in a sequestration case beyond ten days. *Arnold, Petitioner*, 10th March 1852, - - - - - 610
- Competency of Reclaiming Note.—A presented a note of suspension of a charge on a decree of the Sheriff Court, dismissing a petition for interdict;

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*Reclaiming Note.—Inner House.*

and the Lord Ordinary refused the note. A. reclaimed. Objection to the competency of the reclaiming note, on the ground that the appendix did not contain the petition and answers in the Sheriff Court action, as required by Act of Sederunt, 24th Dec. 1838, sec. 6, repelled. *Simpson v. Young*, 22d May 1852. — 716

— Competency of reclaiming note under Act 13 and 14 Vict., c. 36, § 11.— A party presented a reclaiming note to be reponed against an interlocutor dismissing an action, in respect of failure to revise a paper or sist a mandatory. The reclaiming note was held to be incompetent, as not having been presented within ten days:—*Held* competent for him now to reclaim within the twenty-one days against the same interlocutor as against a final interlocutor. *Arnold v. Atkinson*, 25th May 1852, — 723

— Competency of reclaiming note. *Campbell and Others v. Pringle and Others*, 21st May 1852, — 708

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| and the trustees did not denude :— <i>Held</i> , that there was here a valid substitution in favour of the eldest sister of B., and that her right of succession was not conditional upon B.'s dying before attaining majority. <i>Cumming's Trustees v. Boswell and Others</i> , 27th January 1852,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 314   |
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| <b>Poor rates</b> , liability of Crown property for, under 8 and 9 Vict., c. 83. Advocate General v. Collector of Poor Rates, Paisley, 19th January 1852,               | 291  |
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| <b>SOLICITORS</b> and law agents, admission duty of. Advocate General v. Reddie, 8th December 1851,                                                                     | 130  |
| <b>TRUST-settlement</b> may be interpreted by a reference to a cancelled codicil. Advocate General v. Smith, 1st March 1852,                                            | 553  |
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| <b>CHURCH</b> of St Bernard's, Edinburgh, disjoined from the Parish of St Cathbert's. White and Others, v. The Officers of State, 19th November 1852, | 47  |
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## ENGLISH CASES

(RECENTLY DECIDED.)

*Railway Company—Compensation—Lands Clauses Act—Notice of Taking Land—Actual Taking.*—A railway company being desirous of taking the plaintiff's land for their railway, served him with a notice, pursuant to the 8th and 9th Vict. c. 18, stating that they required to purchase and take his land for the railway. The plaintiff afterwards, pursuant to the provisions of the 8th Vict., c. 18, sec. 68, served the company with a notice requiring them to issue the warrant to the Sheriff to summon a jury to inquire into the value of the land, claiming to be paid by way of compensation for the purchase by them of the fee simple of the land. *Held by the Court of Exchequer*, that as the land had not been actually taken, or actually injuriously affected by the company within the meaning of the 68th section, the plaintiff was not entitled to compensation. *Law Journal Reports, Birkenshaw, v. The Birmingham and Oxford Junction Railway Company*. Vol. XX., part 8 of the new series, p. 246.

The corresponding Scotch statute and sections are the 8th and 9th Vict., c. 19, sects. 17 and 36.

See the same statute and section illustrated by the case of *the South Staffordshire Railway Company, v. Hall*. *Law Journal Reports*, Vol. Ior Lord Cranworth's Court. XX., p. 397, in which Lord Cranworth V.C., held, in conformity with a decision of Lord Truro, which was opposed to one of Lord Cottenham, that the Railway Company could not restrain by injunction, (interdict) a party who claimed compensation for land, injuriously affected, and called upon the company either to pay the sum claimed, or to summon a jury to assess the amount, on the allegation that the defendant's land was not injuriously affected within the meaning of section 68 (36.).

*Railway Company, Liability of—Defective Carriages—Injury to Horses—Special Contract—Bailment.*—Action against a railway company for injury done to horses while being conveyed along the line. The plaintiff averred that whilst the horses were being so conveyed, one of the wheels of the carriages caught fire, of which the defendants had due notice, and were at the next station requested by the plaintiffs not to persist in conveying the said horses in the said carriage further, which the defendants refused to do, and, in spite of such request, continued to convey the horses in the same carriage; that afterwards the wheel again took fire, by and

## ENGLISH CASES

Court of Queen's Bench.

for want of due precaution against friction ; and, in consequence thereof, the carriage was thrown out of its proper place on the railway, and the horses injured. The defendants' plea denied these allegations, and a trial was had. At the trial the defendants put in evidence a letter signed by one of the plaintiffs, in which was a memorandum, stating that the owner undertook all risk of injury by conveyance, and other contingencies, the charge being for the use of the carriages and locomotive power only ; and that the company would not be responsible for any alleged defects in their carriages or trucks, unless complained of at the time of booking, or before the train left the station, nor for any damage whatever to horses travelling upon their railway in their vehicles. *Held by the Court of Queen's Bench*, that in respect of the special terms of the memorandum, that the defendants were entitled to the verdict on the above plea. *Austin and another, v. The Manchester, Sheffield, and Lincolnshire Railway Company*. Law Journal Reports, Vol. XX., part 8, p. 335.

Court of Common Pleas.

*Witness—Commission to examine Witnesses Abroad—Foreign Law—Oath of Commissioners.*—Where a commission had issued to a foreign country, requiring the commissioners to be sworn and to administer an oath to the witnesses, and depositions had been taken by the commissioners and returned, but no oath had been taken by the commissioners or witnesses, owing to a law of the foreign country, that burgomasters alone should administer oaths, and that no voluntary oaths should be taken, a new commission was ordered to be issued to burgomasters to examine the witnesses, without requiring the burgomasters to be sworn. *Böhm v. Melliden*. Law Journal Reports, Vol. XX., part 8, p. 172.

In this case, TALFOURD, J. said, " You must take care to bring the proceeding within the principle of *Omichund v. Barker* ; " and WILLIAMS, J. observed, " There must be some appeal to a Divine Power by the witnesses, before they make their statement." The case of *Omichund v. Barker*, referred to, is reported in Smith's Leading Cases, vol. i. p. 195, and decides that the depositions of witnesses professing the Gento religion, who were sworn according to the ceremonies of their religion, may be admitted to be read in evidence.

Rolls' Court.

*Domicile of Succession—Domicile of Origin—Acquisition and Change of Domicile—Intention—Evidence.*—J. B. Gilchrist was born and educated in Scotland, of Scotch parents. In 1780, he went to the East Indies, where he remained, as a surgeon, in the East India Company's service until 1804, when he came to England on leave of absence, but never returned to India ; and, in 1809, he retired from the Company's service upon a pension, and in the pay of his rank. At the end of 1806 he went to Edinburgh, where he embarked in business, and purchased a house. In 1815 his affairs became embarrassed. In 1817 he came to London, and continued to reside in England until 1828, occupying fur-

nished lodgings. He caused his house and furniture in Edinburgh to be sold, and his books to be sent to London, where he occupied himself in the sale of various Oriental works, of which he was the author, and in lecturing on Hindostanee and the Eastern languages. Between 1817 and the time of his death, he also projected various undertakings, and resided in London. He paid three short visits to London, and in 1825 he went to Belgium, and continued to visit the continent. In 1833 he returned to England, but, in 1834, he again visited France, and remained for longer periods than at first; and in 1837 he took a lease of premises in Paris, for a term of years, in which he resided, occasionally visiting England, and in which he died on the 8th January 1841, having executed a will, according to the laws of England, in which will he described himself as of the city of Edinburgh: *Held by the Master of the Rolls*, that in 1817, the testator was domiciled in Scotland; that he subsequently became domiciled in England, and was so in 1827, and that it was not changed at the time of his death.—*Whicker v. Hume, Hume v. Gilchrist*; Law Journal Reports, vol. XX. part 9, new series, p. 369.

In the argument of counsel a distinction was taken, on the authority of Sir Herbert Jenner Fust's opinion, and also of a French case, *Lloyd v. Lloyd*, (cited at length in the Report) between a political domicile such as that conferred by naturalization, and a civil domicile for the purpose of succession.

In concluding his judgment, the MASTER OF THE ROLLS said,—“In the course of the argument it seems to have been considered that the testator could not acquire a domicile in a country where he was only a lodger, and not a housekeeper, without repudiating his nationality, his character or quality of a Scotchman, but there is no foundation for any such notion in law.”

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*Foreign Bills of Exchange—Cancelled Acceptance.*—Held in an action by the holders of a foreign bill of exchange against the acceptors, that the acceptances were cancelled by a letter having been acted on according to the intention of the drawer, and that subsequent indorsements of new seconds of exchange conferred no right against the acceptors.—*Ralli v. Dennistoun and Others*. Law Journal Reports, vol. XX. part 9, p. 278.

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*Contract—Damages—Non-Delivery of Goods—Payment by Bill Dishonoured—Bankruptcy.*—Where, by contract for delivery of good (in this case iron), payment is to be made by bills which are dishonoured before the goods are delivered, the parties are then placed in the same position as if the bills had never been given, or the contract had been to pay in ready money; and the vendee can recover only the difference between the contract price and the market price of the goods. *Valpy and Another, Assignees of Boydell and Another, v. Oakeley*. Law Journal Reports, vol. XX. part 10, p. 380, new series.

Per PATTISON, J.,—“The bankrupts might have recovered full dama-

Court of Ex-  
chequer.

Court of  
Queen's  
Bench.

Court of Queen's Bench.

ges directly they discovered the non-delivery ; but having waited until the bills were dishonoured, they lost their remedy." And LORD CAMPBELL, C.-J., added,—“This may be likened to a case where the vendor may stop *in transitu* if bills delivered in payment become dishonoured before the *transitus* is completed.

Court of Queen's Bench.

*Railway—Lands Clauses Consolidation Act (1845)—Property injuriously affected—Obstruction of Private Right of Way—Compensation.* Under the Lands Clauses Consolidation Act 1845, landowners are entitled to be compensated in respect of their property being injuriously affected where the property is depreciated in value by an act of a railway company, which, if done by a private individual, would support an action. The erecting gates, and the passage of trains across roads forming the only access to a house, are acts by which property may be so injuriously affected. *Glover v. North Staffordshire Railway Co.*, Law Journal Reports, vol. XX. part 10, p. 376.

Per ERLE, J.,—“If a man places a dangerous animal in any private way, I may bring an action for the obstruction, and a train passing along, as stated in the verdict, is very much the same thing.” LORD CAMPBELL, C.-J., observed,—“It is clear that the plaintiff is entitled to judgment. The property is depreciated in value by the company doing that which would be actionable, unless they were protected by the powers of their act. I agree that this affords a very fair criterion of the right to receive compensation.” And WIGHTMAN, J., said,—“The test (*i. e.* the right of action at common law) applied is a true and conclusive one.”

Court of Queen's Bench.

*Railway Company—Construction of Railway Clauses Act, 8 and 9 Vict. c. 20 sects. 6 and 35—Obstruction of Right of Way—Special Damage only to be recovered in Action.* Under the statute and sections referred to, the remedy by action for interference with a private right of way is taken away, except where special damage has been suffered. *Watkins v. Great Northern Railway Co.*, Law Journal Reports, vol. XX. part 10, p. 392, New Series.

The corresponding Scotch statute and sections are 8 and 9 Vict. c. 33, sects. 6 and 48.

*Will—Construction—Charity-Legacy.* A gift of £1000 towards contributions for the political restoration of the Jews to Jerusalem is not a charity-legacy, and held to be void. But a gift (£500) towards the fund for the bishopric of Jerusalem agreed to be good charitable legacy. *Habershaw v. Varden*, Jurist, vol. XV. No. 773, November 1. 1851, p. 963.

The VICE-CHANCELLOR said,—“The gift of the £1000 is not a charity-legacy ; it is void. If it can be understood to mean anything, it is to create a revolution in the dominions of an ally of her Majesty. At any rate, it is totally void.”

## ENGLISH CASES

(RECENTLY DECIDED.)

*Publication of Design—Copyright.*—The owner of a design, before it had been applied to any fabric, or been registered, exhibited it to his customers in his place of business for the purpose of soliciting orders in respect of goods to which it was to be applied. *Question,* Whether this amounted to a publication of the design within the Designs' Copyright Act, the 5 and 6 Victoria, c. 100. *Dalgleish v. Jarvie*, Law Journal Reports, Vol. XX., Part 11 of New Series, p. 475.

*Railway Company—Directors—Common Seal—Credit—Application to Parliament.*—The Directors of the South Devon Railway Company introduced two bills into Parliament on behalf of the Company, which, it was alleged, would have the effect of altering the existing and established rights of the shareholders, as between themselves. They consisted of two classes,—the holders of original or whole shares, and the holders of half or preferential or guaranteed shares. Upon a bill filed by a holder of original shares, alleging that the bills introduced into Parliament would vary the terms upon which the half-shares were created, and that it would give a benefit to the holders of the half-shares at the expense and to the loss of the holders of the whole shares: *Held by the Master of the Rolls*, that the application to Parliament by the directors to authorize the scheme was not a breach of trust of duty to the Company; and the defendants undertaking to be answerable for the costs, the Court refused to restrain the directors from using the name and seal of the Company for introducing or prosecuting the bills in Parliament; but it restrained the directors from applying the funds of the Company in payment of the costs of the bills, so far as they sought to alter the relative rights of the shareholders. *Stevens v. South Devon Railway Company*, Law Journal Reports, Vol. XX. Part 11 of New Series, p. 491.

*Lands Clauses Consolidation Act, 8. and 9. Vict. c. 18—Compensation—Court of Jury—Costs.*—The 68th section of the Lands Clauses Consolidation Act, 8 and 9 Vict. c. 18, by which any party entitled to compensation in respect of lands taken, or injuriously affected by the execution of works, may give notice of his claim to the promoters, and the claimant may have the

Court of Common Pleas.—Court of Common Pleas—matter settled by a jury, incorporates all previous sections which are applicable, and, among others, the 38th, which requires the promoters to give notice of the amount of compensation they are willing to pay before summoning the jury, and also the 51st, which gives the claimant the costs of the inquiry when he recovers more than the sum offered by the promoters.—*Richardson v. The South Eastern Railway Company*, Law Journal Reports, Vol. XX., Part 11 of New Series, p. 236.

*Conflicting with Railston v. The York, Newcastle, and Berwick Railway Company*, 19 Law Journal Reports, New Series, 2 B., p. 464.

JERVIS, C. J., said—"I quite feel that this view of the case does, to a certain extent, conflict with the decision of the Queen's Bench; but it is to be observed, that the Court was not unanimous, and that my brother Coleridge pointed out in his judgment many inconveniences which might result from the decision."

MAULE, J.,—"This decision does perhaps, in some degree, conflict with the Queen's Bench in the case relied on for the defendants; but at the same time, the reason given for my brother Coleridge differing from the other Judges, seemed to me to be of great weight."

The corresponding Scotch statute and section are 8 and 9 Vict. c. 19, sec. 36.

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Court of Exchequer.—*Legacy-Duty*.—Trustees having a discretion to sell real estate for payment of a legacy, duty attaches upon a satisfaction of a legacy by a compromise with the party beneficially interested, and who elects to take the estate in specie. *Attorney-General v. Metcalf*, Law Journal Reports, Vol. XX., Part 11, New Series, p. 329.

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Exchequer Chamber.  
Court of Error.

*Copyright—Alien and resident abroad—Work first published in England—Assignment of Copyright*.—If an alien, meanwhile resident abroad, compose a literary work, and send it to and publish it in England, before it is published in any other country, he has, by the statutes 8 Anne, c. 19, and the 54 Geo. III. c. 156, a right of copyright in such work.

If the foreign author be permitted by the law of the place of his domicile to assign his property in the work, and he duly assigns it in such place according to such law to another alien *am*; before publication, the assignee, though resident abroad, will have a like right of copyright, if he first publish the work in the country. *Boosey v. Jeffries*. Law Journal Reports, Vol. XX. Part 11 ; New Series, p. 354.

In delivering the judgment of the COURT, LORD CAMPBELL, C. J., said,—“The British Parliament has no power, and could not by any general words, be supposed to intend to legislate for anything beyond the British

territory; but for anything within that territory it has the power to legislate, for aliens as well as natural born subjects; and as we can see, by these general words, must be presumed to do so. The monopoly which the statutes confer is to be enjoyed here, and the conditions which they require for enjoying it are to be performed here. . . . . Assuming that the legislature looked only to the enlightenment of Great Britain, and the encouragement of learning in Great Britain, without any general regard for the republic of letters, may it not be highly for the encouragement of learning in this country, that foreigners should be induced to send their works, composed abroad, either in English or in a foreign language, to be first published in London? If Racine and De Lolme had written their valuable works to illustrate the British constitution without ever visiting our shores, could it ever be intended they should be debarred from publishing, on their own account, in England, and selling their copyright to an English publisher? Looking to the statute book, we may, without impropriety, observe that it has been the uniform policy of Parliament to facilitate the importation of foreign literature."

Farther on, his Lordship observed,—“If Mr Gibbon, after writing the latter volumes of his ‘Decline and Fall’ at Lausanne, had continued to reside there, can it be doubted that while domiciled there he might have caused them to be purchased in London, acquiring the same right as an author as if he had returned to this country, or that he might have sold the copyright to another residing at Lausanne, who might have published as the purchaser in London, or have assigned the right to a London publisher? For such a purpose, what difference can it make whether the author be an alien or a natural born subject domiciled in a foreign country? . . . We wish to be understood always as speaking of the rights of a foreigner who first publishes his work in England. It seem to be understood that in America, and on the continent of Europe, when a literary work has once been published in any country, the author can only claim the copyright vested in him by the law of the country where he publishes, and as to all other countries it becomes *publici juris*. This is the doctrine of our Courts; and the legislature must be considered as having adopted and sanctioned it by the enactment of the international copyright statutes 1 and 2 Vict. c. 59, and the 7 and 8 Vict. c. 12.

The Law Magazine remarks, with reference to the above case of Boosie *v.* Jeffries,—“This very important case may, it is hoped, be considered as definitively settling an important point of law, concerning which there has been an immense amount of litigation.” Law Magazine for November 1851; Notes of leading cases, p. 293.

*Construction of Mercantile Contract—Meaning of the term “say.”—Agreement on the 12th December between A and B, that B should deliver to Bench.*

Exchequer  
Chamber.  
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Error.

A all the wool which B might pull up to the 6th January, " say not less than 100 packs;"—*Held*, (*dissentiente* COLERIDGE, J.) that the word "say" in this agreement must be read as if it had been written "that is to say;" that the words following it therefore must be taken to form part of a binding stipulation, and not to be merely words of conjecture or estimate; and that the true construction of the agreement was, that B, on his part, was bound to deliver at least 100 packs of wool.

The Court, in construing a mercantile contract, is bound, in the absence of any averment to the contrary, to construe all words in their ordinary, and not in any technical sense.—*Leeming and Another v. Smith; Jurist*, Vol. XV. No. 774, p. 988.

COLERIDGE, J., who dissented from the judgment of the Court, said—“There is no averment that any of the words were used between the parties in a technical sense, and I agree that without such an averment all the words of a mercantile contract are to be construed by the Court in their ordinary sense. Now the ordinary sense of the word “say,” as here used, seems to me to import a mere calculation. In *Gwillim v. Daniel*, 2 C. M. R. 61, where it was used precisely as here, the Court held that the true construction of it was—‘we estimate that it will not be less than so much.’ The authority of that case seems quite express.”

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Court of Queen's Bench. *Trespass—Right of Way.*—A public right of way may exist over a close, subject to the right of the owner to keep two gates, erected across the way, closed in such a manner as to be capable of being opened by persons using the way; and such a right may be pleaded generally as a right of way, and if put in issue will be proved by proof of a right to be exercised in the manner stated.—*Topham v. Huggins*; Law Times for November 1851, Vol. XVIII. No. 450, p. 72.

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Court of Queen's Bench. *Friendly Society—Alteration of Laws—Discretion of Officers.*—The principal officers (clerk, secretary, president, &c.) of a friendly society, are bound by stat. 10, Geo. 4, c. 56, s. 9, to sign a public notice for the convention of a general meeting, if required so to do by a requisition signed according to the provisions of that section, and are not entitled to the exercise of any discretion as to the propriety of holding such meeting. ERLE, J. dissented from the decision, and said, “I read the provision as one intended to secure the stability of the society, by providing that seven requisitionists should not disturb the society upon such a subject without the sanction of one at least of the society’s officers.”—*Reg. v. Bannatyne and Others*; Law Times for November 1851, Vol. XVIII. No. 450, p. 74.

## ENGLISH CASES

(RECENTLY DECIDED.)

*Lands Clauses Consolidation Act—Harbour Improvements—Wharf—Access Obstructed—Compensation.*—A Harbour Improvement Company, in the prosecution of their works, erected a coffer-dam which prevented ships from approaching the defendant's wharves, and he was, in consequence, put to some additional expense in the carriage of his goods ; he claimed compensation for the alleged injury, and proceeded to appoint an arbitrator under the Lands Clauses Consolidation Act, but, upon a bill filed by the company, the *Master of the Rolls* restrained his farther proceedings until an action was brought to establish his legal right. *Sutton Harbour Improvement Company v. Hitchins*; Law Journal Reports, Vol. XX. of the New Series, p. 489.

*Railway Company—Directors' Powers—Internal Management—Profits from Incomplete Line—Stay of Dividends—Jurisdiction.*—The Monmouthshire Railway and Canal Company obtained several Acts of Parliament for improving their existing canal and railways, and for making a new railway, but, from want of funds, they failed to complete the whole works within the time specified by their acts. Upon a bill filed by a shareholder to restrain the company from making a dividend out of the income arising from that portion of the property which was worked,—*Held* that the jurisdiction of the Court had been usefully exercised in cases arising from a combination of illegal acts, breaches of contract with the public or shareholders, and erroneous acts which shareholders could not rectify : That it could not safely be laid down that in no case ought joint-stock companies to be allowed to divide any profits, or receive any tolls, until all their works were complete : That it was necessary to distinguish between the duty which the governing body had to perform to the public and to the shareholders : That the Court did not attempt to direct the performance of all the duties which a governing body owe to the shareholders, but left shareholders to enforce the duties to themselves arising out of internal arrangement : That it was imprudent to treat income as profit, while the works and the contract with the public were incomplete : That the Court had not jurisdiction to interfere on the ground that this was a violation of

duty to the public, and because the misapplication of income was the subject of internal regulations. *Brown v. the Monmouthshire Railway as Canal Company*; Law Journal Reports, Vol. XX. Part 11 of New Series, p. 497.

Court of Common Pleas. *Ship and Shipping—Master—Hypothecation—Form of Instrument—Maritime Risk—Insurable Interest—Loan.*—The master of a ship has no authority to hypothecate a ship for money advanced for repairs, unless the payment of the money borrowed is made to depend upon the arrival of the ship; nor can he pledge the ship itself and the personal credit of the owners.

Where the master of a ship having borrowed money for repairs gave the lender bills on the owner of the ship, and on the consignee of the cargo for the amount, and also an instrument by which he purported to hypothecate the vessel, &c., and stipulated that in case the bills were not accepted or paid, the lenders might take possession, and sell under process of the Admiralty Court, and in which it was agreed that the lender should forbear maritime interest, and that the advances were to be recoverable whether the vessel arrived at its port of destination or not,—*Held by the Court of Common Pleas*, that the instrument was void, and that the lender had no insurable interest. *Stainbank and Others v. Fenning*; Law Journal Reports, Vol. XX. of New Series, p. 226.

Court of Exchequer. *Ship and Shipping—Authority of Master to pledge Credit of Owner.*—The authority of the master of a ship to pledge the credit of his owner is incident to his being employed to bring the ship to the end of its voyage, and to obtain things necessary for that purpose he may, in the absence of the owner, or any easy means of communicating with him, pledge his credit, or even borrow money in his name, where immediate payment for such necessary things is required, but he has no authority to borrow money to pay for work previously done. *Beldon v. Campbell*, Law Journal Reports, Vol. XX. Part 11 of New Series, p. 342.

Court of Appeal in Chancery. *Railway Company—Injunction (Interdict)—Partial Completion of Undertaking.*—A series of acts had in the same years been obtained by the same parties, for the construction of three different railways, all forming part of one system, but not joining each other at any point, and with different amounts of capital stock specifically allotted to each undertaking. Two years afterwards the whole of the undertakings were leased to another company under an Act of Parliament, the management being entrusted to a joint committee. Only one of the three lines was completed, the others being abandoned: *Held by the Lords Justices of Appeal*, overruling the decision of the Master of the Rolls, that no injunction ought to be granted on an interlocutory application to restrain the amalgamated companies from making calls or extending the works which they had

already completed. *Hodgson v. Earl Powis*; Jurist for November 1851, Vol. XV. p. 1022.

*Will, construction of—“Issue,” whether used in general or restricted sense, as meaning “Children.”*—A testator bequeathed a sum of money in trust “for all and every the issue of his daughter E. as should be living at the decease of the survivor of E. and her husband, but if any of the issue of E. should die in the lifetime of the survivor of E. and her husband, leaving issue, the issue of such of the issue of his daughter E. so dying should stand in the place of her, his, or their parent, as to the share which such parent would have been entitled to, if such parent had not departed this life : ” Held by the Master of the Rolls, that “Issue” meant “children,” and that if “issue” had been used in its unrestricted sense by the testator, as meaning descendants generally, the words “issue of the issue” would have been unnecessary.—*Pope v. Pope*; Law Times Reports for November 1851, Vol. XVIII. No. 451, p. 83.

*Will—Construction—Annuity—Legacy Duty.*—An annuity was given by a will in these words, “One clear yearly rent-charge or annuity of £100 a-year,” and charged on the real and personal estate of the testator: Held by the Master of the Rolls, that the legacy-duty was payable out of the testator’s estate and not by the annuitant; the word “clear” meaning clear of all deductions whatsoever. *Bailey v. Boult*; Law Times Reports for November 1851, Vol. XVIII. No. 451, p. 83.

*Compensation—Jury—Time of striking and summoning Special Jury, 8 and 9 Vict., c. 18, section 54—Irregularity.*—An inquisition taken before the Sheriff, whereby compensation is given for lands taken compulsarily by a railway company is not rendered void by an omission to strike the special jury in sufficient time to allow three days before the day of taking the inquisition for summoning them. It is at most an irregularity only, and does not vitiate the proceedings. *Ex parte—The Great Western Railway Company v. The Sheriff of Gloucestershire*; Law Times Reports for November 1851, Vol. XVIII. No. 451, p. 92. (The corresponding Scotch Statute and section are the 8 and 9 Vict., c. 19,) section 53.

Court of Queen's Bench.

*Contract—Performance.*—By agreement the defendants took the plaintiff into their service for five years, if he should so long live, and be able to perform and actually perform the services contracted for, and, upon the like condition, covenanted to pay him a certain salary: Held by the Court of Queen’s Bench, that the plaintiff could not recover his salary for such time as he was absent from the place of his employment upon sick leave, though during that time he had not ceased to be in the service of

Court of Queen's Bench.

Court of  
Queen's  
Bench.

the defendants. *Inglis v. The East India Company*: Law Times Reports for November 1851, Vol. XVIII. No. 451, p. 93.

*Railway—Liability for Loss of Luggage*.—A servant, travelling with his master, lost his luggage upon the railway during the journey: *Held*, that it was no objection to the servant suing for the loss that his fare had been paid by his master. *Marshall v. The York, Newcastle, and Berwick Railway*; Law Times Reports for November 1851, Vol. XVIII. No. 451, p. 94.

In argument it was maintained by *Knowles* and *H. Hill* for the defendants, that the action was founded on contract, and that the plaintiff was no party to the contract. To this it was answered by *Humphrey* and *Willes* for the plaintiff, that although the master paid the fare it was for the servant, to whom the ticket was given, and that payment may therefore be held to have been taken on his account. And of this opinion were the Court.

*Railway Company—Arbitration—Secretary's Agreement to Bind the Company*.—The secretary of a railway company agreed in writing to refer the compensation to be paid for land to arbitration. The reference proceeded, the award made, and the compensation under it paid, but the company would not pay the costs of the award; and in an action to recover the same, *Held*, that the agreement of the secretary, so entered into and acted on, was binding upon the company, and the award made in pursuance of it good, notwithstanding the regular and ordinary notices required by the Companies' Clauses Consolidation Act did not appear to have been given. *Collins v. The South Staffordshire Railway Company*; Law Times Reports for November 1851, Vol. XVIII. No. 451, p. 96.

*Pollock, C. B.*.—We think the plaintiff entitled to judgment, and on this very simple ground; there can be no necessity to ask for a perfect compliance with all the forms, where all the parties have agreed according to the Act, and so acted upon that agreement. The notices referred to in the act could only be necessary where no option is exercised, and there is a doubt as to what the claimant may require.

*Parke, B.*.—This is a case where the parties agreed to refer, and the statute says, that the signature and consent of the secretary to bind the company to the agreement shall be enough.

*Injunction. (Interdict)—Medicines.—Breach of Confidence.—Secret of Compounding Medicines.*—The Court will restrain, by injunction, a late partner in a firm for compounding and selling a certain medicine not patented, from using the secret of the firm, the knowledge of which such partner has obtained surreptitiously, or by communication from a third party, in breach of confidence and good faith.—*Morrison v. Moat*, Law Journal Reports, Vol. XX., part 12, new series, p. 513.

*Copyright—Periodical—Actual payment to the Author.*—The plaintiffs alleged that they were the proprietors and publishers of a periodical, containing original articles: that all the articles had been composed for the use of the plaintiffs by persons employed by them, on the terms that the copyright therein should belong exclusively to the plaintiffs, and should be paid for by them: that the plaintiffs were entitled to the sole liberty of publishing the articles in the said periodical, subject to the provisions of the Copyright Act, and that such articles were their exclusive property. An injunction had been granted *ex parte* to restrain the piracy of one of the articles in the plaintiff's publication: *Held*, upon motion to dissolve the injunction, that actual payment to the author by the publisher of a periodical was a necessary condition to the vesting of the copyright of any article in the publisher, but that the plaintiffs had sufficiently alleged such actual payment. *Richardson v. Gilbert*, Law Journal Reports, Vol. XX., part 12, new series, p. 553.

*Railway Company—Contract for Land—Abandoned Undertaking.*—A railway company, incorporated by Act of Parliament, contracted unconditionally with a landowner, in consideration of his having withdrawn his opposition to their bill in Parliament, to purchase certain of his land for the formation of their railway. The undertaking was afterwards abandoned, and the time for its completion, limited by the company's act, had expired: *Held*, on claim filed by the landowner, that the company was bound to complete the contract. *Webb v. The Direct London and Portsmouth Railway Company*, Law Journal Reports, Vol. XX., part 12, new series, p. 566.

*Acquiescence—Action—Small amount of Damages—Injunction—(Interdict).*—The defendants were mill-owners on the banks of a canal; and having used the water of the canal for generating as well as condensing steam in their steam-engine, the canal company brought an action against them, on the ground that the defendants had no power under the Canal Act to use the water for any other purpose than that of condensing steam. When the action was tried the plaintiffs recovered only 1s. damages. The defendants threatened to continue using the water as before, and the plaintiffs moved for an injunction to restrain them: *Held*, that the plaintiffs having once established their right at law, it was not

Dec. 1851. necessary for them, although nominal damages only were recovered, to bring further actions; but the injunction was refused, on the ground Vice-Chancellor Lord Cran- that the plaintiffs had acquiesced for many years in the conduct pursued worth's Court. by the defendants. *The Rochdale Canal Company v. King*, Law Journal Reports, Vol. XX., part 12, new series, p. 675.

Court of Queen's Bench.

*Railway Company—Purchase of Land—Entry by Consent—Compensation—Reference to Arbitration—Ejectment by Owner.*—A railway company, by their special act, were empowered to purchase land, and enter upon and use the same for the purposes of the railway. But they were not, "except by consent of the owners or occupiers," to enter upon any such land until they should have paid, or deposited in the Bank of England, the purchase-money or compensation agreed or awarded to be paid for all interest in the same. The company, with the consent of the owner (the plaintiff) entered in 1847 upon certain lands required for the purposes of the railway: the amount of compensation having been, by an agreement between them, referred to an arbitrator, who, in 1849, awarded a certain sum as compensation. No tender of a conveyance, nor payment of the sum awarded had been made; and after the award a demand of possession by the owner was served upon the company: *Held*, that an action of ejectment could not be maintained against the company: the plaintiff's only right being to enforce the payment of compensation under the award. *Doe and Hudson v. the Leeds and Bradford Railway Company*, Law Journal Reports, Vol. XX., part 12, new series, p. 486.

*Prohibition (Suspension and Interdict)—Foreign Sovereign—Immunity from Suit—Lord Mayor's Court of London—Foreign Attachment—Time at which Defendant or Garnishee may apply for Prohibition—Necessity of Plea to Jurisdiction—Application by a Stranger.*—No English court has jurisdiction to entertain an action against a foreign sovereign for any thing done, or omitted to be done, by him in his public capacity as representative of the nation of which he is the head.

Where the Lord Mayor's Court of London has no jurisdiction over the person of a defendant against whom a plaint has been entered in that Court, the awarding process of foreign attachment against a person having funds in his hands belonging to the defendant, as a means of compelling an appearance, is an excess of jurisdiction for which prohibition will lie.

Where, therefore, a plaint was entered in the Lord Mayor's Court against the Queen of Portugal "as reigning sovereign and supreme head of the nation of Portugal," to recover a debt alleged to be due from the Portuguese Government, and a foreign attachment had issued according to the custom of the city of London, the Court made absolute a rule for a prohibition to restrain proceedings in the action and in the attachment.

The same principle was applied to a case where a plaint was entered in the Lord Mayor's Court against the Queen of Spain, not expressly as reigning sovereign and head of the Spanish nation, but where it appeared, by affidavit, that the plaintiff's sole cause of action arose upon a Spanish Government Bond, purporting to have been issued under a decree of the Cortes, sanctioned by the Regent of Spain, in the name of the Queen, then a minor.

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Queen's  
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The writ of prohibition (Suspension and Interdict) may, in such cases, be granted on the application of the Queen (the defendant) before she has appeared to the action in the Lord Mayor's Court; or on the application of the garnishee, either before or after he has pleaded *nil debet*.

Where an Inferior Court has no jurisdiction to entertain a suit, it is not necessary to entitle a party to a prohibition, that he should have there pleaded to the jurisdiction, and that the plea should have been overruled.

The Court is bound to grant a prohibition where a Court has no jurisdiction, upon the application of a stranger, as well as of a party to the proceedings.

The process of foreign attachment can only be resorted to where the cause of action against the original defendant arises within the jurisdiction of the Court from which the attachment issues."—*De Haber v. The Queen of Portugal*; *Wadsworth v. The Queen of Spain*; 28th May 1851. Law Journal Reports, Vol. XX., Part 12. New Series, p. 488.

LORD CAMPBELL, in concluding his judgment in *De Haber v. The Queen of Portugal* said—

"What has been done in this case by the Lord Mayor's Court must be considered as peculiarly in contempt of the Crown, it being an insult to an independent sovereign, giving that sovereign just cause of complaint to the British Government, and having a tendency to bring about a misunderstanding between our own Gracious Sovereign and her ally the Queen of Portugal. Therefore upon the information and complaint of the Queen of Portugal, either as the party grieved or as a stranger, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit."

And in concluding his judgment in the case of *Wadsworth v. The Queen of Spain* his Lordship said—

"Judicial procedure in England would have been liable to great reproach had it not afforded a prompt and effectual remedy at once to put an end to actions brought in perversion of the ancient and laudable custom of foreign attachment in the city of London, and in violation of the universal law by which all civilized nations are bound. It gives us great satisfaction, therefore, to be able, consistently with the decisions of our predecessors, and the principles by which they have been guided, to grant

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the relief which is prayed. If we had entertained any grave doubt upon the subject, we should have directed the applicant to declare in prohibition; but being clearly of opinion that there is an excess of jurisdiction in the Court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute."

*Land Tax—Waterworks Company—Liability in respect of Pipes.*—A Water Company which had laid pipes in a land-tax division, under a statutory power in that behalf, but which Company is the owner of no land within the division, is not assessable there to the land-tax; the right in question being in the nature of an easement (servitude), and not "land" or "hereditament."—*The Governor and Company of Chelsea Water Works v. Bowley.* Law Journal Reports, Vol. XX., Part 12, new Series, p. 520.

LORD CAMPBELL observed—"The right in question, when exercised, appears to us to be in the nature of an easement (servitude), and neither land nor hereditament. The right is to convey water through the land of another, and whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us for this purpose to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditament. . . . The Company are not the owners of the land where the pipes lie, nor are they tenants of this land; and there is no rent from which they can deduct the amount of the assessment when they have paid it."

*Note.*—See, in contrast with the doctrine here laid down, the Scotch case of *Hay v. The Edinburgh Water Co.*, 18th July 1850, 12 D. B. M., 1240.

V.-C. Parker's  
Court.

*Solicitor and Client—Privileged Communication.*—A solicitor for a plaintiff had an interview with a defendant in a suit, which defendant afterwards desired to examine the solicitor as to what passed at the interview. To the interrogatory put to the solicitor on this subject he demurred (*i. e.*, he objected to the relevancy of the question), as the information was obtained by means of confidential communications made to him by or in the course of his agency for his client.

The objection was over-ruled.—*Gore v. Harris.* Law Times Reports, Nov. 1851, Vol. XVIII., No. 452, p. 104.

The VICE-CHANCELLOR said,—“One of the objects of the suit was to set aside a certain deed on the ground of fraud, it being alleged that a material clause contained in that deed was not communicated to the plaintiffs until a recent period. The defendant, Sanders, alleged that the existence of the clause was known to the plaintiffs much earlier, and that at an interview the solicitor produced to Sanders a copy of the deed containing the clause in question. By the interrogatory to which Goode

(plaintiff's solicitor) demurred, Sanders proposed to examine him as to what took place at that interview. His Honour could not doubt that Goode was bound to answer the interrogatory. In the transaction in question, the plaintiff had employed his solicitor as his agent to communicate with the opposite party. His Honour could not see how the communication could be regarded as either privileged or confidential, and he thought the solicitor must be examined as to what the communication really was. It was the everyday practice that communications of this nature passed between the solicitors for opposite parties, and orders were then made for the production of letters which passed between solicitors and parties on opposite sides.

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*Action for Neglect of Duty—Railway Company—Obligation to carry an Officer of the Post-office.*—To enable the plaintiff to maintain an action on the case for negligence, it is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and defendant. However the duty arise, if it exist, and be neglected to the injury of the plaintiff, he has a right to sue for damages in an action on the case.

Where a duty was cast, by Act of Parliament (1 and 2 Vict. c. 98), upon a Railway Company, to carry any officer of the Post-office whom the Postmaster-General might elect, for which service the Company was to be remunerated by the Postmaster-General, and the plaintiff was the officer elected, and the plaintiff was injured by the negligence of the defendants in carrying him: *Held*, upon demurrer, that it was the duty of the defendants to carry the plaintiff with proper care and diligence; and that for a breach of such duty, to the injury of the plaintiff, he might well sue the company in an action on the case, though there was no contract between him and the company, but the duty arose only from the obligation imposed upon the defendants by the Act of Parliament. *Collect v. The London and North Western Railway Company*, English Jurist, Vol. 15, No. 777, p. 1053.

LORD CAMPBELL, C.J., said—"I can see no difficulty in the case. It seems to me that the allegation in the declaration, that it was the duty of the defendants to use due and proper care and skill in and about the carrying and conveying the plaintiff, is made out in point of law. It is true that the duty does not arise upon any contract made between the defendants and the plaintiff, but upon a contract between the defendants and the Postmaster-General, or rather from the obligation thrown upon the defendants by the statute, to carry and convey the officers of the Postmaster-General. But it is clear that it was the duty of the defendants to carry the plaintiff; and if it was their duty to carry him at all, surely it was their duty to carry him with proper care and skill. However the duty arose, it was the duty of the defendants to carry the plaintiff with proper care

and skill ; that duty was neglected to the injury of the plaintiff : thereupon he was entitled to the ordinary remedy in such case, namely, to recover damages in an action on the case."

PATTESON, J., said—" This is not a matter of contract, but of duty. The duty of the defendants to the plaintiff does not arise upon any contract, but upon an obligation imposed upon the company by Act of Parliament."

The other Judges concurred.

Court of Exchequer.

*Fraud—Evidence—Post-dated Cheque.*—If a man tells an untruth, knowing it to be such, in order to induce another to alter his condition, who does accordingly alter it, and thereby sustains damage, the party making the false statement is liable in an action for deceit, although in making the false representation no fraud or injury was intended by him.

A post-dated cheque on a bank is not absolutely void ; if paid without knowledge of the false date, the payment is good ; and, though not admissible in evidence to prove a contract, may be used to shew fraud. *Watson v. Poulsen*, English Jurist, No. 779, Vol. 15, p. 1111.

Court of Queen's Bench.

*Liability of Innkeeper—Gross Negligence of Guest—Evidence.*—The plaintiff, a commercial traveller, whilst a guest at an inn, placed his gig-box in the commercial room, as was the practice with travellers frequenting the inn. The box contained money, and was allowed to remain in the commercial room in the night time, during the plaintiff's three days' stay at the inn. The lock of the box was a very insecure one, and could be opened without a key by pushing back the bolt. On two or three occasions, the plaintiff opened the box in the room, and counted the money it contained in the presence of several persons. Held that the jury were properly directed that gross negligence on the part of the plaintiff would relieve the innkeeper from his common law liability ; and that, on evidence to the above effect, the jury were warranted in finding that the plaintiff had been guilty of gross negligence, and the defendant, therefore, entitled to the verdict. *Armistead v. White*, Law Journal Reports, vol. XX., Part 12 of new Series (December 1851), p. 524.

LORD CAMPBELL, C.J., said—" If the Judge had told the jury that it was the duty of the plaintiff to withdraw the box from the room, and to take it up to his bed-chamber, that would be a misdirection, but he does not appear to have done so. . . . I may add that it is questionable whether the direction was not unfavourable for the plaintiff, for I doubt whether to get rid of the innkeeper's liability, there must be *crassa negligentia* on the part of the guest."

Court of Common Pleas. *Marine Insurance—Loss, total, or partial—Test—Expenses to be considered in ascertaining whether practicable to deliver cargo at port of discharge.*

—A cargo of wheat was insured from O to L, and the vessel was damaged and repaired, and vessel and cargo were hypothecated for repairs, by a bottomry bond, and afterwards the vessel was wrecked and towed into the port of C, by salvors. The cargo was damaged, but part of it could have been dried and conveyed in a merchantable condition to L, the port of discharge. Proceedings were taken in the Admiralty Court, and a sum was awarded on the bottomry bond, and another sum for salvage. *Held*, that in determining whether it was "practicable" to send the whole or part of the cargo to its place of destination in a marketable state, the jury ought to have ascertained the costs of unshipping, drying, warehousing, and transhipping the cargo into a new bottom, the cost of the difference of transit to the port of discharge if it could be only effected at a higher than the original rate of freight, and the amount of the salvage, in proportion to the value of the cargo saved; that the loss would have been total if the aggregate of those items had exceeded the value of the cargo at L, but if the aggregate would not have exceeded the value of the cargo or the part saved, then the loss would have been only partial. *Held* also, that the sum paid to the parties entitled under the bottomry bond, and their costs in the Admiralty Court, could not be taken into account. *Rosetto and others v. Gurney*, Law Journal Reports, Vol. XX, Part 12 of New Series, (December 1851), p. 257.

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*Patent—New Combination—Specification—Infringement.*—There may be Court of Ex-  
a patent for a combination of old and new mechanism, and such patent chequer.  
will be infringed by using so much of the combination as is material;  
and it will not be less an infringement, because the result is attained by  
the substitution of a mechanical equivalent. *Sellers v. Dickinson*, Law  
Journal Reports, Vol. XX., Part 12 of New Series, (December 1851),  
p. 417.

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*"Household Narrative."*—*Liability to Stamp Duty as a newspaper.*—Court of Ex-  
The publication called "The Household Narrative of Current Events," chequer.  
is a paper which contains public news. It is printed and published in  
London for sale, for less than sixpence, and is published in parts or num-  
bers, at intervals exceeding twenty-six days, and contains not more than  
two sheets. *Held* by POLLOCK, C.B., PLATT and MARTIN, B.B., that it  
was not liable to stamp duty as a newspaper—such a paper must be pub-  
lished, in order to constitute it a newspaper, so far as stamp-duty is con-  
cerned, at intervals not exceeding twenty-six days; if the publication exceed  
twenty-six days, the infrequency of such a publication gives to a  
periodical the character of a chronicle or history, and not that of a news-  
paper. Parke, B. *Dissentiente*. The *Attorney-General v. Bradbury and  
another*, Law Times Reports for December 1851, Vol. XVIII. No. 453,  
p. 122.

Vice-Chancellor Parker's Court. *Copyright—Injunction—(Interdict)—Acquiescence.*—In 1844 A. B. purchased from a foreigner the copyright in a piece of music, and in the same year, the music was published in England and Berlin at the same time. In November 1849, C. D. published the music, and A. B. gave notice of his copyright, and threatened proceedings. In May 1851, the Exchequer Chamber decided the case of *Boosey v. Jeffries*, overruling the former decision. In March 1851, A. B. had again given notice of his copyright. In August 1851, A. B. gave C. D. notice of the decision in the Exchequer Chamber, and required him to desist from the publication of the music, and upon this notice being neglected, filed his bill for an injunction. Held that A. B. was entitled to the injunction, but the Court ordered that if C. D. required it, A. B. should be put under terms to bring his action at law to establish his right. *Buxton v. James*, Law Times Reports for December 1851, Vol. XVIII. No. 454, p. 134.

Court of Exchequer. *Companies Clauses Consolidation Act, 7 and 8 Vict. c. 16, §§ 71, 138—Notice of Meeting, validity of—Advertisement in newspaper—Call, validity of.*

—This was an action for calls. Pleaded by defendant that the call was not made by any persons having authority on behalf of the company to make it. By the Swansea Dock Act, passed in July 1847, certain persons were named as directors, who subsequently resolved that the principal place of business should be Swansea. On the 5th of October, at a meeting of some of the directors held in London, it having been then resolved to call an extraordinary general meeting of the company, to be held in London on the 20th of October, a notice was, on the 5th of October, inserted in the third edition of the Sun newspaper, published and circulated in London on that day, and subsequently published in other newspapers, calling a meeting of the company in London on the 20th of October. At the meeting held on the 20th of October, the directors appointed in July were discharged, others being appointed. By the 71st and 138th sections of the Companies Clauses Consolidation Act, 1845, fourteen days' notice of all public meetings is to be given by advertisement in a paper circulating in the district of the company's principal place of business. There was no evidence to shew that the third edition of the Sun newspaper of the 5th of October ever reached Swansea. On the 21st of October 1847, and the 31st of January 1848, meetings of shareholders were held at Swansea, when the number of directors was reduced to nine, and on the 10th of February 1848, three of those directors made the call in question. Held, that as it was not proved that the Sun newspaper of the 5th of October reached Swansea, the notice was bad, and the meeting of the 20th of October, which discharged the directors by whom the call was afterwards made, was invalid, and consequently the call was good. *The Swansea Dock Company v. Levien*, Law Journal Reports, Vol. XX., Part 12 of the New Series (December 1851), p. 447.

*Literary Society—Library—Newsroom.*—“The Portico,” in Manchester, was erected by a society for the purpose of being used as a library and newsroom, and was vested in trustees, upon trust to permit it to be so used by the society. The society consisted of 400 shareholders, who paid an annual subscription of L.2, 10s., and were at liberty to transfer their shares. The library contained upwards of 15,000 volumes, for general reference and circulation among the subscribers, comprising works on scientific subjects, as well as in general literature, to which additions were continually made. There was a librarian with an annual salary of L.100, and a reading room supplied with periodical works, pamphlets, magazines, and reviews. In the newsroom were provided newspapers, the London Gazette, reports of the markets, and the commercial and periodical directories. *Held* that the society was not exempted from liability to be rated within statute 6 and 7 Vict., c. 36, the primary object of the shareholders being their own information and convenience. *Reg. v. William Gaskell and Others.* English Jurist for December 1851, Vol. 15, No. 781, p. 1156.

The above statute applies to Scotland.

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*Evidence of Judicial Proceedings.*—A minute of the proceedings at the Court of county court made by the clerk, pursuant to statute 9 and 10 Vict., c. 95, sec. III., is conclusive evidence of them, even though the judge gives evidence to the contrary. *Dews v. Ryley.* English Jurist for December 1851, Vol. 15, No. 781, p. 1159.

JERVIS, C. J., said, “The only evidence against the defendant was the warrant, sealed and signed by him as clerk of the Court. The defendant produced a minute of the proceedings at the Court held on the 10th October, which, after stating the particulars, the amount claimed, and the judgment, under the word ‘order,’ contained the following entry:—‘On the 17th October instant, or thirty days imprisonment for not attending.’ The judge of the court proved, from a private memorandum, that he intended the order to be for a commitment forthwith, with an understanding that it should not be enforced till after the 17th October. By the 9 and 10 Vict., c. 95, sec. III., the clerk is directed to cause a note of all orders and proceedings of the Court to be fairly entered in a book, and a copy of such entry, duly authenticated, is at all times to be admitted as evidence of such entry, or of the regularity thereof. We are bound, therefore, by the copy of the entry so produced, and must assume, contrary to the evidence given by the judge, that the order was that the present plaintiff should be imprisoned for thirty days for not attending, unless he paid the debt and costs on or before the 17th October.”

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*Bottomry—Abandonment—Sale of Cargo—Transhipment of Cargo.*—Bond Court of Admiralty. on ship, freight, and cargo, the money to be paid within twenty-one days

Court of Admiralty.

of the ship's arrival in the port of London, and not to be demanded or recovered in case the ship and her cargo be lost, miscarry, or be cast away on the voyage. The ship never reached the port of London, but was abandoned as for a total loss at Algoa Bay, where part of the cargo was sold, and the proceeds brought to England, and part put into another ship, and also brought to England. The fact that the ship could not be repaired was not proved. Held that the bond must be pronounced for, and enforced against, the proceeds of the cargo, and the cargo transhipped. *The Elephanta*, English Jurist for January 1852, Vol. 15, No. 782, p. 1185.

DR LUSHINGTON, in pronouncing judgment, said, "I greatly regret the time which has elapsed between the period at which this case was argued, and the period when I pronounce my judgment. But the case appeared to me to be one of very considerable difficulty, involving a consideration of points which had not hitherto been satisfactorily disposed of by any previous decisions, at least in these courts; and I have been very anxious, if I possibly could by any exertions and searches of my own, to discover—not in our own jurisprudence, because I am satisfied there is no such case to be found—whether, by the examination of cases which have occurred, either in the United States, or have been mentioned in books which treat of the subject abroad, this question, which I am about presently to determine, has been the subject of any decision abroad; but I regret to say that my searches have been in vain. . . . .

"The bond granted by the master is in the usual form—the money borrowed to be paid, with maritime interest, within twenty days next after the arrival of the ship in London. It is farther covenanted, that in case the barque shall be lost, miscarry, or be cast away, during the voyage, the money so secured on bottomry, and all demand thereof, shall not be demanded or recoverable. The question then is, referring to these conditions, and to the circumstances in evidence, whether the bottomry bondholder can make good his claim against what remains of the ship, cargo, and freight, if any. . . . . Let me consider whether any meaning has, by authority, been attached to the words I now seek to construe, or whether usage of the greatest weight in mercantile affairs, has given any custom—any interpretation—to the words 'lost, castaway, or miscarry.' With respect to authority, the case cited upon the present occasion, and indeed upon all others at all similar, is that of *Thompson v. The Royal Exchange Assurance Company*, (1 Man. & S., 30.) If that is a case in point, I should be bound by it. . . . . If there be any difference between the facts of the two cases, it is this, that the *Elephanta* could not be repaired at all. This is a question I shall have to decide. In that case the action was brought by a person who had insured the bottomry bond against the insurers. Lord Ellenborough nonsuited the plaintiff. His reasons were in substance, that the bor-

rower was not discharged, because there was not an actual total loss ; Court of and that, unless the borrower was discharged, the insurer was not liable. Admiralty. If the plaintiff could not on this account recover, must it not necessarily follow, that the ship and cargo hypothecated must still continue liable in the Court ? The concluding sentence of the judgment shews, that in the opinion of that very learned Judge, the fact of the ship continuing to exist *in specie*, whether repairable or not, kept the bond alive. It may be asked, whether, with this authority before me, I ought to go further ? The answer is, that it would be more satisfactory to my mind to find a case of pure bottomry, where the question was whether the bond could be enforced or not. . . . On the whole, I am bound to conclude that Lord Ellenborough, whatever expression he used, meant that the bond would remain valid and in force, unless there was a total destruction of the ship. When he said, ‘ if it exist *in specie* in the hands of the owner, it will prevent a total loss,’ I apprehend the expression was used with reference to capture, and not sale,—for, in the very case he was speaking of, the ship had been sold. But the most material part of this judgment is, that Lord Ellenborough distinctly states, that the owner may abandon the ship as for a total loss ; but if the ship exist at all the bond is valid, and he does not qualify this opinion. It appears to me that this case is a very strong authority for enforcing the bond in this Court—still there are some difficulties to be overcome. One of these is, that the money shall be paid within twenty days after the arrival of the ship in London, which event never took place ; but if the event was prevented by the act of the master, then, no doubt, the condition would not be binding upon the bondholder. I think, as the result of my investigation, that the judgment of Lord Ellenborough is admitted as to all cases where it was possible to have repaired the vessel, though at a ruinous expense.

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*Evidence—Action for Libel.*—*Held*, affirming a judgment of the Courts House of Lords of Common Pleas and Exchequer-Chamber in Ireland, that in an action for libel against the editor of a newspaper, that the plaintiff may give in evidence the publication by the defendant of previous libels on the plaintiff to shew actual malice. *Barrett v. Long*, Law Times Reports for December 1851, Vol. XVIII., No. 455, p. 145.

Previous to giving judgment, the House of Lords took the opinion of English Judges, speaking for whom, PARKE, B. said, “ We are all of opinion that the publication of previous libels on the plaintiff by the defendant is admissible evidence, to shew that the defendant wrote the libel in question with actual malice against the plaintiff ; a long practice of libelling the plaintiff may shew, in the most satisfactory manner, that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertency, and the more the evidence approaches to the proof of a systematic practice the

House of  
Lords.

more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote, from the time of the publication of that in question, merely affects the weight, not the admissibility of the evidence."

**Privy Council.** *Hypothecation of Cargo—Bottomry Bond.*—The master of a vessel bound from Sweden to Hull, driven by stress of weather, put back into another port of Sweden, on the 21st of November, ten days afterwards the cargo was unladen, and the ship found to be greatly damaged. The repairs were completed, and on the 7th of April the voyage was completed, and the vessel and cargo reached Hull. In the meantime, and without any proof of an attempt to communicate with the owners of the cargo, the master hypothecated the vessel, cargo, and freight, for money borrowed for the repairs: *Held* by the Judicial Committee of the Privy Council that, considering the length of time, and the distance between England and Sweden, and the means of communication existing, the master did not do his duty to the owners of the cargo, and that there being no evidence of any attempt to communicate with the owners of the cargo, the hypothecation could not stand: *Held* also that, as the respondents desired an opportunity of again taking the case before the Court of Admiralty, for the purpose of shewing that the master did attempt to communicate, or that circumstances existed which rendered it justifiable in him not to communicate, the Court would remit the case to the Court of Admiralty on that point. *Williamson and Others v. Wilson and Another.* Law Times Reports for December 1851. Vol. xviii. No. 456, p. 161.

Court of Ap-  
peal in Chan-  
cery.

*Lands Clauses Consolidation Act, § 68—Compensation—Injunction—Interdict.*—A company under the provisions of their Act were making improvements in their harbour, and in their works had formed a cofferdam, which prevented the ships of the proprietor of an adjoining wharf from coming so close as they had hitherto been accustomed, and by reason of which his servants were compelled to go a greater distance for the purpose of loading and unloading the coals: *Held*, overruling the decision of the Master of the Rolls, that the proprietor was entitled to proceed for compensation under the 68th section of the Lands Clauses Consolidation Act. Where less litigation will be created by dissolving than continuing an injunction, the Court will adopt the former course. *Re Sutton Harbour Improvement Company v. Hitchens.* Law Times Reports for December 1851. Vol. xviii. No. 456, p. 163.

V.-C. Turner's  
Court.

*Professional Confidence—Privileged Communication—Evidence.*—Communications between a testator and his solicitor employed to make a will, with reference to illegal trusts intended to be inserted in the will, are not communications privileged for disclosure by reason of professional con-

fidence. Communications between the same solicitor and the executors of the testator's will, with reference to the same trusts and to the will, the same solicitor being continued to be employed by the executors, are communications privileged from disclosure by reason of professional confidence. *Russell v. Jackson*. Law Times Reports for December 1851, Vol. xviii., No. 456, p. 166.

V. C. Turner's Court.

The VICE-CHANCELLOR in delivering judgment said, "I am very much disposed to think that the existence of an illegal purpose would prevent any privilege attaching to the communications. When a solicitor is a party to a fraud, there is no privilege attaching to communications between the client and him upon the subject of the fraud, because, to contrive fraud is no part of a solicitor's duty ; and I think it can as little be said that it is part of a solicitor's duty to advise his client as to the means of evading the law. Another view of the case is, that the protection which the rule gives, is the protection of the client; and it cannot be said to be for the protection of the client that evidence should be rejected, the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust."

*Parliament—County Vote—Dissenting Minister.*—The minister of a dissenting chapel was invited to become pastor by letter from the deacons; and upon this invitation entered upon the office of minister, and took possession of a house and premises vested in trustees, to permit the minister of the chapel "during his life, if he should so long continue pastor," to occupy the same without paying any rent:—*Held*, that the minister had an equitable estate for life, under the trusts of the deed, in the house and premises, and was entitled to vote in respect thereof. *Northamptonshire Southern Division. Burton App.; Brooks Resp.* Law Times for December 1851, Vol. xviii., No. 456, p. 171; and Law Journal Reports for January 1852, C. P. p. 7.

Court of Common Pleas.

(This case is noticed as an illustration, derived from the decisions in the English Courts, of the proceedings in the late Registration Courts before the Sheriffs in this country, where the right of ministers of the Free Church to vote in parliamentary elections was, in respect of the peculiarity of their title to their manse, glebe, &c., disallowed.)

*Embezzlement—Contract for Service—Labourer—Stamp Act—Exemption.*—A. contracted with B. to manage a farm for him as bailiff, receiving a yearly salary, and certain share of the clear profits after all expenses paid. He was instructed to account, and did account, at stated periods; but on one occasion denied the receipt of two sums of money, which had been paid to him in the course of the business of the farm. *Held*, that A. was guilty of embezzlement, the relation of master and servant being created by the contract; and that the contract was admissible

Court of  
Common  
Pleas.

in evidence without a stamp, being a contract for the hire of "a labourer" within the exemption in the Stamp Act. *Reg. v. Wortley*. Law Times Reports for December 1851, Vol. xviii. No. 456, p. 174.

LORD CAMPBELL C.J., said, "I am of opinion that this conviction ought to be sustained. Assuming that, if this had been an agreement for a partnership, it could not have been received in evidence without a stamp. I think that it is not such an agreement, but a hiring of a labourer within the meaning of the exemption in the Stamp Act. There is no reason for confining that exemption to a person who has no labourers under him,—to the mere hedger and ditcher; it may well apply also to a person who labours himself, and also superintends the labours of others. I think, therefore, that even in a civil action, this agreement would have been admissible. Then, upon the second question, whether the direction of the chairman, that this instrument created the relation of master and servant was correct, I am of opinion that it was. It did not create a general partnership between them; they were not partners *inter se*, although the prisoner was to receive a share of the clear profits by way of compensation for his labour. As to the remaining question, whether the denial of the receipt of the two sums constituted evidence of embezzlement, there is abundance of evidence to shew that it does."

ALDERSON, B. said, "This prisoner was not a menial servant; but as amongst menial servants there is no distinction between the lowest foot-boy and the highest butler, why should we introduce any distinction between different classes of labourers?"

Court of  
Chancery.

*Will—Construction—Persona Designata—Second Husband.*—A testatrix gave the interest in certain money in the funds to her daughter Mary for life, and after her decease, the capital to be divided between the husbands of her daughters and her son, or such of them as might be living at the decease of her daughter Mary. One of the daughters married a second husband, after the death of the testatrix, who was living at the death of the tenant for life:—*Held*, that the testatrix meant to designate the particular husbands living at the time she made her will, and that the second husband was not entitled to a share of the trust-fund. *Ex parte, Bryan's Trust*, Law Journal Reports for January 1852, New Series, Vol. xxi., Part 1, p. 7.

KINDERSLEY, V.C., in delivering judgment, said, "I cannot say I think the case of *Garrat v. Niblock* governs this case necessarily, because there was an express indication that the testator had in view a particular individual. If he had meant any wife, he would not have said 'his beloved wife.' The expressions, 'my wife,' and 'my beloved wife,' are certainly not synonymous. The question here is, whether the testatrix meant a class of persons, or certain individuals. She has used no expression to indicate which she intended. She says, 'to be divided between the husbands of my daughters, and my son, or to such of them as may be living

at the death of my daughter Mary.' Now, it appears that the testatrix had before mentioned her son John, and that she had but one son ; therefore I think it clear that in using the expression 'my son,' she meant to designate her son John, and not any son she might have, or might be living at her decease. Now, the husbands of her daughters, whom the testatrix knew as well as her son John, would materially be objects of her bounty ; and, as she designates her son as an individual and not a class, I think the same construction ought to apply throughout the clause, that is, that all the husbands mentioned by the expression 'the husbands of my daughters,' meant the individuals whom she knew as the then husbands."

*Husband and Wife—Representing woman as Wife—Liability*—A man went with a woman to a mercer's, bought some goods for her, and had them sent to his house. The woman afterwards went alone and ordered other goods, which were sent to the same place:—*Held* that if the man in any way represented her to be his wife, he was liable for the last-mentioned goods. *Graham v. Bretile.* Law Times Reports for January 1852, Vol. xviii., No. 457, p. 185.

LORD CAMPBELL, C. J., in charging the Jury, said, "the law upon this point is, that if the defendant, by word of mouth, represented the lady in question to be his wife, or if he did what was tantamount to it, and so led the plaintiff to believe that she was his wife, he will be liable for goods reasonably supplied to her, as if she were really his wife. . . . The question of the defendant's liability depends upon what took place in the plaintiff's shop on the 22d of November. It is said they then appeared like man and wife. It seems to be assumed that the lady was not in fact the wife of the defendant. The plaintiff cannot recover the amount of the last two purchases, unless the defendant held the lady out as his wife, and the plaintiff believed that she was so. It is for you to say whether what transpired in the shop fairly led to that conclusion."

*Savage Dog—Liability of Owner*:—A dog had, in the course of five years, bitten three people at different times, but the owner knew only of the last. He still permitted the dog to be at large, and a child who went up to it and put its arms round the dog's neck was bitten by it. *Held* that the owner was liable. To entail liability on the owner, it is not necessary that the dog should be generally prone to bite. Verdict for the plaintiff. Damages L.25. *Charlwood v. Greig.* Law Times Reports for January 1852, Vol. xviii., No. 457, p. 186.

It appeared that the child had gone up to and fondled the dog, which was loose, and that it had bitten him. It was proved, also, that the dog had previously bitten other persons when at work on the defendant's premises—some of them severely ; and that by one of those persons the biting was communicated to the defendant.

Court of  
Queen's  
Bench.

CRESSWELL, J. in charging the jury, said, "There can be little doubt that the plaintiff's child has been severely injured, and that the injury was inflicted by the defendant's dog; but it is averred in the declaration, that the dog was of a savage disposition, and that the defendant knew it. These, therefore, are the material points which the plaintiff has to prove. The dog must be of a savage nature, and the defendant says it must be generally prone to bite; but that is not so. An ill-tempered man may not always be in a passion, so a dog may sometimes be savage, and sometimes not. This dog had, it appears, five years ago, bitten a man who was working for the defendant, but nothing was then said about it to the defendant, though the man was much injured. He says the dog was then in a passion. Then, about four years ago, it bit a child. The dog was frequently in the habit of going to the house of that child's father—the child was three years old, and was playing with the dog. Again, another boy was bitten when in the defendant's stable. This last case was communicated to the defendant. The defendant ought then, after such a communication, to have been very careful with the dog. In an old case, *Smith v. Pelah*, 2 St. 1264, it was held that if a dog has once bitten a person, and his owner knows it, but allows him to run about, he is liable to an action at the suit of any person who is bitten by him even if such person treads on the dog's toes. It is said, in that case, that when the owner knows that the dog has bitten a person, he ought to hang him; though, perhaps, in the present day, it may be thought that this is going too far. In this case the plaintiff's child put his arms round the dog's neck, and is at once bitten by him. The defendant, upon being told that this child was bitten, and being asked to make some compensation, said, 'dogs are very uncertain animals, and children ought to be kept out of their way;' but it would be more correct to say, that dogs ought to be kept out of the way of children. You will say whether the dog was of a savage nature, and whether the defendant knew it?"

Court of  
Exchequer.

*Evidence—Entry against Interest, effect of.*—In support of the right of the Earl of L. to a fishery in the Solway Frith, the defendants put in evidence the following entry in the book of a former receiver of rents of the Earl of L. s estate :—" Received of J. H., the respective shares due from three proprietors (J. H. being one), of the raise net set in the Solway Frith in D., in the year 1733." *Dictum*, the entry is evidence not only having been paid by J. H., but also by the two other proprietors.

*Per POLLOCK, C. B.*—If an entry is admissible as being against the interest of the party making it, it carries with it the whole statement. But if the entry is made merely in the course of a man's duty, it does not go beyond those matters which it was his duty to enter. *Percival v. Nanson and Others*. Law Journal Reports for January 1852, New Series, Vol. xxi., Part 1, p. 1.

*Partners—Money Paid—Affidavit—Isle of Man.*—A. and B. being part-<sup>Court of Ex-</sup>ners, kept an account with C. as their banker. On the banker's claim-<sup>chequer.</sup>ing a balance against the firm, A. demanded an explanation from B., and B. wrote to him that the balance was his own private debt, and that the firm had nothing to do with it. Subsequently B. gave the banker a pro-missory-note for the balance, signed in the partnership name. A. hav-ing been compelled to pay this note,—*Held*, that he might recover the whole from B. in an action for money paid to his use. *Semblé.* That an affidavit sworn before the Deemster of the Isle of Man is not receivable without proof that he has power to take affidavita. *Cross v. Cheshire.* Law Journal Reports for January 1852, Vol. xxi., Part 1 of the New Series, p. 3.

PARKE, B. said, "I think, in strictness, we ought to reject the affida-vit which purports to be sworn in the Isle of Man, as not being in com-pliance with the practice of the courts. The master has directed my at-tention to the rule on this subject, which is, that in the case of foreign affidavits, the authority of the person administering the oath must be shewn, either by affidavit, or a notarial certificate. The case of the Irish and Scotch Judges is different, for they have power to administer an oath."

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*Master and Servant—False Imprisonment—Evidence of Party being a Servant—Authority to Arrest, Evidence of—Railway Company—Liability of, for tortious acts of Servants.*

The plaintiff having seen an advertisement of an excursion train from Monk's Ferry to Bangor and back, enquired of the clerk at the Monk's Ferry station, which belonged to the defendants, as to the return of the train, and was informed that he could return that day by the half-past 7 train. The plaintiff then took a ticket, proceeded to Bangor, and, return-ing thence by train at the time appointed, arrived at Chester, when the train stopped. The Chester station was used by the defendants and other railway companies. A railway servant, who had charge of the train, took the plaintiff's ticket, and informing him that he ought not to have gone by that train, demanded 2s. 6d. more. Payment being refused, the railway servant and the superintendent took the plaintiff into custody. The plaintiff's attorney having written to the secretary of the defendant's company, asking for compensation, received an answer from the secretary requesting that he might be furnished with the date of the transaction, and promising to make inquiries. The secretary also stated verbally that it was an awkward business; that the blame would fall upon the station clerk at the Monk's Ferry station, who gave the plaintiff the false infor-mation; and he also offered to return the 2s. 6d.

*Quare.*—Whether there was evidence for the Jury of the railway ser-vant who made the arrest being a servant of the defendant's?

Court of Ex- chequer. But held, that at all events, there being no proof of the defendant's having the power of arresting the plaintiff, there was no evidence of their having expressly or impliedly authorised or ratified the arrest made by the railway servant, and therefore that they were not liable for his tortious act; *Roe v. the Birkenhead, Lancashire, and Cheshire Junction Railway Company.* Law Journal Reports for January 1852, Vol. xxi., Part 1 of New Series, p. 9.

POLLOCK, C.B. In delivering his opinion, said, "I regret that the company should be able to escape the payment of the £50 damages, but we are bound to administer the law as it existed before the establishment of railway companies, and we must apply to this case the principles applicable to principal and agent, and master and servant. The law lays down the same rule for all, and we cannot make a different rule in the case of a servant of a railway company and an ordinary tradesman. The principle is, that the master is not liable for the tortious act of the servant, unless he has either given him express directions, or an implied authority to do the act. If the act, indeed, had been one that the company had been legally authorised to do, it might have been put as having been done with the authority of the company. But the evidence was of an injury having been done, and done wrongfully; and, therefore, treating Phillips as the servant, the company are not liable for his tortious act any more than other individuals would be; and, as I observed before, we are bound to apply to this case the same rules which govern the relation of principal and agent, and master and servant."

PARKE, B., said, "I agree with the Lord Chief Baron, that the same rule must be applied to railway companies as to individuals, and that we ought not to stretch the law as against those bodies, merely because they are capable of paying for injuries done by their servants. The plaintiff may, if he pleases, bring an action against the officer of the company."

Prerogative Court.

*Domiciled Scotchman—Scotch Judicial Factor—Administration limited to receive and invest dividends.*—Where a suit respecting the testamentary papers of the deceased, a domiciled Scotchman, is pending in Scotland, and the Scotch Court has appointed a person, *ad interim*, judicial factor, and executor dative, the Prerogative Court will not, in the absence of necessity, grant to such person a general administration with respect to money in the public funds, but only an administration limited to receive and invest the dividends upon the stock. *In re John Morgan. English Jurist for January 1852, Vol. xvi., No. 784, p. 20.*

The facts of the case were these—J. Morgan, a domiciled Scotchman, died in August 1850, possessed of considerable property in Scotland and India, and about £100,000, £3, 5s. per cent. Government annuities. In 1848, he had become "of infirm mind," and Mr Lindsay was duly appointed *curator bonis* and continued to discharge the duties of that office, by receiving, managing, and accounting for the property, until the

death of Morgan. The deceased left several testamentary papers, in Prerogative Court. which he had named no executor. Soon after the death of the deceased, Mr Lindsay was duly appointed *ad interim* factor of the deceased's estate and effects; and, subsequently, he was, for the purpose of better preserving and administering the said estate, appointed executor dative; and he then instituted the usual and necessary proceedings in the Court of Session in Scotland, in order to determine who might be entitled to the real and personal estate of the deceased, under the said testamentary papers, or an intestacy. These proceedings were still pending.

*Harding* applied for letters of administration of the goods of the deceased, within the Province of Canterbury, to be granted to Mr Lindsay as the executor dative, limited to the finding of the proceedings in the Court of Session in Scotland, in order that the stock and dividends arising since the death of the deceased might be placed under the control of the Court of Session, by which Court they must ultimately be distributed or administered. He cited *Viesed v. D'Arambarie*, (2 Cart. 277). Mr Lindsay had given full security on his appointment as executor dative, was accountable to the Scotch Court, and had no personal interest in the estate of the deceased. The application was made with the knowledge and consent of all the parties interested.

SIR H. JENNER FUST said—" You may have administration limited to receive and invest the dividends; but I see no reason for administration in respect of the principal fund. In the case cited, the property was in private hands; here it is in Government securities. There is no necessity for, and no advantage can result from, a general grant. I shall, therefore, reject the motion. The parties may apply, if they think fit, for a grant as to the dividends."

On a subsequent day, administration was decreed, limited during the dependence of the proceedings in the Scotch Court, for the purpose only of receiving and investing the dividends due, and to grow on the stock.

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*Contract of Sale—Payment by Bill afterwards dishonoured—Non-delivery of Goods—Bankruptcy—Measure of Damages.* 1. Where in a contract of sale there are specified days for the delivery of the goods, and payment is made by bill, if the bill be given, but dishonoured before the goods are delivered, the parties are placed in the same position as if no bill had been given, or as if the contract had been for ready money; and, therefore, if the vendor be sued by the vendee after the dishonour of the bill, for non-delivery of the goods, the measure of damages is not the full contract price, but the difference between the contract and the market price of the goods.

Court of  
Queen's  
Bench.

2. Assignees of a bankrupt, suing upon a contract made with the bankrupt, are entitled to all the legal and equitable rights, and no other, which the bankrupt would have had if the action had been brought by him on the day of his bankruptcy.

Court of  
Queen's  
Bench.

3. A. contracted to deliver to B. on certain days, certain quantities of iron, to be paid for by bills. The bills were accordingly accepted by B., but upon maturity were dishonoured, and afterwards B. became bankrupt. Held in an action by the assignees of B. against A. for the non-delivery of the goods, that the assignees were entitled to recover only such damages as could have been recovered by B. if the action had been brought by him on the day of his bankruptcy; and, therefore, only the difference between the contract and market prices of the iron. *Vaipy and Another, Assignees of Boydell, v. Oakley.* English Jurist for January 1852, Vol. xvi. No. 785, p. 38.

V. C. Turner's *Foreign Ships—English Patent—International Law—Injunction*—The Court.

owner of an invention for propelling vessels obtained a patent for England, Wales, and Berwick-upon-Tweed. The patentee was an English born subject. Foreigners, owners of Dutch ships, trading between Amsterdam and London, had their vessels fitted with this propeller. The patentee filed a bill for an injunction, and the Court being of opinion that there was no proof of the invalidity of the patent, nor of user by the defendants with the acquiescence of the plaintiff, granted the injunction against the use of the propeller (until a licence should be obtained from the plaintiff) within England, Wales, and Berwick upon Tweed, and the waters, harbours, &c., the plaintiff undertaking to bring an action to try the right at law. *Caldwell v. Vanlissengen.* Law Times Reports for January 1852, Vol. xviii., No. 458, p. 192.

VICE-CHANCELLOR TURNER, in the course of pronouncing judgment, said, "After anxiously considering the case, I think that I cannot withhold the injunction upon the grounds stated. I take the rule to be universal that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if, in any case, when they are out of their own country, their rights are regulated or governed by their own laws, it is not by force of those laws themselves, but by the laws of the country in which they may be, adopting their law as part of their own, for the purpose of determining their rights. Mr Justice Story, in his 'Conflict of Laws,' addressing himself to this subject, uses these expressions:—'In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear, upon general principles of international law, that such a right does exist, and the extent to which it should be exercised is a matter purely of municipal arrangement and policy.' Huberas lays down the doctrine in his second axiom: 'All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof.' Boullenois says, that 'the sovereign has a right to make laws to bind foreigners in relation to their property within his domains, in relation to contracts and acts done therein, and in relation to judicial proceedings, if they implead before his

tribunals; and further, that he may, of strict right, make laws for all V.-C. Turner's foreigners who merely pass through his domains, although, commonly, this authority is exercised only as to matters of police. Vattel asserts the same general doctrine, and says, that 'foreigners are subject to the laws of a state while they remain in it.' In this country, indeed, the position of foreigners is not left to rest upon the general law, but is expressly provided for by statute. By the 32 Henry VIII., c. 16, sec. 9, it was enacted, 'That every alien or stranger born out of the King's obedience, not being a denizen, which now or hereafter shall come in or to this realm, or elsewhere within the King's dominions, shall, after the 1st day of September next coming, be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same.' Natural justice, indeed, seems to require that this should be the case. When a country extends to foreigners the protection of its laws, it may justly require obedience to those laws as the price of such protection. These defendants, therefore, while in this country, must be subject to its laws. . . . . In the course of the argument, I put the question whether a railway engine, patented in England, and not in Scotland, but constructed in Scotland, might be permitted to run into England? I might have added the question, whether, if the present invention had been patented in England and Scotland, but not in Ireland, steam-boats could lawfully be propelled by means of it in running from Dublin Bay to Holyhead? The answer I received was, that a prior user in Scotland, like a prior user in foreign countries, would not invalidate an English patent. This answer does not seem to meet the question. What user would invalidate the patent, or what user would protect the contravention of the patent rights, are questions depending upon different considerations, one of which is the extent to which previous knowledge would affect the grant."

*Charter-Party—Freight of Goods stowed in Cabin—Practice—Cross-examination—Right to defer.*—A charterer is entitled to stow in a chartered vessel as many goods as she can reasonably carry in those parts usually appropriated to cargo; and if his agents ship a greater quantity, the shipowner may charge him freight for the excess at the current rate of the day at the place of shipment.

Where, therefore, after a chartered ship was reasonably loaded, the charterer's agent sent on board other goods, which could only be stowed in the cabin—*Held*, that the shipowner was entitled to full freight for such goods.

*Per MARTIN, B.*—There is no rule of practice binding counsel to cross-examine a witness at the close of the examination in chief; but if it be convenient to him to defer it, he may do so by leave of the Judge. *Michelson v. Nicoll*, Law Times Reports for January 1852, Vol. xviii, No. 458, p. 198.

*Nisi Prius,*  
before Baron  
Martin.

The following discussion arose with reference to the cross-examination of witnesses.

The first witness called by the plaintiff proved the payment of the freight under the charter-party, and the refusal of the defendant to pay the freight under the bill of lading.

*Bramwell, Q.C.*, for the defendant. I do not at present wish to cross-examine this witness, but will reserve my right to do so, if it should become necessary hereafter.

*Crowder* objected to this course as irregular. The proper practice is for the cross-examination to follow the examination in chief. He was himself recently held to that course of proceeding in another Court. He therefore called upon the Court to enforce the rule.

*Bramwell*.—But there is no rule on the subject. It is inconvenient to me to cross-examine this witness now. What objection can there be to my doing so afterwards?

*Crowder*.—The objection is, that you gain an advantage by waiting till you hear all my case, when you will cross-examine this witness, who is, in fact, the defendant's witness, according to the course the case of the plaintiff has taken. If you began your cross-examination now, it would be nothing.

*Bramwell*.—That is just the case. I have literally nothing now to ask him, but I may hereafter, and I must press my right to defer the cross-examination.

*MARTIN, B.*.—I confess that I never heard of any rule of practice which makes it obligatory on counsel to cross-examine a witness as soon as the examination in chief has ended. The point has never arisen before in my experience; and, but for the assurance of Mr Crowder, that such a rule was enforced against him recently, I should have no hesitation in holding that there was no such rule. As it is, if Mr Bramwell tells me that it is inconvenient to him to cross-examine this witness now, I think he may defer doing so.

*Bramwell*.—It is certainly so, and I apply to defer my cross-examination.

*MARTIN, B.*.—Then you need not cross-examine this witness.

At the close of the case for the plaintiff, the witness was cross-examined.

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Court of Chancery.—*Railway Company—Specific Performance of Agreement—Residential Injury.*

The plaintiff agreed with a Railway Company that, on the following conditions, he would assent to the railway being made through his property. That if the company should obtain their Act, they should pay him £1000 for all lands required for making the railway, and the further sum of £4000 for residential injury to the estate and hall of the plaintiff. The company amalgamated with another company, who

formed the railway in another direction, and did not pass through the plaintiff's property. *Held*, upon demurrer to a bill for specific performance of the agreement, that there was sufficient evidence to shew that the defendants represented the persons who originally contracted with the plaintiff, and although no land was taken in pursuance of the agreement, the defendants were bound to pay the £4000, which must be considered as agreed to be paid for the plaintiff's assent to the undertaking. *Preston v. The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway Company*. Law Journal Reports for February 1852, Vol. xxi., Part 2. of New Series, p. 61.

*Contractor and Sub-contractor—Contractor not liable for Negligence.*—Court of Common Pleas. A. contracted to pave a district, and B. entered into a sub-contract with him to pave a particular street. A. supplied the stones, and his carts were used to carry them. In the course of the work B.'s men negligently left a heap of stones in the street, so as to cause serious injury to the plaintiff:—*Held* that A. was not liable, and that the fact that the act complained of amounted to a public nuisance, made no difference.

*Sembly.*—If the contract with A. and B. had been to do what might, in itself, be a nuisance, A. would have been liable, *Overton v. Freeman and Another*, English Jurist for January 1852, Vol. xvi. No. 786, p. 65.

MAULE, J., in delivering judgment, said:—"As my brother Alderson stated in *Knight v. Fox*, 5 Exch., 721, the question is, whether the thing was done by a servant of the defendants; at least that is the mode of arriving at the defendant's liability. But this is not so in the case of a sub-contractor. Warren may be liable for the acts done, but it does not follow that the defendant's liability ensues on that of Warren. I do not say it would be by any means absurd if the law were otherwise as to sub-contractors, so as to make the liability extend from the last up to the first; but it so happens that the law of England is otherwise, and this has grown up gradually, resulting from one case to another; and no one, amongst the various suggestions for the improvement of the law, has recommended any alteration in this respect; and we may assume, therefore, that there results from it no very great practical inconvenience. I think, therefore, that this case, falling as it does within that class of cases in which the sub-contractor himself is criminally and civilly liable, there can be no liability in the defendants. I do not mean to say that there can be no case in which both contractor and sub-contractor may be held liable; but the mere fact of being contractor does not render a defendant liable without his personally giving directions, or even seeing what had been done without interfering.

CRESSWELL, J., said—"The defendant might well have been held liable, if the building of the hoard, the supposed contract, was in itself a public nuisance. In this case, the defendants contracted to have the stones laid

Court of Common Pleas. down as pavement, but do not appear to have contracted to have the stones laid in the manner which caused the injury. The fact of the defendant's carts being used, I think, cannot make any difference.

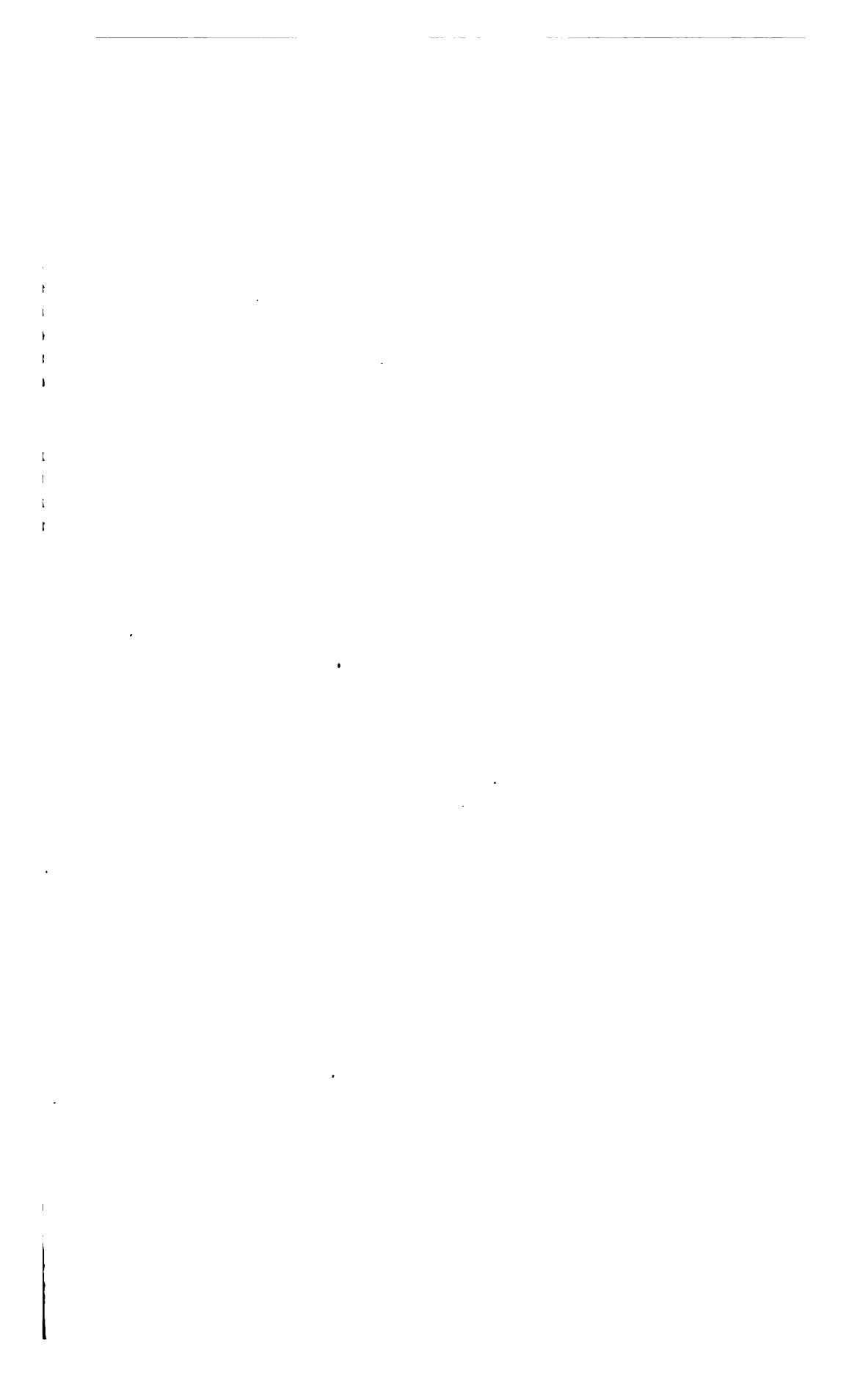
WILLIAMS, J., said—"I am of the same opinion. It was admitted in the argument that this was not the case of master and servant, but contractor and sub-contractor; but it was contended that both were liable, because the wrong complained of was a public nuisance; but this is explained away by Parke, B., in *Knight v. Fox*, who says that the nuisance excepted in Mr Baron Rolfe's judgment means a nuisance connected with a man's house or his fixed property."

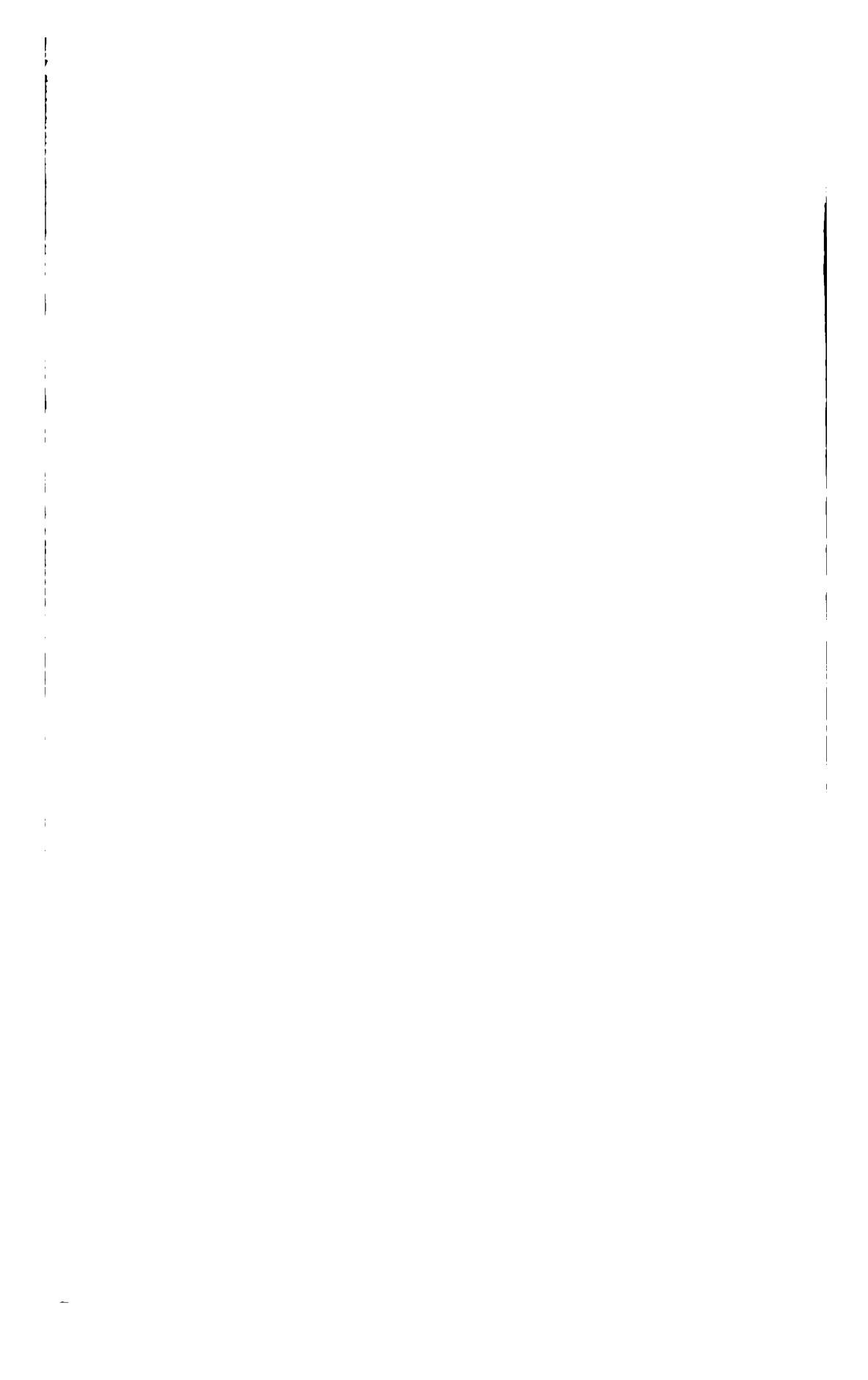
Vice-Chancellor Knight  
Bruce's Court. *Statute of Limitations (Prescription).*—At the hearing of a claim for foreclosure, (Adjudication) a defendant is at liberty to avail himself of the benefit of the statute of Limitations (Prescription) without having pleaded it (on record). *Sneed v. Sneed*, English Jurist for February 1852, Vol. xvi., No. 787, p. 72.

KNIGHT BRUCE, V.-C., said—"I think that it is not necessary for the defendant to plead the statute, and that he is entitled to the benefit of it without pleading it. Upon a claim I will hear anything that may be suggested. If the plaintiff is taken by surprise, that is another thing. If this be so, the claim may stand over, that he may be prepared to meet the case."

Court of Chancery. *Baron and Femo—Solicitor and Client—Production of Documents.*—The plaintiff, being the wife of the principal defendant, filed a bill against her husband, alleging that, by their marriage settlement, a particular estate was charged with a jointure on her behalf; that she afterwards signed a deed exonerating that estate from the jointure, upon the understanding that it was to be charged on another estate, and that during the preparation of that deed, the solicitor of the husband acted also on her behalf, and that she had no other legal advice. The decree prayed was, that the second estate might be charged with the jointure. The husband, by his answer, stated that the transaction relative to the release of the jointure was conducted by the solicitor solely on his behalf, and the solicitor stated that the plaintiff had no separate solicitor or counsel, and acted only under the opinion of the husband's legal advisers:—*Held* (reversing the decision of the Court below) that the solicitor was to be deemed the solicitor of the wife as well as of the husband; and that the wife had a right to the inspection of all documents which came into the solicitor's possession in relation to and during that employment.

*Semble.*—Where husband and wife have distinct interests, and the wife is induced, in dealing with those interests, to act under the advice of a solicitor employed and paid by the husband, the solicitor will be deemed

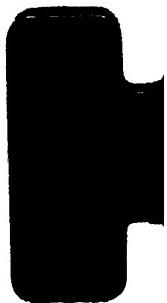




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